

# CONSTRUCT

NEC ECC CONTRACT

EDT. 5

COMPLETION, COMPLETION DATES, KEY  
DATES, TERMINATION AND  
MANAGEMENT OF LATENT DEFECTS



Construction & Technology Attorneys

The 2025 MDA Attorneys Construct Journal is focused on the NEC3 and NEC4 engineering and construction contracts (NEC ECC).

In this fifth edition, MDA Attorneys discusses concepts of completion, completion dates, key dates, termination of the NEC ECC and management of defects.

### **Completion Date, Sectional Completion, Key Dates and delay damages**

The definition of Completion Date applies to every NEC ECC and requires a firm date to be included by the Employer in the contract data.

The inclusion of sectional completion dates (under secondary option X5), key dates (inserted in the contract data) and delay damages (secondary option X7) is optional.

One of the most commonly misunderstood aspects of the NEC ECC is the difference between sectional completion dates and key dates.

Sectional completion dates involve a transfer of risk from the Contractor to the Employer upon completion of the section. The Employer is required to take over the section within two weeks of completion (clause 35.1) and any damage which occurs to the works (in the normal course) following take over is an Employer's risk (clause 80.1). Where a Contractor fails to meet a sectional completion date, the Employer's remedies include for the imposition of delay damages (where secondary option X7 is selected), general damages (where secondary option X7 is not selected), and/or termination (under clauses 91.2 or 91.3).

Key dates require a condition to be met by a certain date. These key dates do not involve a taking over of the works or a transfer of risk (as between the Contractor and Employer).

Where a Contractor fails to meet a key date, and the Employer incurs cost as a result thereof, the Employer may then claim these costs from the Contractor. Importantly, this claim for costs is the only remedy which the Employer has in these circumstances.

An example of a key date is a standard arrangement governing the interface between a civil contractor and a mechanical contractor whereby the Employer includes a key date for the civil contractor to hand over a civil structure to the mechanical contractor. Should the civil contractor fail to meet the key date, and the Employer incurs costs in relation to the mechanical works, the Contractor is liable to pay such costs.

Two important observations must be noted. Firstly, clause 25.3 does not state that an Employer can employ third parties to achieve the condition stated. This, for some reason, appears to be a popular misinterpretation of this clause. Secondly, the clause imposes a strict four-week time limit on the Project Manager to assess the costs incurred by the Employer. Given strict language of the final sentence of this clause, it appears to be beyond argument that should a Project Manager fail to assess such amount within the stipulated time period, the Employer would lose this entitlement.

### **Completion**

Completion is a defined term. Clause 30.2 requires the Project Manager to decide the date of completion and certify same. For such an important milestone in any project, most observers will agree that at first glance, the provisions relating to completion are quite "light".

However, the NEC ECC is not the same as other standard form construction contracts and completion does not represent a complete transfer of risk from the Contractor to the Employer.

Two fundamental differences are the way in which the NEC ECC deals with defects after completion and its definition of Employer's risks, relative to taking over.

Most standard form construction contracts give the Contractor the right of first refusal to correct notified defects following completion. The NEC ECC differs in that once a defect is notified, the Employer elects whether to give access to the Contractor or not to correct the defect. This election then provides differing rights to payment where the Contractor does not correct the defect. Clause 45.1 permits the Employer to claim the full cost of employing a third party to remedy a defect where access has been given to the Contractor, but defect has not been corrected within the required period. Clause 45.2 permits the Employer to a claim for the Contractor's cost of correcting a defect where it elects to not give access to the Contractor.

Although this approach differs from other standard form contracts it does reflect a position of fairness and equal bargaining between the parties. Where work has been paid for, that is later found to be defective, the Employer is entitled to have the defective work remedied at no additional cost. The election given in clause 45 permits an Employer to account for operational circumstances as well as the Contractor's performance during the contract.

Also, unlike other standard form contracts, there is no express procedure addressing the transfer of risk of damage to the works from the Contractor to the Employer upon completion. Instead, clause 80.1 provides that the Employer is at risk for the loss of or wear or damage to the parts of the works taken over by the Employer, subject to certain exclusions. Although this approach is novel, in practice, it is not much different from other standard form contracts – damage to the works caused by the Employer post completion, is an Employer's risk.

Secondary option X7 allows for delay damages to be imposed where completion is later than the completion date. X7.3 provides for the Project Manager to proportionally reduce the delay damages if the Employer takes over a part of the works before Completion. This must be read together with the second bullet of X7.1 to understand that the proportional reduction will occur in a situation where the works had been delayed beyond the completion date and the Employer then takes over a part of the works.

