Building.co.uk

Extensions of Time : After the Event

5 February 2015 | By Jeffrey Brown, Steve Goodwin

The judge's comments in a judgment around extensions of time provide future guidance

The judgment in Obrascon Huarte Lain SA vs Her Majesty's Attorney General for Gibraltar was given by Mr Justice Akenhead on 16 April 2014. Among many matters it related to a Spanish contractor's claims for further time and money arising from a contract to design and build a road and tunnel at Gibraltar airport. After two and a half years on the two year project little more than a quarter of the work had been done when the employer terminated the contract. The court had to deal with the contractor's claims and any liabilities flowing from the termination of the agreement.

Subject to some minor changes the general conditions of contract were those of the FIDIC Yellow Book 1st edition 1999. The court considered the contract's extension of time and notice provisions. Clause 8.4 [the extension of time provision] sets out the circumstances under which a contractor would be entitled to an extension of time. It states "the Contractor shall be entitled subject to Sub-clause 20.1 … to an extension of the Time for Completion if and to the extent that the completion … is or will be delayed by any of the following causes…". The judge in particular noted that the wording of the clause was not "is or will be delayed, whichever is the earliest".

Clause 20.1 [the notice provision] imposed a condition precedent upon the contractor to provide a notice describing the "event or circumstance" giving rise to an extension of time. This notice was to be given "as soon as practicable, and not later than 28 days after the contractor became aware, or should have become aware…". A failure by the contractor to give notice of the claim within this timescale meant that any right to an extension of time together with any prolongation costs was time-barred.

An undesirable result of the strictest interpretation of becoming 'aware of the event' could mean the contractor being time-barred before he 'believes' an event is a compensation event

The court rejected the contractor's claims and found, with one exception, that it had failed to comply with the notice requirements. However, Mr Justice Akenhead did provide some useful insight into how the court might construe the meaning of such clauses in the future. Of particular note was his comment that he could "see no reason why this clause should be construed strictly against the contractor" and could "see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims…". So when does the 28 day period start?

There are certain similarities between FIDIC's Clauses 8.4 and 20.1 and Clause 61.3 of the latest edition of NEC 3, published in April 2013. There is similarity between FIDIC's "is or will

be delayed" and NEC3's "has happened or which he expects to happen", noting the NEC3 clause also does not say "…whichever is the earliest".

We identified the potential implications of the NEC3 wording in our previous article "Compensation culture" (page 48, 28 February 2014). The Obrascon judgment noted that becoming "aware" of an "event or circumstance" introduced a subjective element into the test noting the NEC3 provides further subjectivity in its use of the words "expects" and "believes". We concluded that without judicial clarification of its meaning, and irrespective of any parallel rights to claim damages or indemnities that exist, contractors were well advised to notify all facts, past, present or future, which could conceivably be regarded as a compensation event.

An undesirable result of the strictest interpretation of becoming "aware of the event" in NEC3 could mean the contractor being time-barred before he "expects" and/or "believes" an event is a compensation event and perhaps even before the "event" itself has even occurred.

Clause 61.3 similarly seeks to impose strict time limits upon the contractor although it refers to notice of an "event" only as opposed to "event or circumstance". Should the contractor fail to notify an "event" as a "compensation event within eight weeks of becoming aware of the event" he forfeits any claims to a change "in the Prices, the Completion Date or a Key Date" except where the project manager is duty bound to notify. The judge's willingness not to apply a strict interpretation of Clause 20.1, in the judgment, might well assist contractors when using NEC3.

We concluded however that the most likely interpretation of the date of the "event" in NEC3 was that it should be construed as the date when the contractor "believes" the event was or could be a compensation event, thus applying a subjective test. The Obrascon judgment supports our view. The contractor's awareness of an "event" must also extend to its anticipated consequences from which it seeks relief.

Jeffrey Brown is a partner in the London office of Veale Wasbrough Vizards. Steve Goodwin is director of GVE Commercial Solutions