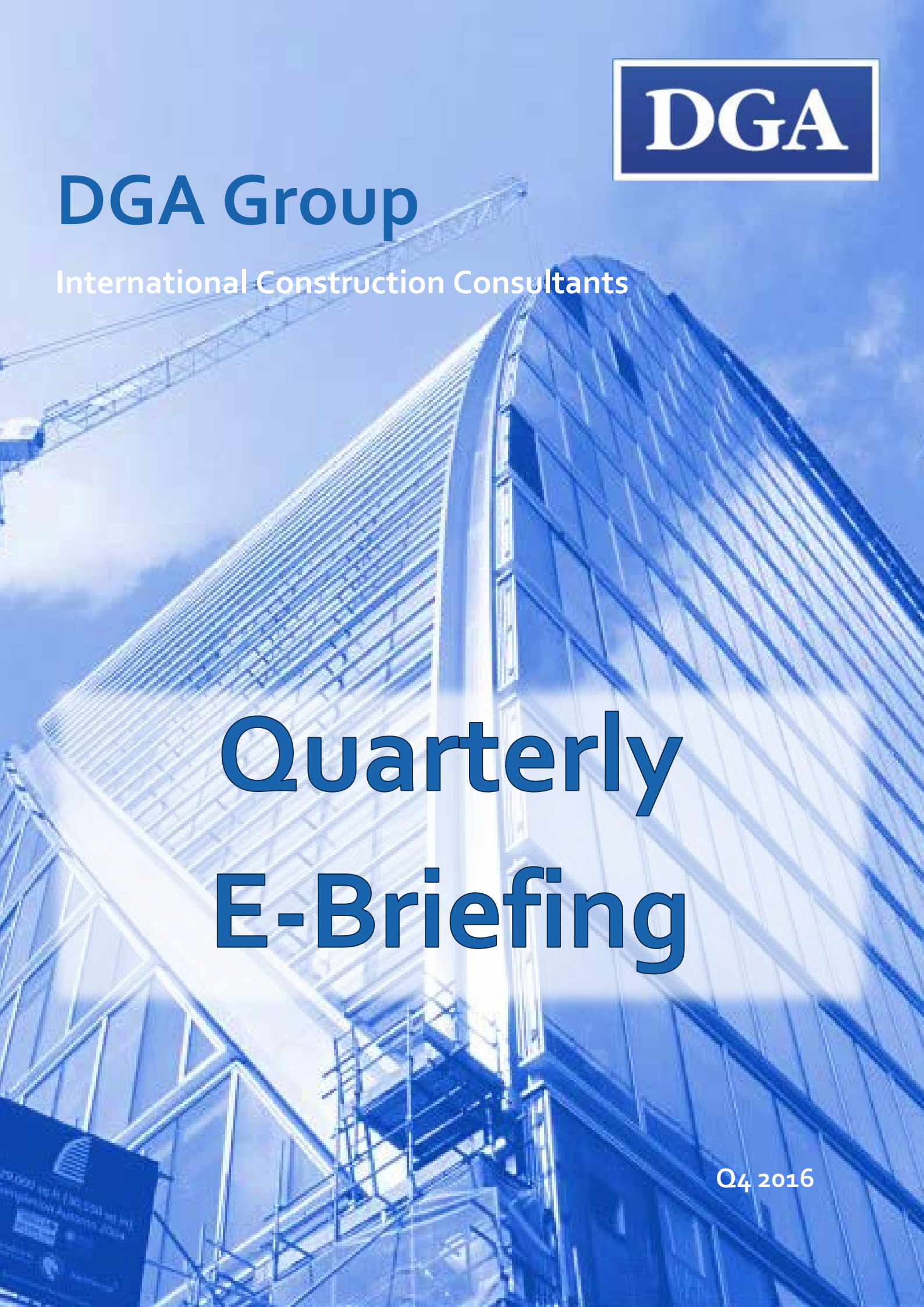

DGA

DGA Group

International Construction Consultants

Quarterly E-Briefing

Q4 2016

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A message from the CEO

Happy New Year to Everyone

The start of 2017 has seen the opening of our Middle East office in Dubai, with the local team growing apace to ensure that we can deliver our full range of commercial and programming services to our clients in the region, from project support through to claims and expert services. The wider DGA Group management team, including our International Experts division, will be closely involved with the growth of the firm in the region.