An interesting observation is the lack of any objective restrictions or guidelines directing the Project Manager as to the factors to be considered in establishing the benefit to the Employer of an early take over. In South Africa, under the Conventional Penalties Act where delay damages have been imposed and a Contractor believes that these damages are disproportionate to the loss actually suffered, it can approach the court and request a reduction in such damages. The case law on such reductions sets out several factors which need to be considered, some going as far as reputational damage, which supports the notion that the exercise to be conducted by the Project Manager will be a difficult one, which will likely be subject to challenge.

## Termination

Clause 90 lists the reasons that may be relied on for termination of the contract. For each reason there is a procedure to be followed and a method of calculating the resultant payment due following such termination.

By listing definitive reasons, and in respect of the Contractor's right to terminate, it has been suggested that the NEC ECC severely restricts such right to terminate. This is attributable to the language of clause 90.2, which states "*The Contractor may terminate only for a reason identified in the Termination Table*".

An example of such restriction is a failure by the Employer to provide the Contractor with access to the site. Under the NEC ECC this constitutes a compensation event but does not constitute a reason for termination. It is beyond debate that a prolonged and intentional refusal to grant access to the site will constitute a repudiation of the contract by the Employer.

Does clause 91.5 offer a possible solution to such restriction?

This provision allows either party to terminate if the parties have been released under the law from further performance of the whole of the contract. Our position is that the drafters of the NEC ECC clearly intended to exclude common law rights to termination and that clause 91.5 does not provide a possible answer. This position is supported by the formula for calculating the amount due for such termination, which does not reflect the common law rights of an innocent party facing repudiation, instead the payment formula reflects the rights for a neutral termination reason.

The result is that the only right which the Contractor has to terminate the NEC ECC, in accordance with its terms, and when it is confronted by a breach by the Employer, is to terminate for non-payment of an amount due.

However, although the termination reasons do not include a general common law right to terminate (for example, for material breach or repudiation), this does not mean that the Contractor has foregone its common law rights. What it means is that if confronted by a material breach, or a repudiation, by the Employer, the Contractor may pursue a common law termination, but in doing so cannot rely on the mechanisms and processes contained in the NEC ECC.

It is noteworthy that the drafters have amended clause 90.2 in the NEC4 which lends support for the view expressed above.

By contrast, the Employer enjoys a wide range of reasons to terminate. Under the NEC3 the Employer may terminate the contract for any reason. This right had been amended under the NEC4. However, there are limitations to these rights. The most obvious of these is that the common law rights of termination for a material breach are amended to a substantial failure to comply with obligations.

Except for neutral reasons, only two reasons relating to the Employer's performance of its obligations under the contract affords the Contractor the right to terminate.

These are, firstly, if the Employer hasn't paid an amount due within 11 weeks of the date that it should have been paid, and secondly, if the Project Manager issues an instruction to stop or not to start the works due to the default of the Employer, and an instruction to restart or start the works have not been issued within 13 weeks.

The NEC ECC differs from other standard form contracts which provide either a right to suspend and/or a right to terminate if the Employer's agent fails to issue a payment certificate timeously, or in this instance as provided for under the NEC ECC, an assessment of the amount due. The Contractor's right in respect of such failure is limited to claiming interest.

### Latent Defects

The NEC ECC does not address latent defects. This is because in several jurisdictions including the UK, legislation exist addressing latent defects (e.g Latent Damage Act 1986). In South Africa, there is no such legislation, however, latent defects are governed by our common law (implied warranty against latent defects).

Although the NEC ECC does not address latent defects, clause 43.3 provides that an *"Employer's right in respect of a Defect which the Supervisor has not found or notified are not affected by the issue of the Defects Certificate."* Thus, any legal rights which an Employer may have in respect of latent defects are not limited by the issue of the defects certificate.

Despite the above, it has become common place in NEC ECC contracts in South Africa for a Z-clause to be introduced addressing latent defects. Such clause typically addresses the duration for which a Contractor will be held liable for latent defects and a procedure to be followed for notifying a latent defect to the Contractor.

Secondary option X18 also provides for the parties to limit liability in respect of latent defects without expressly referring to such as latent defects. In discussing this, we point out that the definition of *"Defect"* in the NEC ECC does not distinguish between patent and latent defects.

X18.3 (X18.4 under the NEC4) allows for the inclusion of a financial cap on all defects.

X18.5 (X18.6 under the NEC4) allows for the inclusion of a time limit on all matters, which will include liability for defects.

Although, as stated above, it is common-place for a Z-clause to be added to address latent defects, it is unnecessary to do so where X18 is selected.

In MDA's next, and last, Construct article on the NEC ECC, we will discuss disputes, adjudication and related issues.