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Discussion

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Discussion: Briefing: Time-bar provisions of the NEC3 *Engineering and Construction Contract* clause W1.3

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Contribution by Peter Higgins

The briefing by Davis (2018) seeks to explain why the time-bar provisions for notifying a dispute should not apply to the project manager's assessment of a compensation event. It is postulated that the time bar is intended to apply only to actions which would disrupt the execution of the project and not actions which simply disrupt the contractor's cash flow. That is entirely against the drafting intention of the NEC. The approach taken in NEC contracts is that all issues should be resolved as quickly as possible and not left to be resurrected once parties no longer have an immediate recollection of the facts. As the guidance notes make it clear, 'time stipulations are clearly set out in the adjudication table in order to avoid protracted exchanges and argument and to achieve prompt resolution of disputes' (NEC3, 2005: p. 97).

The author argues that the only dispute which is time-barred is the project manager's notification itself and not the project manager's assessment. The contributor finds this difficult to follow, since he does not see how there can be a dispute about the factual issue of whether or not the project manager has made an assessment. Either the project manager has made one – there can be no dispute – or the project manager has not – in which case the second category of dispute arises: the project manager not having taken an action. A dispute about the project manager's action can only be a dispute about the project manager's action being incorrect. In the case of the assessment of a compensation event, it can only mean that the assessment is incorrect.

The author cites, as an irrational consequence, that the contractor is time-barred from disputing an incorrect assessment of a compensation event before it was required to notify the event. This cannot be the case. The project manager is not able to make an assessment of a compensation event until after it has been notified. There can thus be no such restriction on the contractor.

Author's reply

A dispute about the project manager's action is about whether the action was taken correctly. Such a dispute would involve a determination of whether the project manager had acted in accordance with the provisions of the NEC3 *Engineering and Construction Contract* ('ECC') and made their assessment of the

compensation event accordingly. If they have, then they have discharged their obligations in terms of the contract. This does not mean that there can be no dispute about the product or the result of their action.

The project manager's assessment is the project manager's estimate of the amount of the contractor's entitlement arising from the compensation event. The third edition of the *Shorter Oxford Dictionary* defines 'estimate' as '(1) to assign a value to; to appraise, *assess*. (2) to form a notion of (quantities, numbers, magnitudes, etc.) *without* actual enumeration or measurement; to fix by assessment' (OUP, 1973: p. 683) (emphases author's own).

It is always open to the contractor to dispute that the project manager's assessment reflects the precise and true value of the contractor's entitlement. At no stage during the period of the contract is the project manager's assessment final and binding on the contractor or deemed to have been agreed to by the contractor. Such a dispute is classified as a dispute about 'any other matter' and can be brought up by either party at any time. There is no time-bar stipulation in respect of the dispute in terms of option W1.3(1).

Indirect, but strong support for the view that an assessment by the project manager is not a substitute for the amount of the precise true value of the amount due is to be found in the reasoning of Coulson J in his judgement *Grove Development Limited v. S&T (UK) Limited* [2018] in paragraphs 81 and 82.

It would be an anathema to interpret the ECC, which obliges the employer and contractor to act in a spirit of mutual trust, in a manner which would time-bar the contractor from claiming from the employer payment of their precise entitlement arising from a compensation event. This right is not to be sacrificed on the altar of expeditious dispute resolution.

REFERENCES

- Davis T (2018) Briefing: Time-bar provisions of the NEC3 *Engineering and Construction Contract* clause W1.3. *Proceedings of the Institution of Civil Engineers – Management, Procurement and Law* **171**(6): 238–239, <https://doi.org/10.1680/jmapl.18.00008>.
Grove Development Limited v. S&T (UK) Limited [2018] EWHC 23 (TCC).

NEC3 (2005) *Guidance Notes for NEC Engineering and Construction Contract*, 3rd edn. Thomas Telford, London, UK.

OUP (Oxford University Press) (1973) *Shorter Oxford English Dictionary*, 3rd edn. OUP, Oxford, UK.

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