

February 2021

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No.2: Key Dates and associated liability

Introduction

Training and development support is a key part of CECA's core offer for its membership and working in conjunction with GMH Planning it has delivered a programme of training events around the NEC Form of Contract across several CECA UK regions.

In addition to this training a series of monthly NEC Contract Bulletins are being produced for both Contractors and Subcontractors to improve practical awareness on key topics within the NEC. The coverage whilst not exhaustive is intended as a general overview on some of the contractual principles to increase a wider understanding in support of more sustainable outcomes.

For the purposes of these bulletins a contractual relationship between a "Client" and "Contractor" is assumed. The same rules/principles also apply if the contractual relationship is between a "Contractor" and a "Subcontractor" and so the term "Contractor" will be used to describe both parties.

These bulletins are based on the latest NEC4 family of contracts, but the same principles and rules would apply where parties are engaged under an NEC3 form of contract.

Coming next month:

Bulletin Nr 3: Secondary options being included or not included and the indirect risk that can bring to a Contractor.

Please respond to Leone Donnelly should you require any further information on the CECA NEC4 Bulletins via e-mail: leonedonnelly@cecasouth.co.uk.

For further advice or guidance on the NEC details please visit www.gmhplanning.co.uk or contact GMH Planning Ltd by e-mail glenn@gmhplanning.co.uk.

NEC4 Contract Bulletin Nr 2 - Key Dates and associated liability

Establishing the Completion Date, i.e. the date that the Client expects you to have completed by is an essential consideration in the preparation of your bid and the price that you submit. Most contracts will also include secondary option X7 delay damages for the project which is the amount you will be charged if you were to exceed that date. The contract may also include X5 Sectional Completions where they will identify phases of work that they require completed and handed over at an earlier stage than the Completion Date. These sectional Completion Dates again will likely attract delay damages identified within X7.

In addition, the contract may also include Key Dates. These are separate and specific contractual milestones where the Contractor is obligated to fulfil a certain condition by a certain date. These will not be introduced on every project, but any that exist should be identified in section 2 of contract data part 1. They are as equally important as any sectional completion and the overall Completion Date but come with a different level of liability. We have already said that if a Contractor exceeds a Completion Date or a Sectional Completion Date then the liability will be the delay damages per day as stated in X7 of contract data part 1. However, these damages are not specific or relevant to Key Dates.



Key Date liability: clause 25.3 states that any cost the Client has paid or will incur as a result of the Contractor missing that Key Date is recoverable from the Contractor. The Project Manager will consider the cost incurred by the Client within four weeks of the Key Date eventually being achieved and then include that deduction in the next application period.



In simple terms the costs for missing a Key Date are undefined/unliquidated cost. A Contractor could be lucky and this could be negligible cost, or not so lucky and it could be significant cost. Very important therefore that the potential risk is understood as much as possible and the likely cost at tender stage of these being missed considered in the price/programme accordingly.

Only Key Dates are Key Dates: Some contractors show a section of “Key Dates” on their programme even if these have not been named as such within the contract. Rather than “Key Dates” in a contractual sense, they are representing “milestones that are key”. To avoid any confusion (or maybe the Client now thinking the Contractor has agreed these are Key Dates) make sure that your programme only call anything a “Key Date” if it is identified as a Key Date in contract data. Anything else is “an important project milestone” but with no specific associated financial liability if it is not achieved.

Think you might miss a Key Date? Then notify an early warning. Call a meeting and discuss the issue so everyone knows the potential problem and you can agree actions to take to avoid or minimise the potential impact of missing that Key Date. It is in everyone’s interest to try to meet that date where possible, or at least manage people’s expectations if it really cannot be met. The earlier people realise there is a potential problem, the more chance it has to be resolved or the impact minimised.

Know you are going to exceed a Key Date but the reasons for missing it are not your liability? You need to be able to notify the reason you are going to miss the Key Date as being a compensation event, providing of course it fits one of the reasons for being a compensation event within the list in clause 60.1. This is the only way a Key Date can be moved

to a later date and take away that Contractor liability for being late that would otherwise exist. If the Client agrees it is a compensation event, then as well as any associated cost within the compensation event quotation there will also be the agreement as to how much the Key Date should move by. Once the compensation event is agreed (implemented) then the Key Date can be moved by the agreed/assessed amount.

Key Dates and Completion Date are not immovable: Many Clients think or act that if they have identified a Key Date or a Completion Date in the contract then these are cast in stone and they should not move. They may think or act that a Contractor must achieve that date no matter what but contractually that is not correct. If there is a compensation event that affects the completion of either a Key Date or the Completion Date, there is an entitlement as part of that compensation event for the Key Date and/or Completion Date to be moved out as well.

Key Dates can be instructed to be completed earlier: This is a potentially contentious area of the contract, but we have to work with the existing contract rules (until such point that we can convince the authors that it should be changed).



It is very clear under the contract that if the Client wants to bring forward either the Completion Date or a Sectional Completion Date then this will be considered acceleration under section 36 of the contract. Acceleration must be by agreement and the quotation the Contractor gives to commit to meeting that date is either accepted or not. There is no mechanism for the Client to make their own assessment of that quotation and if they do not agree with the quote then simply the acceleration is not agreed, and it does not happen. Unfortunately, this is not quite the case with Key Dates. Clause 14.3 allows the Project Manager to instruct an earlier Key Date without this being considered contractually as acceleration. The good news is that this will be a compensation event (under 60.1.4). The bad news is that this can be assessed by the Project Manager themselves if they do not agree with the Contractor's quotation. In simple terms they can impose acceleration of a Key Date and through the compensation event process make their own assessment of that quotation. They would obviously have to make a "fair" assessment of that quote, otherwise the Contractor could ultimately challenge that through adjudication and if they won the Client would not only have to pay the difference but also pay the adjudicators costs. However, given that most Contractors do not want to take a Client to adjudication it might be something that unfortunately may remain unchallenged (clearly not the outcome or behaviours that the NEC contract is intended to promote or encourage). Thankfully, the author has not witnessed this happening on many occasions, but it is something a Contractor just needs to at least be aware of.

Summary: Key Dates are a standalone process different from the Completion Date and Sectional Completion Dates. They come with different financial liabilities and which should be fully considered within the contract programme.

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