

## NEC3 Key Dates – more risk on the Contractor ?

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### Introduction :

In the third edition of the Engineering & Construction Contract, the concept of Key Dates was introduced whereby a "a Key Date is the date by which work is to meet the Condition stated" (clause 11.2 (9) 1<sup>st</sup> sentence). Both the Key Date and the Condition are stated in the Contract Data and stay as such unless later changed by the *Project Manager* under clause 14.3, which is a compensation event under clause 60.1 (4).

A Key Date could, for example, be when the *Employer* needs a specialist contractor or Statutory Utility to come in to do some work within an area and, having done this work, leave and hand the area back to the *Contractor*. This 3<sup>rd</sup> party is likely to be contracted directly with the *Employer* and is therefore contractually an "Other". Alternatively, it could be that the *Employer* will be doing work himself in that area.

If the Key Date is not met, then, under clause 25.3, if "the *Employer* incurs additional cost either

- in carrying out the work or
- by paying an additional amount to Others in carrying out the work

on the same project, the additional cost which the *Employer* has paid or will incur is paid by the *Contractor*".

This would usually be by a deduction from the amount due. Continuing clause 25.3 : "the *Project Manager* assesses the additional cost within four weeks of the date when the Condition for the Key Date is met. The *Employer's* right to recover the additional cost is his only right in these circumstances."

The question that this article seeks to answer is : does this put more risk on the *Contractor* compared with the second edition ? On the surface it does, but let us dig a bit deeper ... ..

### The Situation under the 2<sup>nd</sup> Edition of the Engineering & Construction Contract :

In the second edition, if the *Employer* wanted to have an area of the Site in a certain condition by a certain date and for it to be handed back to the *Contractor*, then he would need to state it in the Works Information as a constraint on how he is to Provide the Works<sup>1</sup>. The *Contractor* could then put this constraint, both in terms of time and location, in the programme. If the *Contractor* subsequently failed to meet this condition by the date stated, the *Employer* had no recourse through the contract terms.

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<sup>1</sup> If he is not going to hand it back to the Contractor, then he was best advised to use option L : Sectional Completion or under NEC3, Option X5.

Instead, he would have to sue for a breach of contract and, if proven, the *Contractor* would be liable for damages that were, from the *Contractor's* perspective, reasonably foreseeable at the time of making the contract <sup>2</sup>. The more the *Employer* made the *Contractor* aware of the consequences of the breach prior to signing the contract, the greater the potential damages the *Employer* could recover and this could include indirect or consequential costs, as well as direct costs of that breach. In the case of a large chemical works, it could be that the whole plant could not work, so the losses could be quite substantial !

### **The Situation under the NEC3 Engineering & Construction Contract :**

In the third edition, the *Employer* still has the option of doing it the 2<sup>nd</sup> edition way. Alternatively, he can state the Key Date or dates upfront in the Contract Data together with the Condition that is required.

The principal advantage to both parties of doing it this way is that the important dates, from the *Employer's* perspective, are highlighted as opposed to potentially hidden away in the depths of the Works Information.

The *Employer* also has the advantage that, should the *Contractor* not meet the Condition stated by the Key Date, then he can recover the additional project related costs through the contract by deducting them from any subsequent assessment. This is much easier than suing through the courts.

These two advantages mean that it is more likely that a *Contractor* will strive to meet a Key Date.

However, there is an advantage to the *Contractor* and a potential disadvantage to the *Employer* in stating a Key Date and Condition, which is that, under clause 25.3, the additional cost the *Employer* can reclaim is limited to that of carrying out work either by himself or Others on the same project. In legal terms, this limits the *Contractor's* liability to something akin to direct costs only and not the indirect or consequential costs which the *Employer* may be entitled to if the condition and dates were stated in the Works Information.

### **Some Other Factors to Consider :**

1. There may be arguments over what the extent of "the same project" is as this is undefined.
2. The *Contractor* is likely to add a risk premium into his Prices at tender to allow for the possibility that he may not meet a Key Date.

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<sup>2</sup> *Hadley v Baxendale [1854]*

3. Once into a contract, my view is that the *Project Manager* can directly change a Key Date, which includes bringing it forward. This is unlike the Completion Date or sectional Completion Dates, where they can only move back as a result of a compensation event<sup>3</sup>. If the *Project Manager* does change a Key Date under clause 14.3, then it is a compensation event under clause 60.1(4) and the *Contractor* would be advised to build in extra risk allowances in the quotation under clause 63.6.
4. If the *Project Manager* does not want the *Employer* to pay these risk allowances, then he can refine the basis for the quotation by stating assumptions (clause 61.6) and if any of these assumptions change, then it would be a compensation event under 60.1 (17).

However, the additional costs that the *Contractor* would have to pay to the *Employer* for not meeting a Key Date are not in either of the Schedule of Cost Components, so while it will be a compensation event, the *Contractor* will be liable to pay these additional costs, but not able to reclaim them. Careful phraseology in stating these assumptions is needed, so contractors beware !

5. If Option X18, Limitation of liability, is used :
  - under 18.1, "the *Contractor's* liability to the *Employer* for the *Employer's* indirect or consequential loss is limited to that stated in the Contract Data", where as
  - there is no specific limit on his liability for not meeting Key Dates, except under 18.4 where it is mixed in with his total liability.

**Conclusions :** On the face of it, the introduction of Key Dates in the NEC3 Engineering & Construction Contract puts more risk on the *Contractor* as it gives the *Employer* an easier mechanism of reclaiming costs if a Key Date and Condition is not met.

However, in reality, it clearly highlights which dates are important to the *Employer* and, if not met, effectively limits the *Contractor's* liability to the additional direct project based costs, as opposed to possibly unlimited indirect or consequential costs as well.

Lastly, those involved in an NEC3 Engineering & Construction Contract with Key Dates specified need to carefully evaluate the risks and consequences of not meeting them, both before entering into a contract and should they be changed during the contract.

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<sup>3</sup> The exception to this is where the *Contractor's* effectively agrees to bringing the Completion Date forward under the 'Acceleration' clauses.