We move into the current year with all business streams within the Group having a strong pipeline of work, meaning we can continue with our targeted recruitment strategy while ensuring that we retain the quality on which our business values are based. Both our Calgary and Hong Kong offices, together with our International Experts division are all currently looking to expand their teams and we are confident that the Group will attract the highest rated applicants.

There is no doubt that 2017 will be an interesting year in regards to both national and international political changes and the effect these will have on our industry. We will ensure we continue to offer support and guidance to our clients where needed as the year progresses. We pride ourselves on the strength of our client relationships which are built upon the foundation of a deep understanding of the challenges faced in the global construction industry. This allows us to work in partnership with them in a proactive manner to try and avoid potential issues, therefore, saving time and money.

2016 was a year of expansion for the Group, particularly internationally, with a firm presence now on four continents, Europe, Asia, North America and Africa. As we go into 2017 we look forward to publishing some very exciting changes to the Group profile in the near future but, as ever, remain focused on delivering industry leading services to our clients.

If you would like to know more about DGA please do not hesitate to call me directly.

Kind regards

David Gibson
CEO

Concurrent delay - the *Saga* continues

(Saga Cruises BDF Ltd & Anor v Fincantieri SPA [2016] EWHC 1875)

By Scott Milner
Regional Manager, Yorkshire & North East

Concurrent delay has been the subject of legal debate for many years - probably because standard form construction contracts do not expressly deal with the issue[1].

The courts of England and Wales[2] view on the issue was established in *Henry Boot Construction Ltd v Malmaison Hotel (Manchester) Ltd* (1999)[3]:

> *"If there are two concurrent causes of delay, one of which is a Relevant Event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the Relevant Event notwithstanding the concurrent effect of the other event"*

It, therefore, followed from this in a number of cases concerning concurrent delay and damages that the contractor is not entitled to recover its time related delay costs; and the Employer is deprived of liquidated damages for the period of concurrent delay.

What is actually meant by concurrent or more precisely when does it truly exist?

However, a common question asked by many parties faced with concurrent delay is what is actually meant by 'concurrent' or more precisely when does it truly exist? This very issue arose in the Commercial Court in a matter between *Saga Cruises BDF Ltd & Anor v Fincantieri SPA* (2016) EWHC 1875.

Saga are owners of a cruise ship, the Saga Sapphire, and entered into a contract with Fincantieri for dry docking, repair and refurbishment of that ship at Fincantieri's yard in Palermo.

The completion date for the works was 17 February 2012, but this was extended by agreement of the parties until 2 March 2012. Completion was actually achieved 14 days later on 16 March 2012. The delays were caused by:

- The creation of new cabins (for which Fincantieri were responsible). These were not completed until 16 March 2012;
- The creation of a new decking system (for which Fincantieri were responsible). This was not completed until 12 March 2012;
- The weight of the lifeboats (for which Saga were responsible for arranging). This was performed between 3 and 14 March 2012
- The installation of new insulation (which was subject to a Saga change order). This was performed between 2 and 10 March 2012

In light of the delay, Saga claimed liquidated damages up to a maximum of €770,000 in accordance with the agreement.

Fincantieri contended that it had been prevented in completing the works by 2 March 2012 due to the last two causes of delay or there was concurrent delay and, contractor caused delay.

[1] Albeit the absence of an expressed term dealing with concurrency was dealt with in the contractor's favour in *Walter Lilly & Co Ltd v Giles Patrick Cyril Mackay and DMW Developments Ltd* [2012] EWHC 1773. The JCT contract in that matter permitted an extension of time for a relevant event regardless of any concurrent

[2] Scottish law permits responsibility for concurrent delay to be apportioned between the parties City Inn Ltd v Shepherd Construction Ltd (2010),

[3] 70 Con LR 33

consequently, it was not liable to pay liquidated damages.

In dealing with the concurrency argument Judge Cockrill QC stated:

> *"…unless there is a concurrency actually affecting the completion date as then scheduled the contractor cannot claim the benefit of it. Causation in fact must be proved based on the situation at the time as regards delay.*

The court, therefore, rejected Fincantieri's argument on the premise that Saga's delays had been subsumed by Fincantieri's delays which continued until 16 March 2012.

