**The Impact of Coronavirus (Covid - 19) on Construction Projects and the Potential Remedies Available**

What the UK is currently facing is unprecedented as a consequence of the Covid-19 pandemic, with the country effectively in lockdown and asked to stay at home in order to prevent the spread of the virus, and save the NHS becoming overwhelmed with severely ill patients that have contracted the virus.

**Government Advice**

We have all seen the television daily bulletins from the Prime Minister, other Cabinet Ministers and senior health officials and the advice we are expected to comply with.

Many businesses have been asked to close such as retail, restaurants and others to ask their employees to work from home. Construction sites have not been asked to close although there is pressure being placed on contractors and employers from the public to do so.

So, what is the actual position? It is a moving state of affairs but at the time of writing:

The Government website ([www.gov.uk](http://www.gov.uk)) states that we should stay at home and:

* only go outside for food, health reasons or work (but only if you cannot work from home)
* if you go out, stay 2m (6ft) away from other people at all times

With regard to businesses the Government states that:

*“With the exception of some non-essential shops and public venues, we are not asking any other businesses to close – indeed it is important for business to carry on.*

*However, you should encourage your employees to work from home unless it is impossible for them to do so.*

*Sometimes this will not be possible, as not everyone can work from home. Certain jobs require people to travel to their place of work – for instance if they operate machinery, work in* ***construction*** *or manufacturing or deliver front line services.* (emphasis added)

*Employers who have people in the offices or on site should ensure that employees are able to follow the Public Health England guidelines including where possible, maintaining a 2m distance from others”*

So, at the time of writing, the Government has not made it mandatory for construction sites to close, although a number have closed.

On 31 March 2020 the Secretary of State for Business, Energy & Industrial Strategy has issued a letter *“To everyone working in the UK’s construction sector”.* The letter makes reference to the construction of temporary hospital wards, the installation of complex and life-saving oxygen systems, constructing infrastructure that society needs and ensuring we have healthy homes.

There is reference to the need for many construction workers to travel to their place of work and in order to operate safely, to comply with the Site Operating Procedures (SOP) which were published on 23 March 2020 by the Construction Leadership Council (CLC) which align with the latest guidance from Public Health England. With regard to close working on construction sites, the CLC’s SOP states that *“there will be situations where it is not possible or safe for workers to distance themselves from each other by 2 metres”*. The SOP will be updated as the situation develops.

It is therefore clear that certainly for the time being, the Government has not made it mandatory to close construction sites however, a balance has to be found by contractors in protecting workers, the needs of the nation and the economic impact on their businesses. On 30 March the CLC issued *“Advice on temporary suspension of sites”.*

One of the significant issues for contractors will be delays to progress, that are caused by a potential lack of labour and materials through people staying at home, self-isolating or who are ill and possibly in hospital.

The delays have the potential risk for the contractor of being exposed to the deduction of liquidated damages, therefore needing an extension of time. In addition, the costs of the delay require recovery through loss and expense or compensation events.

**Force Majeure**

A phrase that has been mentioned recently in the context of Corvid-19 is force majeure. Not often used in this country, so what is it?

Force majeure is not a legal doctrine but a clause within a contract which provides that on the occurrence of a particular event or event beyond the parties control, one or both of the parties can, depending on the wording, treat the contract as being cancelled, or entitle a party to exercise a right to cancel the contract, or excuse the parties from performance of the contract. It may entitle the parties to suspend performance, and to claim an extension of time and, in some cases loss and expense.

It is also necessary to distinguish force majeure from frustration. In the case of frustration, an event must have made the performance of the contract impossible whereas force majeure will not always lead to a discharge of the contract, but the contract will set out what is to happen in the case of a force majeure event occurring.

With regard to the main forms of construction contract used in the UK, the position under the JCT and NEC is considered below in their unamended form. However, in reality most projects have contracts which have been amended, so the actual contract for each project should be carefully considered plus the facts pertaining to each project will also be different and must be taken into account.

**JCT**

Reference is to 2016 “With Quantities” edition although the Design & Build version is similar.

**Notice provisions**

In seeking an extension of time, the first thing that the contractor must do is provide the requisite notice under the contract of any delay to the progress. Clause 2.27.1 (the equivalent design & build clause is 2.24.1) has that familiar wording:

*“if and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give notice to the Architect/Contract Administrator of the material circumstances, including the cause or causes of the delay and shall identify in the notice any event which in his opinion is a Relevant Event”*

**Extensions of Time - Relevant Events**

The Relevant Events are set out in clause 2.29 and at the very end of the list of events is 2.29.15 (design & build form clause 2.26.14), which just says *“force majeure”*. Beyond those words there is no definition of force majeure or what event is to be treated as force majeure. The case law on the subject is also limited however, in *Lebeaupin v Richard Crispin and Company [1920] 2 KB 714* the court considered that force majeure included epidemics, and this case concerned the Spanish Flu epidemic, which also turned out to be a pandemic affecting most of the world between 1918 and 1920.

