

Construction Law Update

COVID-19 and Future Construction Contracts – How Can You Minimise the Risk?

Whilst no one yet knows the full extent of the potential implications of COVID-19 on the construction industry, it is now inevitable that almost all construction companies are going to be affected in some way.

Contractors are likely to be particularly vulnerable to the economic impacts of COVID-19. Possible problems that a contractor might face on a project affected by COVID-19 include:

- delays in procuring and importing plant, materials and equipment;
- shortages of labour; and
- potential site closures.

Since COVID-19 is already having a significant impact on the construction industry, contractors entering into construction contracts now or in the near future may be deemed to have priced and programmed for the risk of COVID-19 and therefore may find claiming for relief more difficult than it is under existing contracts. They should therefore consider how best to guard against the risk that COVID-19 and its consequences might affect their ability to perform the contract.

Will standard form construction contracts provide any relief from COVID-19 for contracts that are yet to be entered into?

JCT – Time

The JCT suite of contracts is silent on epidemics, but allows for an extension of time (and thus relief from liquidated damages) for force majeure. This term is not defined, but the general consensus seems to be that contractors may be able to rely upon this Relevant Event for contracts entered into **prior to** the COVID-19 outbreak. However, for any contracts **not yet entered into**, because the potential implications of COVID-19 are now arguably 'reasonably foreseeable', it may be much more difficult to argue that delays arising from COVID-19 constitute events of force majeure.

A contractor could still become entitled to claim an extension of time arising from the exercise by the UK Government or any Local or Public Authority of a statutory power which directly affects the execution of the works if, for example, the site is closed by the Government after the contract has been entered into. However, many JCT contracts are amended so that contractors cannot claim for changes in law and/or exercise of Government power that are reasonably foreseeable when the contract is entered into. Contractors should look out for such amendments because they may restrict entitlement.

JCT – Money

Loss and expense claims are likely to be more difficult to bring than extension of time claims, because force majeure and exercise of Government power are not Relevant Matters. So, unless the employer instructs a change or postpones the works or in some other way causes an act of prevention, it is unlikely that any of the Relevant Matters in the JCT standard form contracts will cover the implications of COVID-19.

JCT – Termination

JCT contracts allow a "no fault" termination by either party in cases where the whole of the Works has been suspended for the continuous period specified in the Contract Particulars (usually two months) due to an event of force majeure or the exercise of Government power. For the reasons set out above, in contracts that are yet to be entered into, it is likely to be more difficult to establish force majeure and therefore this right of termination is less likely to apply and will perhaps be limited to suspension due to the exercise of Government power only.

NEC – Time and Money

The NEC suite of contracts is also silent on epidemics, but there are various compensation events ("CEs") which may apply, depending on the circumstances.

Construction Law Update

The key CE is clause 60.1(19), NEC's equivalent to JCT's force majeure clause, which refers to "an event which neither party could have prevented, and had such a small chance of occurring that it would have been unreasonable to have allowed for, which stops the contractor completing the works at all and/or in accordance with the Accepted Programme". However, as stated above, given that the effects of COVID-19 could now be argued to be 'reasonably foreseeable' for contracts not yet entered into, any consequential delays are less likely to fall within the scope of this CE.

Whether a future NEC contract will grant a CE where the impact of changes to legislation has caused delay will depend on whether Secondary Option Clause 'Option X2: Changes in the law' is selected. Again though, if a foreseeability test has been added, this may be problematic for the contractor.

Other CEs may also be applicable, depending on the actions of the project manager/employer.

NEC – Termination

Clause 91.6 of the NEC standard forms allow a contractor to terminate if the project manager issues an instruction to stop the works and an instruction to resume the works is not given within thirteen weeks. However, contractors may want to broaden the scope of this ability to terminate as it does not permit termination by the contractor due to a prolonged site shutdown ordered by the Government, for example.

How can contractors protect themselves?

Given that JCT and NEC contracts which are yet to be entered into may offer fairly limited ability to claim relief from the effects of COVID-19, when negotiating contract terms, contractors should seriously consider asking for specific amendments to give them more or clearer protection. This might include:

- A specific right to claim an extension of time and/or loss and expense (or a compensation event) for delays caused by the effects of COVID-19.

- Wording which confirms that the effects of COVID-19 are not deemed to be reasonably foreseeable.
- A right for the contractor to terminate the contract if work is suspended for a prolonged period of time due to COVID-19 (which, in JCT contracts, may need to be longer than the standard two months for "no fault" termination).

Many employers are likely to be willing to grant an extension of time, but may not be happy to bear other risks. The parties will therefore need to agree on an appropriate way to share risk. For example, the contractor's right to claim an extension of time might be limited to specific types of delay arising from COVID-19 (e.g. only labour and material shortages) or any loss and expense incurred due to delay might be shared between the parties.

We are here to help

Please contact us if you require assistance in drafting and negotiating contract terms to help protect against the risk of delays caused by COVID-19.

This article contains information of general interest about current legal issues, but does not provide legal advice. It is prepared for the general information of our clients and other interested parties. This article should not be relied upon in any specific situation without appropriate legal advice. If you require legal advice on any of the issues raised in this article, please contact one of our specialist construction lawyers.

© Hawkswell Kilvington Limited 2020