

Key Dates and associated liability: written by Glenn Hide (GMH Planning Ltd) and Rob Horne (Osborne Clarke)

Most people will be aware of the broad difference between Key Dates and X5 Sectional Completions but their differences are, perhaps, more fundamental than you might think at first glance.

What are they?

Sections are a means of dividing up the whole of the works and requiring those section of works to be complete on different dates in advance of the Completion Date. In NEC contracts sections are dealt with through the use of Secondary Option; X5 and delay damages X7. Where X7 applies, the delay damages would be applicable to any sectional completions. Contract Data would state the different delay damage rates for each Section.

Key Dates are a separate mechanism altogether. They are specific contractual milestones where the Contractor is obligated to fulfil a certain condition by a certain date. The application of Key Dates is a Core Clause (25.3) with the definition of the condition and the date being set out in Contract Data Part 1. Key Dates themselves are optional for the Client to have included at tender stage.

How does a breach arise?

For a Sectional Completion Date the breach is quite simple. If Completion (of the Section) has not been achieved by the Sectional Completion Date then there has been a breach. The consequence is equally simple, one either applies the rate of delay damages applicable to that section, as allowed for via X7, or, where X7 does not apply, one assesses damages as a consequence of the breach, that is the loss suffered by the Client as a consequence of the Sectional Completion Date being missed.

For a Key Date the breach is similarly easy to identify, a failure to achieve the condition stated in the Contract Data. The definition of the condition then becomes important and can be somewhat more difficult to get right. The difficulty often encountered is in effectively (yet simply) stating what the "condition" to be met is. Any project can be highly complex with many interfaces so even a seemingly innocuous condition like "permanent power on" can be difficult to apply in practice as there is not necessarily permanency to the condition (e.g. permanent power is switched on by the Key Date but switched off a week later because the connection was dangerous, the condition for the Key Date was met the contractor would say, but the Client would disagree as permanent power is not available one week later). That position can be made more complex if a "completion" condition is used, that is, an effective hybrid between Key Date and Section (e.g. a condition is defined as "all works complete to block B"). Equally, the consequences of the breach are somewhat more difficult to ascertain as explained further below.

Consequences of missing a Key Date

The more interesting and perhaps more difficult question is what the contractual liability would be for missing a Key Date. Delay Damages (or other liquidated damages) are not applicable to Key Dates (unless amended with Z clauses), instead clause 25.3 states that:

[If] the Client incurs additional cost on the same project in:

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- *carrying out work or*
- *paying an additional amount to Others to carry out the work*

on the same project, the additional cost which the Client has paid or will incur is paid by the Contractor (which is assessed by the Project Manager within four weeks of the Key Date eventually being met).

Quite clearly, if the Contractor does not meet the condition by the specified Key Date for a reason which is at the Contractor's risk, and the Client has to pay Others to complete the work to meet the condition stated, then that cost is recoverable. A Client risk causing a delay to a Key Date would give rise to a CE, which enables the Key Date to be moved in the same way as Sectional Completion Dates. One problem is, how often will a Client actually "get work done" because the Contractor missed a Key Date? In the vast majority of cases the Contractor will eventually meet the Key Date but just achieve it late. For the Client to get someone else to finish off the works, or more accurately bring them to the required standard, will very often not be any quicker than the Contractor would be able to achieve it. In addition, it adds a whole new area of potential liability where Others have carried out work on a Contractor installation. If it is an electrical system for example, another party may need to check the whole installation before doing any work on it, and the Contractor may claim their warranties are not valid if someone else has done work on that system or otherwise may deny liability if the system does not later work exactly as planned.

This then brings the more specific question as to what can the Client specifically claim from the Contractor? The Core Clauses don't expressly say "incurring cost in carrying out work in order to meet the Key Date". Does this then mean that if the Client is powerless to do any work themselves in order to achieve the Key Date then the Contractor "gets away with being late" with no financial recourse against them? Is the recoverable cost limited to meeting the Key Date at all?