It is not the force majeure itself that is the cause of the delays to progress, but the subsequent effects such as a lack of labour and materials, lack of access due to the site being closed or access to the site being closed (e.g. the entrance to a shopping mall, where the site is a retail unit within).

What in some contracts can be claimed in the broader sense under the force majeure clause, are separated out into sperate clauses in other contracts, as is the case with the JCT.

The JCT provides other Relevant Events in addition to the force majeure clause referred to above, that the contractor could use to claim an extension of time depending on the facts, from the following (equivalent design & build form references are in brackets):

* 2.29.1(2.26.1) provides for variations. For example, if the contract administrator issues instructions relating to access, how the work is to be undertaken, working restrictions etc.;
* 2.29.2.1(2.26.2.2) caters for circumstances where the contract administrator issues instructions postponing parts of the works;
* 2.29.3 (2.26.3) concerns a deferment of possession;
* 2.29.7 (2.26.6) in connection with any impediment, prevention or default by the employer, contract administrator, quantity surveyor or any employer’s person;
* 2.29.13 (2.26.12) the exercise after the base date by the UK Government which directly affects the Works.

**Loss & Expense - Relevant Matters**

Whilst the above Relevant Events may provide an extension of time, not all will entitle the contractor to loss and expense. For there to be an entitlement to loss and expense, the issue has to be one of the Relevant Matters listed at clause 4.22. Those Relevant Matters which correspond with a similar Relevant Event and would therefore give potential recovery of time and money are (the equivalent design build form references are in brackets):

* 4.22.1(4.21.1) variations;
* 4.22.2.1 (4.21.2.1) instructions in respect of any postponement;
* 4.22.5 (4.21.5) any impediment, prevention or default by the employer.

Force majeure is not a Relevant Matter therefore, the contractor would be entitled to potentially an extension of time but not loss and expense. This is considered a neutral event, where the contractor would be entitled to additional time and relief from liquidated damages, at the employer’s expense, but no recovery of its preliminaries etc.

An employer, the contract administrator and other members of the employer’s team need to be careful that it does not inadvertently provide the contractor with an extension of time and recovery of loss and expense by requiring variations, issuing instructions or commits an act of prevention or the like.

Any entitlement is subject to the contractor keeping the necessary records in order to demonstrate any extension of time and provide sufficient detail and evidence of costs incurred. There is always a requirement to mitigate and there is the further obligation, under the JCT, for the contractor to comply with clause 2.28.6 which states that:

*“the Contractor shall constantly use his best endeavours to prevent delay in the progress of the Works…”*

**Termination**

If the Works are suspended, for one or more of the events stated in clause 8.11.1, for the continuous period stated in the Contract Particulars, either party may terminate the contract. If no period is stated in the Contract Particulars, the period is 2 months and the parties must comply with the notice provisions.

**NEC**

References are to NEC 3 although there are not many significant changes in NEC 4.

**Compensation events**

Unlike the JCT which separates extensions of time and loss and expense, the NEC deals with extensions of time and cost recovery within a compensation event. The NEC does not refer specifically to force majeure however, clause 60.1(19) is for a compensation *“event which*

* *stops the Contractor completing the works or*
* *stops the Contractor completing the works by the date shown on the Accepted Programme*

*and which*

* *neither Party could prevent,*
* *an experienced Contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it and*
* *is not one of the other compensation events stated in this contract”.*

Clause 19.1 requires the project manager to give an instruction stating how the contractor is to deal with the event, which stops the contractor completing the works etc. The guidance notes on clause 19 states that *“this in effect is a ‘force majeure’ clause”* and any instruction will be a compensation event under 60.1(19).