The Judge stated

> *"…the importance in concurrency arguments of distinguishing between a delay which, had the contractor not been delayed would have caused delay, but because of an existing delay made no difference and those where further delay is actually caused by the event relied on".*

Put simply, it seems there is concurrency only if both events (contractor delay and non-contractor's risk event) in fact cause delay to the completion of the works and the delaying effect of the two events must be at the same time.

The Commercial Court's approach seems to consider the start and end date of each delay event. It also appears to mirror the position stated in the Consultation Draft of the SCL Delay and Disruption Protocol 2nd Edition:

> *"the Employer Delay will not result in the works being completed later than would otherwise have been the case because the works were already going to be delayed by a greater period because of the Contractor Delay to Completion. Thus, the only effective cause of the Delay to Completion is the Contractor Risk Event."*

The is an area of law that continues to develop. It will be interesting to see if the Technology and Construction Court follow this commercial court decision.

If either our Contractor or Subcontractor readers are encountering delays on their project, please contact us to arrange a review.

ABOUT THE AUTHOR

Scott Milner

Scott is a Chartered Quantity Surveyor and Solicitor (non-practising) and has over 25 years' professional experience and is a Member of the Royal Institution of Chartered Surveyors, and Chartered Institute of Arbitrators.

He has worked in international private practice, for major building and civil engineering contractors, international contract advice and claims consultancies, solicitors and as a commercial director and as a practicing solicitor (legal counsel) for an international engineering and decommissioning contractor.

Scott provides contractual advice; training; calculation, review and assessment of quantum; representation in ADR (having acted in excess of 130 adjudications).

Grove Developments v Balfour Beatty

By Dominic Keene
Senior Consultant

Background

Balfour Beatty were engaged by Grove Developments to design and construct a hotel and serviced apartments in Greenwich, London.

The Contract was based on an amended JCT Design and Build Contract 2011, which defined the Date for Completion of the Works as 22 July 2015.

Grove Developments and Balfour Beatty had agreed a payment schedule of 23 valuation and payment dates, covering the period up to July 2015.

The project was delayed, and completion was not achieved on 22 July 2015. Following an application for payment by Balfour Beatty in August 2015 [known as "IA24"], and a Pay Less Notice by Grove Developments in September 2015, Grove sought a declaration under Part 8 proceedings that Balfour Beatty had no contractual right to IA24, or any further interim payments.

Grove Developments Ltd v Balfour Beatty Regional Construction Ltd [2016] EWHC 168 (TCC)

It was found that the Scheme for Construction Contracts did not take effect, as the payment schedule was a legally binding agreement that satisfied the requirements of the Housing Grants Construction and Regeneration Act. The effect of this decision is that Balfour Beatty were not entitled to any further interim payments, until practical completion.

Citing Arnold v Britton, Mr Justice Stuart-Smith repeated the courts unwillingness to rescue a party from a bad bargain.

Balfour Beatty Regional Construction Ltd v Grove Developments Ltd [2016] EWCA Civ 990 (Court of Appeal)

Balfour Beatty appealed the TCC's decision, claiming:

The payment schedule "expressly or impliedly provided for continuing interim payments" (past IA23);

If the payment schedule did not provide for continuing interim payments, then the Scheme for Construction Contracts applied; and,

A new agreement for future interim payments had been made during July and August 2015, as both parties did intend to make future interim payments.

The Court of Appeal upheld the earlier decision, despite Lord Justice Vos's dissent, finding that the interim payment schedule provided an adequate (if, at least retrospectively, not acceptable to Balfour Beatty) payment mechanism in accordance with the Act; the Scheme did not apply and that no further payment agreement had been concluded.

Conclusion

The case is a reminder that the courts will only interpret a contract according to its natural language. When agreeing the terms of contract parties should take particular care to ensure that the payment provisions allow for unforeseen delays to the contract.

ABOUT THE AUTHOR

Dominic Keene

Dominic is a quantity surveyor with over 10 years' experience and is a Member of the Chartered Institute of Arbitrators.

He has worked for major building and civil engineering contractors, subcontractors and employers on a number of high profile building, energy, offshore, infrastructure and civil engineering projects within the UK and Europe.

NEC3 and the Accepted Programme

By Steve Ollis
Planning Consultant

The NEC Engineering and Construction Contract has been developed to focus on strong project management principles and provides an environment of collaborative management between the parties.

