



## CORONAVIRUS: CONSTRUCTION - WHERE ARE WE NOW?

Following on from recent the article about the potential impact of the coronavirus pandemic on building contracts, partner Michael Chilton provides a further assessment on what the outbreak means for the construction industry.

The UK Government has introduced a number of initiatives and assistance measures to help businesses and individuals to get through the crisis. The effect of COVID-19 on the economy has been dramatic and the construction industry is now suffering from the impact which we anticipated.

Some construction projects are closing, while those still operating are experiencing delay and disruption for various reasons, including shortages of resources. However, there is still confusion among some employers and contractors about whether to close sites.

Several construction companies have decided to close their sites, but current Government guidance states they may stay open provided Public Health England (PHE) guidelines - including workers keeping two metres apart - can be maintained. It would appear that the authorities are saying that some sites ought to close, but others where more essential work is being carried out (such as on infrastructure projects) can stay open. Companies are nevertheless being told to follow the Construction Leadership Council's guidance on site operating procedures. The position is far from clear. In our previous article we looked at how the JCT Design and Build 2016 and NEC 4 contracts deal with delays and recovery of additional costs caused by force majeure events or events outside the control of the parties. This was on the assumption that any events caused by COVID-19 would likely be considered a force majeure event.



But sites are now closing, possibly for a lengthy period, and it is not just delay and disruption to supply of resources which parties are concerned with. Other provisions in the JCT Design and Build contract 2016 and NEC 4 contracts may now become relevant, either if a delay to progress occurs or there is a suspension of the works due to a site closure:

## JCT Design and Build 2016

- Clause 2.26 - Relevant Events
- 2.26.1 - Changes - This would apply if the employer issues an instruction to restrict or close access to the site and this causes delay or suspension of works. It may also be relevant if new legislation is introduced to deal with COVID-19 after the base date (clause 2.15.2).
- 2.26.12 - This clause would apply if a site closure is ordered by Government or a local or public authority exercising a statutory power.
- 2.26.2 - This clause would apply if the employer issues an instruction under clause 3.10 to postpone the work.
- 2.26.6 - The unilateral closure of a site by an employer may also potentially amount to an act, impediment, prevention or default under this clause.

## Clause 4.21 - Relevant Matters

If the cause of the delay is claimed under the force majeure Relevant Event, the contractor has an entitlement to an extension of time but not to loss and expense under clauses 4.19 and 4.20. If the contractor chooses to use the above Relevant Events, however, the situation changes.

Clause 2.26.12 operates in the same way as the force majeure Relevant Event. But if any one of the other clauses is used, there is a corresponding Relevant Matter under clause 4.21 and the contractor has entitlement to claim additional monies. It may therefore be important to the parties how the effect of COVID-19 manifests itself on a site. For this reason it is sensible for parties to try to agree in advance how they plan to allocate the risk of effects of the outbreak.

For the contractor to have any entitlement to time and money, the correct procedures in the contract must be followed, including the service of notices (clause 2.24) and the use of best endeavours (clause 2.25.6) to mitigate any delay. A note of warning for tenant employers involved with fit-out contracts within existing or occupied buildings: a site closure may be forced upon you by your landlord. In this situation, and in the absence of Government action, this would fall under Relevant Event sub-clauses 2.26.1, 2.26.2 or 2.26.6. The effect being that the contractor would be entitled to claim loss and expense.



## Clause 8.11 - Termination

If a site has to close as a result of the effects of COVID-19, and that suspension lasts for a period of time longer than that stated in the contract (usually two months), either party has the right to terminate the contractor's employment under the contract. This right applies if the suspension is caused by force majeure, Government action or an employer instruction.

Given the likelihood of sites having to close for longer than two months, it would be prudent for parties to agree a longer period to be inserted in new contracts or for existing contracts to be amended so that there is more certainty.

## NEC4

### Clause 60 - Compensation Events

In our previous article, we discussed the 'Compensation Event' under clause 60.1(19), which is the most likely to apply to delays caused by the effects of COVID-19. The main point to note here is that the clause includes the caveat that for an event to qualify 'an experienced contractor would have judged at the contract date to have such a small chance of occurring that it would not have been unreasonable to have allowed for it'.

This introduces a test of foreseeability which is not specifically included in the JCT. If a contract has just been signed or is about to be completed, contractors would be advised to specifically refer to the effects of COVID-19 in a separate clause, otherwise it may not be satisfy the test included in clause 60.1(19).

However, if instructions are issued by the employer or the project manager to close the site or to stop work, compensation events 60.1(2) or (4) are likely to apply.

NEC4 also contains a Change of Law clause (x2) which applies to law changes introduced after the date of the contract. This would apply if the new legislation was introduced or a statutory power was exercised. However, this clause is optional and will only apply as a compensation event if specifically selected.

As with the JCT contract, the NEC4 contains requirements as to the serving of notices regarding compensation events. These are included in clause 61. There are also requirements regarding early warning notices



## Clause 91 - Termination

Under clause 91.7 the employer (not the contractor) has the right to terminate following an event covered by clause 60.1(19) and completion of the whole of the works is delayed by more than 13 weeks. Both parties also have the right to terminate if the project manager instructs the contractor to stop or not to start the work or a substantial part of it, and an instruction to restart or start has not been issued within 13 weeks.

We have received a number of calls from concerned clients and contacts wanting to know what to do and what their rights and obligations are under their contracts. However, many have emphasised that, whilst they wish to protect their contractual position, they don't want to exploit the current situation and are happy to work with the other party to the contract, to establish a fair risk-sharing position. This type of attitude should be encouraged. At the end of the day, while seeking to protect their interests, businesses need to be mindful of the health and wellbeing of their employees. Health and safety should be the main concern and by allowing employees to attend sites where they have to work in close proximity to other workers, businesses may find themselves dealing with different types of claims in the near future.

**Please note:** Nothing in this article constitutes legal advice and we are not liable for any reliance on the information provided. This is a rapidly changing subject, and whilst correct at the time of writing, circumstances may have changed since publication. Please refer to Gov.uk for up-to-date advice on the Government's response to this issue.

To find out more about anything covered in the article, or to discuss the potential impact of the coronavirus pandemic on the construction industry, please contact Michael Chilton or another member of Thrings' Construction team.



**Michael Chilton**  
Partner

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020 7766 5646  
mchilton@thrings.com