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The Impact of COVID-19 on Construction Contracts and Sites - Update

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Introduction

Force Majeure

- Must have FM clause in the contract. Recent case – 2 *Entertain Video Limited and others v Sony DADC Europe Limited* [2020].
- COVID 19 probably an FM event for most construction contracts.

Notices

- Must have given one/two by now, or facing real problems.
- Reluctance to grant extension of time – some consultants do not want to be the “*first*”.

“*Best Endeavours*”

- No legal definition but probably:
 - Re-programme as per Site Operating Procedures (or SOP).
 - Replacing staff who cannot come to site.
- Record “Best Endeavours” – e.g. emails re attempts to try to find alternative labour and get new delivery dates.

SOP Version 4

- SOP V4: the “go to” document.
- Long list of suggestions. Just because cannot keep 2m apart does not mean that the activity should not be carried out. Few changes from V3.
- Key point – risk assessments. Now should be shared with staff.
- But – no additional PPE, face coverings not essential.
- SOP V5?

Money

- JCT – FM time only. NEC – time and money.
- Consider other issues – instructions/impediment breach.
- Change in law/statutory requirements (unlikely) – guidance overkill?

Record Keeping

- Re-programme as per SOP.
 - Weekly/daily site diaries – sent to the Employer?
 - Photographs.
 - “*As Built*” – together with documents showing why.
- Common mistake – not keeping costs separate.
- “*Proper*” timesheets.

CLC Contractual Best Practice

- Notices and “*Without Prejudice and Subject to Contract*” approach.

Remember, it's all about the contract

- This has always been the case anyway but particularly now.
- English law: let's you divvy up the risks as you want and assumes you've understood what you've signed.
- Remember: a lot of risk generally sits at the contractor's doorstep unless the contract says it sits elsewhere. Delays/shortages of materials & labour and increased difficulty of the job are (generally speaking) the contractor's look out.
- There is no one size fits all answer: every job throws up its own issues.
- With your glass half-empty, think about your job, the problems it may face and ask yourself how this is dealt with in your contract.

What assumptions/exclusions are in your tender and how are these picked up in the contract?

- Most tenders are qualified, but those qualifications are often not properly included in the contract or, worse still, say something different to another part the contract.
- Typical examples we're seeing:
 - Current social distancing rules apply - who takes the risk (time and money) if they become more restrictive?
 - Building is unoccupied (noisy works, ease of access, use of lifts etc).
 - Availability of materials (advance & prompt payments all help to secure supplies and oil the wheels).
- All these points need 'baselining' in the contract and (most likely) some drafting to deal with what happens if things change.

When are you starting?

- Many projects that were about to start 6-8 weeks ago were put on hold. Clients now seem more confident about wanting to go ahead but the issue is when to start. Clients don't want to pay for uncertainty.
- Some clients still unsure when possession can be given and want more flexibility. However, contractors want certainty now (order book, cashflow, staff, availability of labour and materials, price rises etc).
- Remember, in JCT it is possession that starts the programme running and the client has the right to defer it by up to 6 weeks.

When are you starting?

Things to think about:

- Some clients are extending the possession date (we've seen up to 3 months).
- Contractors asking for long-stop dates – if possession not given by a specified date then possible price increases, changes to programme etc.
- Including a 'checklist' for possession. So, if conditions A, B and C are met, then the work can start. Often around certainty of materials supply, shell and core work finished to allow fit-out to start efficiently etc. Job starts when it's efficient to do so and not before.
- All these points need to be clearly covered off in the contract. It may not be as simple as saying that the work will start on date x.

When are you finishing?

- Before lockdown the tendency was to programme 'as normal' and the contractor would get time but no money if the job was delayed. Very simplistic.
- Since lockdown, contractors can more accurately estimate the impact of social distancing - varies hugely on the project but could be 30% longer.
- SD rules are a known quantity now but could improve or worsen.
- Do you price the worst case then share a prelims saving if things improve? Or price the best case and have the discussion (argument?) about prelims at the end?

When are you finishing?

- Relaxation of working hours by LPAs (can apply to work to 9pm). Check the prelims for contractual restrictions which may still apply even if LPAs allow longer hours.
- If there are known/suspected risks in the supply chain, what can be done?
- More flexibility for contractor to substitute materials, carving out certain aspects of the work from PC (e.g. specialist joinery, materials from outside UK).
- Again, all these points need to be clearly set out in the contract.

Finally, a few other things to think about

- Mitigating the materials risk: deposit payments, vesting certificates, risk of theft from site (increase in site security?), payment for materials on site sooner than they usually would be, insurance, insolvency in supply chain, prompt payment etc.
- Second wave – can both parties walk away? Prolonged suspension provisions in JCT (see clause 8.11).
- Using best endeavours to mitigate delay – what does the contractor have to do? What does he not have to do? Can these measures be agreed now?

Finally, a few other things to think about

- Client direct work on site.
- Check existing Amendments to contracts carefully – what may have been acceptable before, may no longer be (e.g. changes in legislation which are “reasonably foreseeable” - complete lockdown of sites could be foreseeable if there’s a second wave).
- Contractors – you have all the same issues to deal with in the subcontracts, of course!
- Finally, very few contracts (whether standard or bespoke) will deal with the specific issues coronavirus presents – it will pay to read your contract carefully and ensure it does exactly what you need it to do.

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Thank you

Any questions?

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