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Coronavirus/COVID-19 and Construction Contracts[1]

What needs to be done now?

by Jon Miller

Introduction

1. The impact of COVID 19 is changing daily and last week in England at least many sites closed whilst others continued working. This note seeks to set out the practical steps to be taken in light of recent developments, such as:-

   1.1 is force majeure likely to apply to the current situation?

   1.2 with some sites now forced to close, what needs to be done now?

   1.3 other sites remain open and some Contractors/Sub-Contractors believe that they are being forced to continue working – what can be done?

   1.4 steps to be taken now to try to protect your position if claims are to be made for additional time/money in the future?

   (Please bear in mind the principles underlying the interpretation of *force majeure* and other Contract terms as set out in my first note - https://www.fenwickelliott.com/research-insight/articles-papers/other/coronavirus-construction-contracts)

   Has a Force Majeure Event occurred?

2. At the moment (i.e. the morning of 30 March 2020) in England the Government has not ordered building sites to shut down. Whether a *force majeure* event has occurred will always turn upon the wording of the *force majeure* clause in the Contract, and how COVID 19 has impacted the site in question. There is no guaranteed answer to this question but, bearing in mind:-

   2.1 we are facing a global pandemic which has had a significant effect on the economy, transport, etc;

   2.2 guidance whereby, when leaving their own household, people should remain 2 metres apart even on a building site. This would require changes to not only different methods of working at the work place, but also amendments to canteen arrangements, welfare and changing facilities. Also at least some over the counter trade merchants are closing;

   in my view under most *force majeure* clauses COVID-19 would probably now be seen as a *force majeure* event.

   Site Closures and the Health & Safety at Work Act 1974 ("HASAWA")

3. There has also been a spate of site closures during the past week. Some Employers and Contractors have expressed an overriding concern to protect their workers which is consistent with the HASAWA which contains the well-known provision, "*It*

1. There is obviously a difference between the two, both terms are used here in the colloquial sense.

shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of his Employees"[2].

4. Further the Management of Health and Safety Act Work Regulations provides for risk assessments to be reviewed if "*...there has been a significant change in a matter to which it relates; and where as a result of any such review changes to an assessment are required, the... person concerned shall make them"*[3].

5. In the light of Government Guidance and HASAWA etc virtually every site will have to review and probably change the way it is working. Some sites have closed temporarily to review working practices.

What if my site has not closed (and it should)?

6. Some Contractors/Sub-Contractors have complained of being forced to continue to work without any change in working practices to reflect Government Guidance. My suggestion would be:-

   6.1 write immediately pointing out the dangers and risks on site and asking the person responsible for Health & Safety what they intend to do to change working practices;

   6.2 the welfare of employees, Sub Contractors etc should be the prime consideration. If a Contractor/Sub-Contractor is being asked to work in a dangerous situation and refuses to do so, this could amount to an "*impediment, prevention or default, whether by act or omission*"[4] or "*[a] breach of contract...*"[5]. Again this would turn upon who is responsible for Health & Safety matters, the terms of the Construction Contract and what is (or is not) happening on site. An "*impediment, prevention or default, whether by act or omission*" typically gives rise to additional time and money.

7. Bear in mind that refusing to work when instructed to do so is very risky commercially speaking – it can amount to a repudiation of the Construction Contract giving rise to claims for damages for breach.

Evidence

8. If a Contractor/Sub-Contractor is to argue they were justified in refusing to return to a site where there was no social distancing, not only at the workface but with welfare facilities etc, it is imperative that the Contractor/Sub-Contractor's not only writes to the person responsible for Health& Safety on site highlighting the unsafe working practices and asks how they are going to change, but gathers evidence of what the situation on site was really like. In months to come there may be arguments as to what was happening on site – the Contractor/Sub Contractor concerned will have to establish why it was unsafe to return.

9. Proof can be gathered from sources such as:-

   9.1 employees;

   9.2 other tradesmen and the professional team on site – make a note of who they are as they may prove useful in the future;

   9.3 photographs showing what the true situation was.

2. Section 2(1).
3. Regulation 3(3)(b).
4. JCT 2016 D&B Clause 2.26.6 and 4.21.5.
5. NEC4 Clause 60.1(18).

What can be recovered?

Other Routes of Recovery

10. The reality which many Contractors, Sub-Contractor etc are facing is that even if a force majeure clause applies, under most but not all standard forms of Construction Contract only an extension of time is granted – there is little/no prospect of recovering the loss and expense incurred as a result of a shutdown[6].

11. However many Construction Contracts contain other clauses in addition to a force majeure clause which may not only give rise to an extension of time, but loss and expense/compensation as well:-

    11.1 compliance with an instruction/direction shutting down the site can potentially give rise to a claim for an extension of time and loss and expense[7]. Indeed an instruction to stop work will probably also count as an act of prevention – this too could give rise to claims for time and money[8];

    11.2 often forgotten is that some standard forms contain a provision allowing the Employer/Project Manager etc to postpone all or part of the works[9] - exercising this power will also normally give rise to an extension of time and loss and expense[10];

    11.3 not providing safe working practices on site can amount to prevention, hindrance or even a breach of Contract – see the point made above.

