

# No pain, no gain – English court finds that interim payments under a joint venture contract should not be adjusted for cost overruns

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Construction companies entering into joint venture (JV) contracts should be cautious of entering into agreements where the responsibility for, and timing of cost overruns is not tightly specified, to avoid unexpected surprises.

In *Doosan Enpure Limited v. Interserve Construction Limited* [2019] EWHC 2497 (TCC), Mrs. Justice Jefford made obiter comments that should cause parties to reflect on their obligations under contracts under the NEC3 Option C contract.

## **Follow the formula**

Doosan Enpure Ltd. (Doosan) entered into a joint venture agreement (JVA) with Interserve Construction Ltd. (Interserve) for the purpose of carrying out upgrade works at a treatment plant operated by Northumbrian Water under the NEC3 form with Option C (NEC3).

The procedure adopted for payment under the JVA was that Doosan and Interserve would each produce a monthly spreadsheet and payment certificate showing the payments to which each of them was entitled from the JV account. The first 30 certificates were approved in quick order.

When Doosan invited Interserve to approve number 31, Interserve refused to do so, on the basis that there was a risk that the amount certified on an interim basis in respect to the work done would exceed the amount it could expect to recover as a result of the painshare/gainshare provisions of the contract.

According to NEC3, parties agree on a target cost or price to include the contractor's best estimate of its cost to carry out the works, as well as a fee for costs, overheads, and profit. Upon completion, an assessment is made of the "price for work done to date", and any overrun or cost saving is allocated according to a formula, commonly described as a "painshare/gainshare" mechanism.

The court found that the painshare/gainshare provisions of NEC3 were incorporated into the JVA. The question before the court was whether adjustments could be made under the NEC3 to

interim payments due before the completion of works, to allow for deductions that would likely need to be made at completion of any event.

### **The final countdown**

Justice Jefford considered it was clear from clause 53.3 of NEC3 that the comparison of the price for work done to date to the total of the prices, had to be carried out at completion of the whole of the works and once the price for the work done had finally been established.

According to the clause:

"The project manager makes a preliminary assessment of the contractor's share at completion of the whole of the works using his forecasts of the final price for work done to date and the final total of the prices. This share is included in the amount due following completion of the whole of the works."

The position was confirmed by clause 53.4, which says:

"The project manager makes a final assessment of the contractor's share using the final price for work done to date and the final total of the prices. This share is included in the final amount due."

It followed that since the assessment of the painshare can only take place after completion, there was no amount to be paid by the contractor at the date of any interim valuation.

The court also looked at whether there was anything in the JVA which permitted interim painshare/gainshare adjustments, but concluded the JVA contained no relevant principles that could allow the deduction of painshare from the amounts due for the interim payments.

The court granted declarations that Interserve was in breach of the JVA by refusing to permit the release of interim payments, ordering that funds amounting to £5 million be released from the JVA and paid over to Doosan.

### **Words to the wise**

Whilst Justice Jefford's comments were obiter, the case is a cautionary reminder that under the terms of NEC3, an employer is required to continue to pay the contractor sums in full on an interim basis, without operating the painshare, even when it is clear that painshare will ultimately be applied.

Contractors should consider inserting a Z Clause to amend the standard provisions should they wish the allocation of pain to be applied on an interim basis. They should also take steps to ensure that their JVA terms are consistent with the construction contract or if not, and there is a conflict, it is clear which document will take precedence.

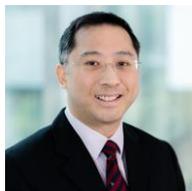
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