

June 2023

CECA NEC4 Bulletin

CECA Member Briefing:

Bulletin No. 30 - Contractual milestones to show on a programme

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 31 - Disallowed Costs

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.

NEC Contract focus month 30 - Contractual milestones to show on a programme

The current forms of contract within the NEC family place a much greater significance on the importance of the programme and on the specific content to include than the previous forms of contract. There are a number of milestones (a key event or action in a project) that NEC contracts refer to, either within clause 31.2, contract data, or within other contract clauses. This bulletin will describe each of these milestones and how they should be applied/represented on a programme issued for acceptance to create clarity for both Parties. Some are **capitalised** which means they are a defined term in clause 11.2, others are **italicised** which means the date of that item will be referred to within the contract data for that project.

Contract Date: The date that the contract came into existence. This is the date that both Parties acknowledge that a contract has been entered into.

starting date: The date the Contractor is to start any work on that project. There is no mechanism for a Contractor to be paid for any work before this date. Whilst for most projects, Contract Date and *starting date* will often be the same, there are instances where Contract Date could be earlier than the *starting date*. The Client may want to guarantee the services of a Contractor, but not want them to start for several weeks or even months. *Starting date* is not to be confused with "start on site" which is covered by the next milestone in this list titled "access date".



access date(s): This is the date the Contractor will get access to site. It could be a single date for the whole site, or multiple dates for different parts of the site. This could be several weeks or even months after the *starting date*, where there may be significant work or design to do before the Contractor will be able or need to be on site.

Completion Date: This is the *completion date* stated in contract data unless changed in accordance with the contract. It will normally be stated in contract data part 1 by the Client as the date they are stating they need the Contractor to achieve the status of "Completion" by. Occasionally this will be left blank in contract data part 1 and the Contractor will need to state the *completion date* in contract data part 2 as part of their tender process and the date evaluated as part of the award criteria/process. Completion Date can be moved to a later date during the project through the agreement (implementation) of compensation events. The only way Completion Date can be brought forward i.e. earlier, would be through the acceptance of an acceleration quotation in accordance with section 36 of the contract. If a Contractor exceeds the Completion Date for reasons that are their own risk, they will be liable for delay damages at the rate per day stated under X7 in contract data part 1. If secondary option X6 "bonus for early Completion" has been included, there is the potential for a bonus for each day early that the Contractor achieves Completion before the Completion Date.

planned Completion: There is a requirement in clause 31.2 to show this on every programme and should be shown separately from Completion Date. This milestone demonstrates when the Contractor plans to achieve the status of Completion which could be on, before, or after the Completion Date. If planned Completion is earlier than Completion Date then the Contractor has created "terminal float", which they own, and is retained in the assessment of compensation events. If planned Completion is beyond Completion Date it either means the Contractor is running late and will be liable for any delay damages under X7, or there is a compensation event yet to be implemented which could move Completion Date and reduce or remove Contractor liability for delay damages.



Sectional Completion Date: Relevant if secondary option X5 has been included. This is where the Client requires the Contractor to hand over a section of the works for the Client to put into use or allow Others to have sole access to from that point. The number of sectional completions and the associated dates will be stated in contract data part 1.

planned Sectional Completion Date: Secondary option X5 states that each reference in the contract to Completion Date applies to any section of works. This means in particular the Contractor should show a "planned Sectional Completion Date" milestone to show if the Contractor is planning to finish on, before, or after the contractual date associated with that section. Both X7 delay damages and X6 bonus for early completion will apply to sectional Completion Dates as well as the overall Completion Date.

Key Date: If identified by the Client these are included in contract data part 1 (section 2) and are a requirement to achieve a certain condition by a certain date. These are different from a sectional completion in the sense that the Client is not looking to "take over" that section but need a certain condition to be achieved. An example would be to provide power to a certain part of the site as they have another party who will need power to carry out their works. The Contractor is not handing over that section at that point and will still need access to complete their works. The liability for Key Dates is very different and is **NOT delay damages** like it would be for a sectional Completion Date, but the **cost that the Client incurs** under clause 25.3 i.e. **undefined liability**. The specific liability for a Contractor exceeding a Key Date is covered in much more detail in CECA bulletin no 2 (published February 2021).

No other milestones should be classified or considered as a "Key Date" as this is a very specific term under NEC contracts. For example, a Completion Date is not a Key Date, even though obviously it is key to achieve to avoid possible financial implications.

planned Key Date completion: This needs to be shown as a separate milestone in order to show where the Contractor is in terms of liability. Again, a Contractor showing they are planning to finish a condition beyond the Key Date means they could incur financial liability under 25.3, or that a compensation event is yet to be agreed to move that Key Date to a later date.

Changes in milestones: As already stated within this bulletin, any milestones stated in contract data can be superseded in accordance with the contract. Completion Date, a sectional Completion Date or a Key Date can be moved to a later date through the implementation of a compensation event. Completion Date and sectional Completion Date can be brought forward (earlier) through agreed acceleration under section 36, and Key Dates can be instructed to an earlier date with the impact agreed in terms of cost and time through the compensation event process.

Other requirements within clause 31.2: There are a number of other elements listed in clause 31.2, not under the Contractor's control, that may be necessary to show as a milestone in the programme. Examples of this could be order and timing of work of the Client or Others, acceptances, Plant and Materials to be provided by the Client, and information from Others. If any of these milestones are then exceeded, the implications of this can then be more clearly demonstrated as to its impact, which would be particularly important if the delay to any of these items is a compensation event.

Other milestones not specified: It will no doubt be useful to have other programme milestones to monitor and track progress. These should not be confused with any other types of milestones listed within this bulletin. There will not be an obvious contractual sanction if these are not achieved, although in the long run any of these could impact a contractual milestone if not achieved. It is recommended to have a separate section on the programme to track these, which for example could be titled "project performance milestones", to avoid the confusion of these being specifically contractual milestones.

Milestones indicated in Scope: The Client may state within the Scope for other milestones to be included within the programme. These would obviously therefore have to be adhered to, and any liability associated in not achieving them understood.

Use the correct name for each milestone: This bulletin highlights the very precise wording that should be used for various different milestones. Do not therefore make up different phrases that would then be open to interpretation. For example, the contract states "Completion Date" not "Contract Completion" and could create a contractual ambiguity if not worded correctly on an Accepted Programme.

Defect Date: This is the period following Completion for which the Contractor is liable for correcting defects and is typically something like 52 weeks after Completion has been achieved. Whilst a contractual milestone, there is little point or benefit in including it within a programme as it will simply be a single milestone several months after the Completion Date with a big period of no work being shown. It would just make the programme harder to read as the scale would have been reduced to make it all fit.

Summary: Very important to include the milestones that the contract requires within the programme issued for acceptance and use the correct language when describing them. Tracking the relevant movement of these milestones will be integral to the agreement of compensation events in terms of cost and time implications.