Other compensation events that may be applicable are:

* 60.1(1) – where the project manager instructs changes;
* 60.1(2) – if the employer does not allow access by the later of the access date or the date shown on the accepted programme. This could apply if the employer closes the site;
* 60.1(4) – the project manager issues an instruction to stop or not to start any work or a change in a key date;
* 60.1 (5) – the employer or others do not work within the times shown on the accepted programme thus causing a delay;
* 60.1(6) – the project manager or supervisor fails to respond to a communication from the contractor within the contractual time period. With staff shortages due to self-isolation, this could become an issue;
* 60.1.(8) – the project manager or supervisor changes a decision previously made;
* 60.1 (16) – the employer fails to provide materials, facilities, samples as stated in the works information;
* 60.1 (17) – the project manager notifies a correction to an assumption made in assessing a compensation event;
* 60.1(18) – a breach of contract by the employer

The effects of changes in the law is covered by option clause X2 and so if this option was not selected, the parties will not be able to rely on it. If selected it provides a compensation event for a change in the law after the contract date in the country where the site is located. It is a requirement for the project manager to notify the contractor.

**Early Warning**

For any of the above compensation events the contractor and project manager are required to give an early warning to the other under clause 16.1, and either may instruct the other to attend a risk reduction meeting under clause 16.2. The project manager updates and re-issues the risk register under clause 16.4 with the decisions made at the meeting. If the decision changes the works information, then an instruction is to be issued simultaneously.

**Notifying Compensation Events**

In the event that the project manager or supervisor has not issued an instruction, under clause 61.3, the contractor must notify the project manager of the event. The notice must be given within eight weeks of becoming aware of the event. A failure to do so may result in the claim being time barred.

**Termination**

In accordance with clause 91.7, where the event stops the contractor completing the works or being complete by the date shown on the accepted programme by more than thirteen weeks, **only the employer** may terminate the contract.

The employer may also terminate the contract under clause 91.2, if the contractor has failed to comply with its obligations (R11).

In addition, the employer may terminate the contract in accordance with clause 91.3, where the project manager has notified the contractor that it is in default and has substantially hindered the employer or others (R14) or substantially broken health and safety regulations (R15), and has not stopped that default within four weeks.

Pursuant to clause 91.6, if the project manager has issued instructions to stop or not to start substantial work or start all work, and no subsequent instruction has been given to re-start or start within thirteen weeks, the employer may terminate the contract if the instruction was due to the contractor being in default ( R18), or the contractor may do so if the employer is in default (R19). Either party may terminate if the instruction was for any other reason (R20) i.e. neither party’s fault.

By way of an example, if the project manager gives an instruction under clause 60.1(4) to stop work because of the Covid-19 pandemic as a compensation event, and that continues for thirteen weeks without work re-starting, then either party may terminate. In such circumstances, the contractor would be entitled to its costs up to that point and an allowance for removing its equipment.

**Conclusion**

The situation regarding the effects of Covid-19, social distancing, self-isolation, the increasing numbers becoming ill and staff being furloughed are changing by the day. Had the Government closed all sites, as in Scotland, that may have made the contractual issues easier. At the time of writing this paper, it seems that the onus is with contractors and employers to decide if to remain open or close for practical, financial and the health and safety considerations.

From a contractor’s perspective, where JCT contracts are concerned, they will try to opt for Relevant Events which provide an extension of time which will also align with a loss and expense Relevant Matter to recover both time and money. Employer’s on the other had will try to rely on Relevant Events which give rise to an extension of time but there is no corresponding Relevant Matter to entitle a recovery of loss and expense. It should be remembered that the delays caused by the effects of Covid-19 should not be regarded as an event for contractors to recover time and money for prior delays of their own making.

Employers need to take great care in closing sites, as this could place the contractor in a better position than if the contractor closes the site itself, although the health and safety of workers should always be the overriding concern.

Under the NEC, compensation events provide the contractor with both extension of time and cost recovery and there is no best endeavours requirement however, the NEC has a number of steps to comply with and remember the 8-week time bar on notifying compensation events, where the project manager has not already done so.

A problem, particularly for projects under the NEC is that compensation events are forecasts into the future whereas JCT is generally retrospective in reviewing time and costs. At the present time we do not know how long the lockdown will continue, whether more stringent measures will be put in place to stop population movement, whether labour and materials will become too scarce or whether the Government will close all sites.

What ever happens, it is more important than ever to keep accurate contemporary records and comply strictly with the contract. Ensure that all notices are given timeously. Most standard forms of contracts used by the industry contain amendments agreed by the parties, and so it is imperative that the actual contract relating to each project is referred to carefully and that the specific facts on each project are applied to the contract.

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This paper is not for the purpose of providing legal advice whatsoever and is for information only. Specific advice should be sought for each and every case. Trevor Drury is able to be instructed by solicitors or on a direct public access basis by employers, contractors or subcontractors who have construction projects affected by Covid-19.

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