

Construction Law Update

Materials Shortage at 'Crisis Level' – How Can Companies Protect Themselves?

In March 2021, the Construction Leadership Council issued a warning to the UK construction industry that the ensuing months would see a significant and widespread shortage in key building materials. That prediction is now very much a reality, and its extensive effects are being felt nationwide.

Which materials are in short supply and why?

Timber, cement, steel, aggregates, plastics, bricks and more are being affected by unprecedented shortages. Factors contributing to this issue include: Brexit-related complications impacting European imports, increased domestic demand for products following the end of the UK lockdown, increased global demand, issues with transportation of materials and, in the case of aggregates, government environmental legislation affecting the use of certain plant and machinery.

What are the knock on effects?

Project delays and increased costs are the key consequences of material shortages, with smaller companies who do not have the facilities to stockpile materials well in advance likely to shoulder the heaviest burden.

Recently it was reported by the Sunday Times that Travis Perkins PLC, one of the UK's largest distributors of building materials, had warned of the likelihood of extended lead times (beyond estimated delivery dates) and notified its customers that the price of bagged cement, chipboard and paint would be increasing by 15%, 10% and 5% respectively from 1 June 2021.

In the case of fixed price contracts, such price increases will inevitably eat into a contractor's profit margin, with extended lead times also exposing the contractor to the risk of delay damages.

Employer or contractor - whose risk is the material shortage?

Who bears the risk of a material shortage will depend on two key factors: the terms of the building contract and the reason for the shortage. Some building contracts will include express provisions which allocate risk in the event of a materials shortage. Where that is not the case, a contractor will need to dig a little deeper into the reason for that shortage in order to understand its liability.

Shortages arising from the COVID-19 pandemic

In circumstances where a contractor can show the issues with procuring materials are a direct result of the COVID-19 pandemic, this could be considered an event of *force majeure*.

Force majeure is an umbrella term used to describe events which may occur and affect a contract, but which are outside the control of the parties. Subject to any express definition in a contract, the COVID-19 pandemic is likely to be considered a *force majeure* event **if** the contract was entered into **before** there were any signs of the outbreak. Where a contract was entered into afterwards, it is likely the contractor would have been expected to factor risks of consequent material shortages into its price and programme.

In an unamended JCT DB 2016 contract, *force majeure* is a Relevant Event (clause 2.26.14) but not a Relevant Matter. Contractors would therefore be entitled to an extension of time (and thus relief from delay damages) but no loss and expense.

In an unamended NEC4 contract, there is no mention of *force majeure*, but clause 60.1(19) provides for the risk of events which neither party could have prevented, and had such a small chance of occurring that it would have been unreasonable for the contractor to have allowed for. Material shortages

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caused by COVID-19 would arguably fall into this category, thus entitling the contractor to additional time and monies.

Shortages arising from Brexit

In circumstances where the issues with procuring materials are a direct result of Brexit, claiming additional time and/or monies under a contract may be more difficult.

As with COVID-19, a key factor will be when a contract was entered into. Contracts entered into after the 2016 referendum should have arguably made express allowance for the risks associated with Brexit, including potential material shortages. In circumstances where the contract was entered into prior to 2016 and/or the effect on the material procurement was arguably too remote to foresee, JCT DB 2016 clause 2.26.14 or NEC4 clause 60.1(19) may be once again applicable.

An additional option a contractor may have where its material shortages are a result of Brexit would be to rely upon a 'change of law' clause (clause 2.26.12 in JCT DB 2016 or Option X2 in NEC4) to claim additional time (JCT) or time and monies (NEC). This option may be available where, for example, a post-Brexit amendment to legislation/trade terms has affected the material supply.

Steps to take now if your project is being affected

The first thing to do if a project's progress is being hindered by the material shortages is to check the provisions of the building contract to see if and how the risk has been expressly allocated between the parties.

Secondly, as with any delay claim, it is vital to ensure all relevant notices are issued and all condition precedents are complied with.

Thirdly, and as a general matter of course, programmes should be regularly updated and contemporaneous evidence should be kept of all delays (meeting minutes, project diaries, correspondence etc). Such documents will be crucial when it comes to proving causes of delay.

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