The contract programme is deemed a key tool for successful project management and is sometimes referred to as the heart of the contract. This is perhaps emphasised by Cl.31.2 –dealing with the preparation of the Contract Programme - which is the longest clause in NEC.

The importance of the programme in the NEC contract is emphasised in Cl.50.3, where it provides the Project Manager with powers to with-hold 25% of the price of work done to date if the Contractor does not provide a programme in accordance with Cl.31.

Assuming no programme is bound into the Contract Data, the Contractor is required to submit the programme at the start of the contract – in a time period specified by the contract.

The Project Manager is then given a prescribed period to accept the programme. The contract provides four reasons by which the programme may not be accepted. Two of these though are not clear quantifiable reasons and are deemed by many to be subjective.

Thus, in a 'collaborative' form of contract, it is possible for the Project Manager to hinder a key part from functioning by non-acceptance without unequivocal reason for doing so - or to create mischief.

Programme Criteria

Cl.31 refers to preparation and acceptance of the first Contract Programme, and Cl.32 relates to revising the programme.

Within these, more specifically:

Cl.31.1 only requires the preparation of a Contract Programme if there is not one already bound into the contract in the Contract Data.

Cl.31.2 relates to the preparation of the Contract Programme & prescribes a long list of requirements to be taken into account, including the need to have all activities fully logic linked and allocated key resource levels.

Details on provisions made for float and any time risk allowances included in the programme should also be given to the Project Manager.

Finally, it also requires the following:

'for each operation, a statement of how the Contractor plans to do the work identifying the principal Equipment and other resources which he plans to use'.

Cl.31.3 outlines the duties of the Project Manager, particularly with regards to accepting the programme (or not as the case may be). It details the time limit for providing a response to a programme submission and provides the Project Manager with 4 criteria for acceptance/ non-acceptance:

- *'the Contractor's plans which it shows are not practicable,*
- *it does not show the information which this contract requires,*
- *it does not represent the Contractor's plans realistically or*
- *It does not comply with the Works Information.'*

Where not accepted, the Project Manager should communicate why, based on the four criteria above.

When accepted, this programme is known as the 'Accepted' (or sometimes called the 'First Accepted') Programme and is referred to as such in later parts of the contract management process detailed in the NEC form of contract (such as the change management process).

Non-Acceptance of the (First) Contract Programme

If a programme is bound into the contract, in the Contract Data as observed in Cl.31.1, this becomes the (First) Contract Programme, and PM acceptance is not required.

It is interesting to note that this 'accepted' programme by default may be the programme prepared by the Contractor at Tender stage and may not now be fully representative of how the project execution team intend to fulfil the contract requirements. Likewise, the quality of the programme and the support information available with it may not fully meet the requirements of Cl.31.2.

Notwithstanding the above, the NEC makes it clear that this programme is contractually binding under Cl.31.

As noted earlier, Cl.31.3 of the contract provides the Project Manager with grounds for non-acceptance including the following:

- *'the Contractor's plans which it shows are not practicable,*
- *It does not represent the Contractor's plans realistically?*

The terms 'not practicable' and 'does not represent…realistically' do not have a definition in the contract and are thus open to interpretation by the Project Manager.

'Not practicable' is defined in dictionaries as (not) '*able to be done or put into practice successfully'*[4].

The word 'realistically' when used in this context is defined as: '*based on what is real or practical'*[5] or more comprehensively as:

'In a way that demonstrates a sensible and practical idea of what can be achieved or expected'6

The above can be considered highly subjective and could be used by the Project Manager to reject programmes without a clear agreement between the parties of the grounds for rejection. There is no definition of the extent or scope these clauses extend to; if just one activity is viewed by the Project Manger as being excessive or ambitious in duration, are these grounds for rejection due to not being practicable?

It is suggested that if the Contractor comprehensively fulfils the obligations of Cl.31.2, including the provision of the statement of how it plans to do the work for each operation and details of the time risk allowances, the Project Manager would have all the information to be able to answer this point.

There is though, a degree of concern with Contractors that this clause enables Project Managers to reject programmes for 'strategic' reasons. If a Contractor experiences this situation, the only redress under the contract is adjudication.

What happens if Programme Acceptance is not achieved on the project?

Acceptance of a programme is not a condition precedent for the Contractor to continue with the works, unlike say design acceptance. Under Cl.32 the Contractor is still under an obligation to submit revisions to the programme.

