

Practical Recommendations for Construction Consultants in the current COVID-19 Pandemic

Introduction

The Covid-19 emergency response measures introduced up to the date of this note are having an immediate impact for all parties involved in construction projects, current and prospective. Construction can be particularly vulnerable to market instability and restrictions on labour, materials and movement. The construction industry is still only getting to grips with how the pandemic is going to affect work.

The already complicated operating of construction sites is becoming even more complex, and potentially impossible, as project teams try to comply with the new emergency restrictions and health and safety measures. The measures in place are impacting on the progress of the works, arising in many ways from closure of sites to a lack of key resources and/or an interruption to the supply chain.

Construction sites, which have been rendered as providing essential services and remain operating during this Covid-19 pandemic have a significant task to ensure they are protecting the health and safety of their workforce and minimising the risk of spread of infection. There is an even greater onus now on the PSCS (Project Supervisor for the Construction Stage) to ensure that the health and safety requirements of all construction activities are not compromised at this time.

The best ammunition in these uncertain times is being prepared and we have outlined below some practical recommendations to assist in that regard.

Contracts

Consultants may have obligations to protect their clients' interests as well as their own in the event of project disruption. Parties are advised to look at exact wording of their appointments for each project (and indeed for future projects) to determine what, if any compensation or time is available to claim. Project completion dates could be re-adjusted and possibly agreed by way of a side letter to the existing contract. Check clauses on suspension and remobilisation. Check contractual insurance provisions are adequate.

As regards contracts being negotiated since Covid-19 came to light, note that some clauses providing for unforeseeable events may not now be effective given Covid-19 delay is now a foreseeable risk (same for the doctrine of frustration). For such contracts, it would be worthwhile ascertaining if such contracts can be re-negotiated to provide for extensions of time for Covid-19 delay. Bear in mind that tender prices may now increase so to factor in this new additional risk.

Contracts could also be re-negotiated to enable off-site activities to continue and to provide for the construction phase to commence only after the current restrictions are lifted and when it is safe to do so. Where clients may be willing to provide relief, amendments can be made to accommodate this aspect.



If you continue to provide services, it is recommended that you communicate that you are subject to limitations in that the agreed scope of services will be provided in accordance with the appropriate government guidelines, emergency legislation and safety measures in place. Given the closure of most sites, it will not be possible to carry out inspections. If you are appointed to carry out inspections, it might be worthwhile writing to your client to advise that specific agreed services such as the duty to frequently inspect are suspended given the current emergency restrictions in place. Identify the challenges presented in writing and work towards a mutually acceptable solution. If in doubt you should seek legal advice and consult with your associated industry and professional bodies.

It is important to keep alive to other ongoing contractual obligations which remain during the suspension period. Parties will still have to comply with claim and notice procedures and, as such the role of the contract administrator in that regard continues. The contractual procedures concerning notices will still have to be strictly complied with for claims to be valid. If you are administering the contract you need to be alive to potential claims and should ensure that all notices received correctly pursuant to the contract are continuously being dealt with. It is likely that a lot of consideration will be going into claim for delays arising out of site shutdowns, shortages of materials and labour etc, all of which will have to be dealt with on a case by case basis.

Force majeure, impossibility, frustration and change of law type clauses are very much now in focus.

Force majeure can only arise if the contract provides for it. Whether the force majeure clause is triggered will depend entirely on the words that the parties have used in the contract. If the force majeure clause refers to pandemics and/or epidemics, then it may almost certainly be applicable. There is authority in the United Kingdom (which is of persuasive effect in the Irish Courts) that inconvenience to a party was not enough for a force majeure clause to succeed and therefore it may well be the case that the fact that a contract has become uneconomic would not be a ground for a claim for relief due to force majeure. It is triggered by an external force rather than an internal management decision to cease operations.

Clause 30 of the standard RIAI (Blue and Yellow Form 2017) sets out the position in relation to force majeure. It is for the architect to assess whether an extension of time is to be granted upon notice of such event by the contractor. This clause may grant the contractor additional time, but not financial compensation. However, force majeure is not defined under standard form RIAI contracts and as such is open to interpretation.

On an encouraging note, at EU-level, the European Construction Industry Federation (FIEC) has called on the European Commission to declare that the Covid-19 is a "force majeure" event. A declaration from the EC, as sought by the FIEC that these measures constitute force majeure would certainly bring some measure of persuasion and clarity to help eliminate any potential penalties for parties that have had to suspend work and in cases where the clause is unclear.

Communication

Continuous open dialogue and effective communication between all key parties and employees on a project is vital now more than ever following closure of a site or if essential sites are continuing. The collaboration of knowledge and viewpoints can help provide a clearer understanding of the impact of the pandemic and the potential for mitigation. Full disclosure and upfront discussions are encouraged. We recommend you work closely with clients and contractors to mitigate the risks on the project at this time.

Key persons or groups should be appointed to keep track of rapidly changing guidance and measures being put in place to enable efficient monitoring of changes and effective communications to staff.



Insurances

Immediate engagement with brokers and, through them, insurers is recommended to discuss whether appropriate insurances and safe security arrangements are in place given recent site closures. They will be able to provide specific guidance with regard to the applicability of your existing policy to the current project circumstances and it is they who are likely to have additional suggestions as to how to best proceed in light of Covid-19.

Furthermore, it is recommended to engage with brokers and insurers to ascertain what cover is available within existing policies such as cover for business interruption insurance. As a result of the 2002 SARS outbreak, many policies may now exclude losses arising out of outbreaks of disease, epidemics or pandemics. It is recommended to keep a risk register and check and liaise with brokers to assess whether existing policies cover the risks identified. Again, good record keeping will help to maximise prospects of recovery.