Notices

12. The protection offered by a Construction Contract means little unless invoked, almost always by the issue of a notice. According to most JCT forms a notice requiring an extension of time is to be issued when *"... the progress of the Works... is being or is likely to be delayed"*[11], whilst most NEC forms require notice to be given within 8 weeks of becoming aware of an event which could change the Prices, the Completion Date or a Key Date[12].

    Under these standard forms, the time for giving notice has almost certainly already started to run.

13. Giving a notice raises a number of issues including:-

    13.1 all Contracts have different deadlines for when a notice is to be given. Frequently the time limits for giving notices are amended in standard form Contracts to make them shorter;

    13.2 the Contract may require the notice to be given in a particular manner and to a particular person – an email to the Employer may not be enough;

    13.3 Contracts normally set out what the notice is to contain. For example under the NEC4 a notice is to contain the notice itself and nothing else - any other points that need to be raised should be in a separate communication[13];

    13.4 separate notices are often required in respect of an extension of time and claims for money, each of which may have different requirements as to what they should contain[14]; some forms of Contract require one notice[15].

6. The NEC is probably a notable exception as it will probably allow compensation to be paid in these circumstances.
7. e.g. JCT D&B 2016 Clause 2.26.2 & 4.21.1 and NEC4 Clause 60.1(4).
8. e.g. JCT D&B 2016 Clause 2.26.6 & 4.21.5 and NEC4 Clause 60.1(2).
9. e.g. NEC4 Clause 60.1(4) and JCT D&B 2016 Clause 3.10.
10. e.g. JCT D&B 2016 Clause 2.26.2.2 & 4.21.2.1 and NEC4 Clause 60.1(4).
11. e.g. JCT D&B 2016 Clause 2.24.1.
12. e.g. NEC4 Clause 61.3.
13. Clause 13.7.
14. e.g. JCT D&B 2016 Clause 2.24 & 4.20.1.
15. e.g. NEC4 Clause 61.3.

14. Failure to give a notice in the form required by the Contract, using the correct method of delivery, or given after the deadline may result in not only any compensations/loss and expense not being payable, but amount to a justifiable reason to refuse to grant an extension of time. This in turn can result in liquidated and ascertained damages being payable.

Confrontational Notices?

15. Aggressive and confrontational attitudes in construction are not that rare[16]. A notice need not be given in aggressive terms - it only needs to comply with the underlying Construction Contract.

16. It is acceptable for a notice to explain, *"We are making our work safe and acting in accordance with your instruction whereby we expect to leave the site at 5pm today. Under the terms of our Contract we are obliged to give you notice of..."*.

Proving your Claim and what needs to be done now

Delays

17. Only delays to the Completion Date can give rise to an extension of time. Programming information is crucial. The burden is on the party making the claim to show why the COVID-19 shutdown delayed the Completion Date.

18. Some sites may be able to continue working safely. We are aware of a site where working practices have been changed whereby there is no more than one operative in each room, operatives start at different times and ensure they maintain a distance of 2 metres throughout.

    But even then this will give rise to delays to the progress of the Works – i.e. changing working arrangements which slow progress may still give rise to an extension of time if they delay the Completion Date (and additional recoverable costs if the Construction Contract allows it).

19. How many people were supposed to be on site? Who was self-isolating/ill/had a pre-existing condition? What trade(s) were they and where were they supposed to work?

20. Was there a lack of supplies/materials? If so when were they to be delivered (and eventually when did delivery take place)?

21. Nearly all Construction Contracts impose a need to mitigate/use best endeavours to reduce delays[17]. Record all attempts to try and find alternative labour and get new delivery dates – i.e. keep emails.

Costs

22. Record separately all costs related with stopping on site or any slowdown e.g.:-

    22.1 demobilisation and remobilisation costs;

    22.2 the costs of making the site safe;

    22.3 materials - what was originally allowed for in the Contract Price, and what did it increase to?

16. To put it politely.
17. e.g. JCT 2016 D&B Clause 2.25.6.1.

22.4 retaining labour/non-productive payments are often difficult to recover. Ask the Employer/Contractor what they want to do?

Costs – the big mistake

23. A common mistake people make is that the additional costs incurred are not clearly attribute to the relevant delay/shutdown due to matters such as COVID-19. For example demobilisation and re mobilisation costs should be recorded separately. Suppliers invoices should not simply cover all the materials delivered to site before and after a shutdown – get clear what materials increased as a result of the shutdown and why.

    Particularly infuriating are timesheets with 7 (or more) hours for every day without any explanation of what was being done, or where the operatives were working.

Further Action

24. No doubt there are other actions which need to be taken which will depend on the site etc but:-

    24.1 works should be made safe;

    24.2 if you are insuring the Works, your insurer should be told.

    Finally I stress again please read your Contract. The rights and obligations you have will largely depend on its terms.