

Key Dates

Construction Law Terms: A to Z

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K is for Key Dates

What is a Key Date?

Most, if not all, building contracts require a contractor to complete its scope of work by a specified date.¹ However, there are often circumstances in which an employer will want the works completed in stages, and will specify different completion dates for different stages of the works.

For many, the contractual mechanism that springs to mind is the sectional completion mechanisms found in a most suites of contracts including the NEC,² FIDIC³ and JCT.⁴ However, the NEC suite of contracts includes another mechanism, referred to as 'Key Dates' which are contractual milestones⁵ the contractor can be required to meet.

The conceptual difference between Key Dates and sectional completion

Key Dates are conceptually different to sectional completion dates, in that they are intended to enable the coordination of work between different contractors working on the same project for the same client. Because of this conceptual difference, the two mechanisms operate in quite different ways.

Key Dates and the Accepted Programme

Where used, Key Dates will need to be recorded in the Accepted Programme,⁶ which sits at the heart of the NEC form of contract. As and when the Accepted Programme is revised (as required in accordance with clause 32, any Key Dates will also need to be reviewed and revised (as necessary).

It is the Accepted Programme that is used for assessing compensation events contemporaneously; the Accepted Programme to be used is the one that is current at the relevant time.⁷ Consequently, failing to update Key Dates in the Accepted Programme might impact (jeopardise) a contractor's entitlement to an extension of time and/or additional money should a compensation event arise.

What happens if a Key Date is met?

Clause 30.3 provides that "[t]he Contractor does the work so that the Condition stated for each Key Date is met by the Key Date". If the condition in respect of a Key Date is met, that part of the works is not automatically taken over by the client (as it would be in the case of sectional completion). Consequently the contractor still has a duty to insure those works.

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What happens if a Key Date is not met?

Clause 25.3 sets out the employer's remedy if the contractor doesn't meet a Key Date. It provides:

"If the project Manager decides that the work does not meet the Condition stated for a Key Date by the date stated and, as a result, the Client incurs additional cost either

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

on the same project, the additional cost which the Client has paid or will incur is paid by the Contractor. The Project Manager assesses the additional cost within four weeks of the date when the Condition for the Key Date is met. The Client's right to recover the additional cost is its only right in these circumstances."

It is therefore for the project manager to decide whether the contractor has met the required condition for a Key Date by the required date.

If the project manager decides that the condition has not been met, clause 25.3 sets out a three-stage test by which the project manager assesses the employer's entitlement:

1. Is the employer incurring additional cost either carrying out work or by paying an additional amount to others in carrying out work?
2. Is the cost incurred on the same project?
3. Has the additional cost been paid or will it be incurred?

In the event the contractor fails to meet a Key Date, the employer is not compensated for the delay to completion; it is only compensated for additional costs it incurs carrying out (or paying others to carry out) work on the same project. An employer's remedy for a contractor's failure to meet a Key Date is therefore quite different to that for a contractor's failure to meet a sectional completion date (being damages for delay, often pursuant to Optional Clause X7 (Delay Damages)).

Issues to consider regarding Key Dates

Where Key Dates are used, the employer specifies the condition which the contractor is to meet by the Key Date. It therefore follows that how that 'condition' is defined is of critical importance to the operability of the mechanism. The employer should therefore ensure that the 'condition' set out in the Contract Data is clear and that it accurately reflects what the employer requires the contractor to achieve (so that its other contractors can then undertake their work). Equally, the contractor must satisfy itself that it understands what is required and that it is achievable in the time available. By way of example, if completion of an access road is required so that another contractor can undertake its package of works, the employer will need to understand exactly what is required to enable its other contractors to use the access road to undertake their works, and will need to set this out clearly, in enough detail, to ensure that the contractor is aware of what it is required to do so that if it is met, then the other contractor will be able to use the access road as required.

Another issue to consider stems from the nature of the remedy for failure to meet a Key Date: an employer is compensated for additional costs it incurs carrying out work on the same project (for example, bringing in a replacement contractor to achieve the Key Date). However, it may well be the case that the employer doesn't actually carry out, or pay others to carry out, any work. This is because, in most scenarios, the issue won't be **whether** the contractor is going to carry out the work required to meet the Key Date, but **when** the contractor will achieve the Key Date. In those circumstances, it may not make sense for an employer to bring in a replacement contractor because it will (i) likely extend the time taken to meet the Key Date (because there will be a time associated with finding a new contractor and bringing it on site); and (ii) bring with it a further interface between works, which could have an impact on liability if the employer subsequently identifies defects in the work.

Conclusion

Key Dates are a useful mechanism for an employer, but should not be confused with the more common sectional completion mechanism; there are key differences between the two. Where an employer wants an element of a project completed before the Practical Completion Date, it should therefore think about which mechanism is most suitable. Key to this decision will be why certain works are required earlier, whether the employer wishes to take over the element of the works, and what remedy the employer will require if the work is not completed on time.

When using Key Dates, care will be needed in drafting the Condition, because that is how compliance with the Key Date is measured. A clear and unambiguous description is therefore important to minimise the risk of a dispute as to whether or not the Key Date has been achieved on time.

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**Content in this article is not legal advice.*



Footnotes

¹ If no date for completion is specified, the contractor will be required to complete the works in a reasonable time.

² See Optional Clause X5.

³ For example, see subclause 1.1.73 of the FIDIC Red Book (2017).

⁴ For example, see the Sixth Recital of JCT Standard Building Contract With Quantities 2016.

⁵ The employer can choose to specify any Key Dates in the Contract Data Part 1.

⁶ NEC4 Clause 31.2.

⁷ NEC4 Clause 63.1.