The Contractor may continue to use his non-accepted programme for the purpose of managing the project, including the management of the project change. The lack of programme acceptance though does affect the assessment of the time effect of change, as this is taken out of the Contractor's hands and given to the Project Manager under Cl.64 of the contract:

'*The Project Manager assesses a compensation event using his own assessment of the programme for the remaining work if*

- *There is no Accepted Programme or*
- *The Contractor has not submitted a programme or alterations to a programme for acceptance as required by this contract.*

There are potential commercial and time management ramifications to this eventuality were the Contractor and Project Manager not to be in agreement on the outcome of this assessment.

Revising Subsequent Programmes for Submission

Any subsequent programme submissions for acceptance falls under Cl.32.2 with regard criteria to be fulfilled prior to acceptance. This includes actual progress achieved on each operation and the reprogramming of future operations, the effects of

4 Oxford English Dictionary

5 Dictionary.com

6 Oxford English Dictionary

implemented Compensation Events and proposals for dealing with delays, Defects and any changes the Contractor wishes to make.

What the NEC Contract fails to require in a subsequent programme are the forecast effects of unimplemented compensation events. These should be included in any programme submitted for acceptance, especially if they affect the planned completion date.

What happens if a revision to the Accepted Programme is not accepted?

Subsequent programme submissions and the project management review process is thereafter managed under Cl.32. The Clause provides reasons for revising and re-submitting the programme, such as if the Project Manager instructs it or if the Contract Data prescribes intervals for programme revision.

It is, unfortunately, common on projects – especially where extensive project change is occurring – for the Project Manager to fail to accept programme revisions; either within the prescribed time period in the contract or continuously fail to accept.

As noted earlier, the Contractor must continue to progress the Contracted and further Instructed Works. He will though be unable to measure the true effect of further instructions and other changes since the NEC contract Cl.62.2 requires the time effect of a Compensation Event to be measured against the 'Accepted Programme'.

This has the effect of leaving the Contractor in the position where the last 'Accepted Programme' was quite a time before the Event instigation date and the project logic and durations may have developed in the ensuing time period. Assessing a CE using an 'out-of-date' programme may not measure the true or complete time effect of it.

To accurately measure the effect of the CE (without also measuring the effect of other occurrences happening in the project), the base for the assessment should represent all prior progress and agreed events up to the date of the event.

The scenario discussed above where the last Accepted Programme was many months earlier will not achieve this requirement. It is therefore suggested that in this case for comprehensive assessment of the time impact of change under the NEC contract, a modified version of the last Accepted Programme is required. Based on the original contract ethos of 'collaboration' the Project Manager should support this way forward and hence be able to agree the results of the analysis.

Contractors who diligently attempt to measure the effects of change in this way often find that Project Managers resist accepting the results due to the use of a 'non-contractual' method of analysis.

Conclusion

The NEC Construction and Engineering Contract is a collaborative form of contract with a prescriptive project management process imposing duties on both parties that need to be adhered to, to ensure successful management of the project.

This is a resource and time hungry process that requires the correct level of suitably skilled professionals and a project wide understanding of the contract requirements and information flows needed to achieve it.

Thus both parties need to work together in the process of preparation, acceptance and update of the programme.

When this fails, and the programme is not accepted, the management of the project may become more difficult and it is suggested the project as a whole is more likely to fail – in terms of both the project duration and cost.

ABOUT THE AUTHOR

Steve Ollis

Steve is a Civil Engineer with over 28 years professional experience in the infrastructure and construction industry and is a Member of the Chartered Institute of Arbitrators.

He is an experienced planner who has worked with Clients, Designers and Contractors on major multi-disciplined infrastructure and construction contracts, with a particular focus on projects using the NEC Engineering and Construction contract.

He has also supported and assisted clients and experts in the analysis of project delay and in the preparation of submissions for use in Mediation, Adjudication and in potential Arbitration/Litigation.

Steve provides planning and programming services including: programme preparation and progress monitoring, time change assessment and management and participation in time dispute resolution processes.

Singapore Focus

Interview with the head of the Singapore Office of DGA Group, Joseph Tong.

- **Can you tell us a bit more about yourself and your role in Singapore?**

I was born in HK and went to England to further my study in 1972. I returned to HK in 1979 after obtaining a qualification in Building Technology and Management from University of West England. One of my first roles was for Mass Transit Railway Corporation of Hong Kong as a site quantity surveyor for the Mei Foo Station project.