Going back to the example above, if the Contractor does not provide permanent power, Others use a temporary generator instead to provide power to do their work – is the cost of the generator recoverable from Contractor? Working through the test in 25.3:

1. The work does not meet the Condition stated for the Key Date;
2. The Client has incurred additional cost (either the Client has hired a generator or Others have) in carrying out work;
3. The cost is on the same project;
4. Further cost will be incurred.

The cost of the generator is therefore recoverable as a consequence of not meeting the condition by the Key Date.

To give another example, if the Contractor was due to have a slab ready for an expensive bit of kit that is being delivered that can't be delayed, but the Contractor failed to pour on time to allow for appropriate curing, what would the consequence be for the Client? The Client will now incur additional storage and security costs and have to rebook a 100 tonne crane at significant cancellation cost as a result of the slab not being ready. There is nothing additional they can do to make the Contractor pour and cure the concrete any more quickly - does the Client then have to absorb those costs themselves? Again, applying the test at 25.3:

1. The work does not meet the Condition stated for the Key Date
2. The Client has incurred additional cost (storage, security, cancellation and re-mob of the crane) in carrying out work
3. The cost is on the same project
4. Further cost will be incurred

The cost of the crane, storage and security is therefore recoverable as a consequence of not meeting the condition by the Key Date.

In the same scenario the Client will also incur cost from Others, charging the Client for being late under their contract, but is that recoverable? Following the test set out in 25.3

1. The work does not meet the Condition stated for the Key Date
2. The Client has incurred additional cost (additional time related costs of Others)
3. The cost is on the same project
4. Further cost will be incurred

The nuance here is that the particular cost is not for carrying out work but rather for not carrying out work, i.e. it is pure time related cost. It could be argued that cost in carrying out work has been incurred (the storage, security cancellation costs mentioned above) and therefore non-work related costs can be recovered. That seems unlikely to be correct however as a scenario could arise where those storage, security and cancellation costs are not incurred, that is, there is no work at all as a consequence of not meeting the condition for the Key Date, but a non-work related loss is still incurred. Therefore it is clear that non-work costs cannot be recovered under a Key Date failure. If further support for that is needed, it is reasonably apparent that the Sectional Completion Dates and delay damages are what are supposed to enable recovery of those costs. If the pure time related costs could be recovered under a Key Date failure there is at least a real danger of double recovery of the same cost; once under the Key Date and once within delay damages.

As a final example, a Client requires an access road to be available by a certain date. This is not achieved and Others charge additional cost for now having to get to site with poorer access (using different vehicles, in smaller loads etc) – what is recoverable of that cost? It is unlikely to be beneficial to get someone else to finish the access road as the Contractor was going to do it anyway just as quick as Others could. Following the test set out in 25.3

1. The work does not meet the Condition stated for the Key Date
2. The Client has incurred additional cost (as explained below)
3. The cost is on the same project
4. Further cost will be incurred

The higher unit cost is recoverable as work (i.e changing load sizes) the time cost for doing that work would also be recoverable as it is really work, the pure prelim cost of the operation taking longer would NOT be recoverable because it is not work.

Put simply, Key Dates are intended to give recovery where work is needed rather than time is lost. Work being needed and time being lost can both give rise to additional cost but those costs are different and differently recoverable.

The question that should be being asked is "what is the consequence of failing to meet this date?". If the consequence, either to cure the problem or deal with the failure is work type costs will be incurred, then a Key Date is probably needed. If time will be lost (whether that time changes planned Completion or not) and there could be cost consequences, then a Sectional Completion Date will be needed. If both types of cost could arise then perhaps both a Key Date and a Sectional Completion Date should be used (although the broad recommendation and in most instances, it would be better to use one or the other). Importantly, the deciding factor is less focussed on the cost to achieve the condition for the Key Date and more the cost consequent on missing the Key Date, which is likely to be a substantially broader question.

Tips in relation to Key Dates:

1. Only use a Key Date where absolutely necessary as these will be an additional risk to the Contractor that they will price for
2. Make sure the condition required is absolutely clear
3. Consider how your Key Dates and Sectional Completion Dates interact
4. Consider the types of cost and consequences that will flow from missing a date (Key Date or Sectional Completion) and match the recovery route to the consequence