If insurance policies are due for renewal within the next three months, it is recommended you make early contact with your broker.

Risk Register and Record Keeping

It is important to monitor the potential anticipated risks for the project during the period of the site closure arising as a result of the Covid-19 measures. Keeping the entire project team fully informed is crucial and provides the means for addressing real and potential risks. A proactive rather than reactive approach is recommended.

Evaluate the status of current projects in the firm's portfolio. Measures may be needed to adapt how a party continues to work on such projects.

Key project personnel from all parties involved should engage on assessing the impact of delay to the programme and monitor costings during the suspension period.

Keeping updated records is key. Record known and unknown schedule, scope and cost impacts and any mitigation measures carried out and so forth.

Replacement of key communicators

Should a contract administrator, site foreman (communicating the contractor's information) or any key communicators involved become infected and/or find themselves unable to work then there should be contingency plans in place. It is important to ensure key personnel are replaced and continuous effective communications are kept in place. The collaboration of knowledge and viewpoints can help provide a clearer understanding of the impact of the pandemic and the potential for mitigation.

Supply chain

During the closure period, ongoing communication with key sub-contractors and suppliers is advised. The pandemic is likely to have a long-lasting impact and there is a risk that key suppliers and sub-contractors could fall insolvent. Indeed, the Office of Government Procurement Advice has advised contracting parties involved in public contracts to examine their supplier bases to assess their exposure to supply chain disruption as a result of Covid-19 and to then to consider and implement mitigation steps to ensure the continuation of services.

Again, contingency immobilisation and remobilisation plans should be in place on a project. Ensure that alternative resources and suppliers are available for when the site re-opens and remobilisation occurs. The costs and effects of sourcing alternatives on the construction programme should be monitored and recorded.



Building Control Amendment Regulations (BCAR)

The Emergency Measures in the Public Interest (Covid-19) Act 2020 was enacted on Friday, 27 March 2020. This suspends deadlines for several aspects of the Planning and Building Control Systems. The suspension period runs from 29 March 2020 to 20 April 2020 and the Government may permit extensions of this suspension period for successive periods until 9 November 2020.

This suspends the time period within which the Building Control Authority (BCA) must respond to applications for/notifications of:

- fire safety certificates and revised fire safety certificates,
- 7-day notices,
- regularisation certificates,
- disability access certificates and revised disability access certificates and
- certificates of approval.

However, the BCA remains open for business. The BCMS can be accessed remotely over the local authority network.

In projects involving BCAR, again we cannot stress that extensive record keeping is paramount during this time. Ensure the inspection plan records the impact and duration of any site closure.

Depending on the stage the project is at following suspension, it is recommended that ancillary certificates be collated from suppliers and sub-contractors and kept safe until such time as the project recommences. Records of inspection should be collected up to the date of suspension along with any available certification of compliance of design and/or construction up to that date. This will help safeguard against the risk of where such parties go insolvent during the suspension period, which could later have a detrimental effect on the works carried out to date.

There may be a risk that key parties such as the contractor or assigned certifier could fall ill, go insolvent and may have to be replaced as a result. It is essential that if this risk looks likely that effective engagement with the BCA takes place.

Clause 4.7 of the Code of Practice to BCAR provides for the situation where there is a change in the assigned certifier or the contractor during the project. A change of either the assigned certifier and/or the contractor will require engagement with the BCA, who are expected to advise and assist in relation to any action that may be required, having regard to the circumstances involved, in order that the building or works notified at commencement may be subject to a valid Certificate of Compliance on Completion. Under the Code a change in assigned certifier or contractor is a significant alert to the risk analysis system of the BCA, which can trigger an inspection of the project. Therefore, effective engagement with the BCA in these extraordinary times is recommended to ensure the works can recommence as smoothly as possible when the crisis subsides.

Recommended Tips:

1. Review your contracts for each project, current and prospective and seek advice where necessary; consider the potential impact on new projects not yet started.
2. Be alive to continuing contractual obligations.
3. Keep up to date on the latest government, HSE and industry developments and guidance. Be clear, keep open the channels of communication, and frequently provide updates to those involved in the project.
4. Liaise with your brokers (and through them insurers) to discuss and agree appropriate insurance arrangements during the period of impact from the pandemic.
5. Engage with the BCA if the project is subject to BCAR in respect of any issues which might arise now and later; collate all relevant inspection records and certificates to the date of site closure.
6. Ongoing liaison with all key suppliers and sub-contractors during the period of site closure is crucial to ensure the project is best positioned for remobilisation, and alternative suppliers sourced if necessary.
7. Continue to maintain effective record keeping – this is key for substantiating and defending claims, should they arise.
8. Maintain and update a risk register and monitor each risk as the situation unfolds

Conclusions:

The commercial, legal and economic implications of the Covid-19 pandemic are unprecedented and the global economic effects will be felt for some time. That said, it is hoped that an inevitable slowdown will be short.

Consultants should continue to seek work and tender for projects. Design work and other off-site remote activities can continue while the construction phase is paused. Position your firm to be ready to start when the crisis subsides. Public and private infrastructure and construction targets will remain and issues such as the housing crisis will still need to be addressed

In consultation with

RIAI

Further Information

Caytons is a provider of specialist insurance and construction legal services.

This material is provided for informational purposes only and does not constitute legal advice.

Given that the Covid-19 pandemic is a fast-evolving situation, this note is relevant to the situation existing as of 2 April 2020.

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