In 1981 I joined Gammon Construction Ltd as a project quantity surveyor for their Foundation Unit. Gammon is one of the largest construction companies in Asia jointly owned by Balfour Beatty UK and Jardine Matheson. In 1984, I was posted to Gammon Construction's Singapore Branch office and quickly promoted to the management team, where I remained for the next 20 years.

I joined DGA Group in 2015 to develop the business in Singapore initially and then looking to expand into other Asian countries such as Malaysia, Indonesia and Vietnam. Since DGA Group set-up in Singapore we have secured work with more than 45 new clients. These clients include contractors, engineering consultants and government authorities.

- **What makes DGA stand out from the crowd in the Singapore market?**

I believe that the Group's delivery strategy for pre-contract work in Singapore is what sets us apart in this service for the local existing industry. We believe in carrying out BQ quantities take off in-house so that we can monitor consistency and ensure the highest quality results.

Within the wider commercial management service area, we utilise our familiarity of the local industry to work with the correct individuals and in line with the local business culture, which gives DGA Group the advantage to manage in an efficient manner.

As part of an international consultancy with over 10 offices this gives us, here in Singapore, access to an extensive bank of knowledge and experience of all international contracts together with the management of claims across the globe. The amount and quality of intelligence the Group has sets us apart in the Global market in all our service areas.

The demand for Expert Witness services has always has been high in Singapore and in 2016 the Group responded to demand by launching a new expert services business, DGA International Experts. This gives our clients access to Experts independently from the wider Group which allows for more flexibility in appointments.

- **What are the biggest challenges for DGA Singapore?**

One of the biggest challenges within Singapore is the effect regional legislation has on the construction industry locally. The slow down within the private residential sector this year is mainly due to the introduction of cooling measures by the government and the delay of launching major infrastructure projects such as the MRT CCL stage 6 tender which has had a knock-on effect on the industry as a whole.

- **How do you overcome them?**

DGA Group are uniquely equipped to manage the local challenges due to the variety of services we offer and the number of locations in which we are based. This support network allows us to continue to expand and grow even in difficult local markets.

Due to the amount of experience we have within the Singapore Office and wider Group, we are able to approach industry challenges in an informed manner; always putting our clients first.

- **What are the major construction schemes ongoing / about to start / in the pipeline for Sing?**
    - MRT Thomson East Coast Line, over 31 new stations are under construction.
    - MRT Circle Line Stage 6 consisting of 5 major civil contracts are currently delayed but expected to be called next few months.

- Changi airport extension, Terminal 4 is expected to complete by the end of 2017 and Terminal 5 site preparation work is on-going in full swing. Terminal 5 tender is expected to be called in the near future.
- Several large hospitals such as Seng Kang and Community Hospital are currently under construction. National Cancer Centre closed their tenders in December and Woodland Hospital will invite tender this year.
- Deep Tunnel Sewerage tenders will be called next couple of months and construction will start in 2017.
- North South Corridor tenders will be called very soon.

- **Travellers Top Tip: What is your top tip for anyone visiting Singapore?**

Be prepared for a short trip only as it is a small island.

ABOUT THE AUTHOR

Joseph Tong

Joseph joined the DGA team on the opening of our Singapore office as Country Manager, reporting directly to David Gibson in Hong Kong.

Before joining DGA Group, Joe worked in both Hong Kong and Singapore for a top tier international contractor in a very senior position for more than 34 years. He has extensive professional knowledge in commercial and bid management. With more than 30 years' residence in Singapore, Joe is very familiar with the local construction market and also a well-known personality in the industry.

Upcoming Events

CICES joint seminar with Weightmans LLP

'Money Claims under NEC 3 – How Contractors and Employers can make the most of the compensation event procedure.' Kevin Terry, DGA Group, will be presenting alongside Ian Yule, Shoosmiths, on 28th February '17. For more information and to apply to attend please visit www.dga.eu.com/news

NEC3 and JCT Contractual Nightmares Breakfast Seminar

A complimentary breakfast seminar with anecdotes of some recent problems faced by parties and their application to the standard form contracts NEC3 and JCT and their resolution presented by Scott Milner, DGA Group, 10th May in Birmingham. For more information and to apply to attend please visit www.dga.eu.com/news

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