Guidance on Contractual Issues Caused by Coronavirus

Contents

Part 1 – General Considerations p.2

A. Impact of Coronavirus on the construction industry p.2

B. Force Majeure and Frustration p.2

C. Price p.3

D. Variations p.3

1. Generally p.3

2. Changes to the parties' obligations p.3

3. Amendments to the contractual provisions p.4

4. "Future proofing" prospective contracts p.4

E. Pandemic clauses p.4

F. Changes to statutory requirements p.4

G. Materials p.5

H. Insurance p.5

I. Public Contracts p.5

Part 2 – JCT Contracts p.7

A. Time and Programme (including force majeure) p.7

B. Health and Safety p.8

C. Price p.9

D. Termination p.10

Part 3 – NEC Contracts p.11

A. Time and Programme (including force majeure) p.11

B. Health and Safety p.12

C. Price p.12

D. Termination p.12

Part 4 – Practical Advice (including reset agreements/variations) p.13

Part 1 – General Considerations

A. Impact of Coronavirus on the construction industry

1. Due to the fast spread of the coronavirus (Covid-19) and the continuing escalation in the government's policy, the situation is changing daily. With school and nursery closures for all but key workers and increasing groups being asked to self-isolate, as well as site closures and import issues (especially from countries like Italy and China), many in the construction industry are already facing unprecedented issues and foresee further issues as the consequences of the virus escalate.

2. There are a number of contractual and practical issue to consider, both for reviewing risks and liabilities under current contracts and when negotiating into future contracts.

3. It is important to carry out an audit of current contracts now. Performance of current contracts is likely to become increasingly difficult – more time may be needed for performance of the contract and there may be labour and materials shortages, increasing costs and some contracts may become commercially unattractive or unprofitable. Key factors to focus on include:
    a. Timing (obligations regarding timing, and consequences for late delivery of materials and/or services);
    b. Contract requirements to give notice of (a) above;
    c. Termination (right to terminate for late delivery); and
    d. Damages (what is the potential exposure to damages).

4. Parties should speak to each other as soon as practical to work together to find solutions. The entire industry is facing the same issues, so it is in everyone's interests to do so.

5. In relation to future contracts consider the implications of these issues now, and do not enter into a contract without having done so. This is especially important because some protection which might be available for those who have entered into a contract prior to the coronavirus outbreak (see for example force majeure) might not be available where parties have entered into a contract with knowledge of the potential risks of the pandemic. There may be an argument for delaying entering into contracts until the risks are clearer and it is known, for example, whether the situation will ease in the summer or whether as some predict, the direct effects might last considerably longer. However, this obviously needs to be balanced with vital cash flow.

6. Where either party is concerned that an issue has arisen which may affect the performance of the contract, it should notify the other party as soon as possible (there are likely to be requirements to do so under the terms of the contract) to agree how to deal with it and to allow the party to negotiate any necessary amendments to the contract.

B. Force Majeure and Frustration

1. Force majeure generally refers to unforeseeable circumstances which change the performance of contractual obligations. There is no precise definition under English law and there is little case law on the subject. Often whether or not an event is considered a force majeure will turn on the wording of the contract and the factual scenario. Most standard forms do not define a force majeure, most notably JCT contracts.

2. It is key to establish whether an event is a force majeure as there are often force majeure clauses in contracts, which change parties' obligations in the event that one occurs. Legislation is currently being debated which may affect the definition of force majeure under English law. We will update this section if required once such legislation is passed.

3. Under the common law doctrine of frustration, a contract may be discharged or frustrated if something unforeseeable occurs after the formation of the contract which makes it impossible to fulfil the contract or radically changes an obligation from that agreed to at the outset of the contract. There is a very high threshold for a contract to be deemed frustrated; a party cannot argue that it is difficult, not profitable or inconvenient to perform the contract. Therefore it is important to consider the contractual obligations and the factual scenario carefully before arguing that the contract has been frustrated.

4. For future contracts, it is very unlikely that a party could argue that the effects of the coronavirus are a force majeure event or an event that has frustrated the contract as both rely on an event which is not foreseeable taking place.

C. Price

1. Parties should consider how to balance the risk of increased procurement and staffing costs during and following the pandemic. If additional costs/charges are to be passed on, consider the use of caps or a limit on costs.

2. It is unclear at the moment what the impact will be on global currency fluctuations as almost every economy seems affected. With difficulty in supply of materials and labour, there are likely to be price increases. Parties should discuss the risk and see whether there are ways of mitigating it, including considering the supply chain to see if there are ways of avoiding particularly volatile currencies and suppliers.

D. Variations (see also JCT and NEC sections for specific guidance)

1. If the possible effects of the coronavirus necessitate a variation to the contract (for example, to alter the supplier's timing and delivery commitments, or to change the pricing structure), the parties should consider how best to achieve this. There are in principle two mechanisms for variation depending on the contract terms:
    a. changes to the parties' obligations in accordance with the variation/change provision in the contract; or
    b. amendments to the contract itself, by way of an agreed and documented variation/reset agreement.

2. **Changes to the parties' obligations**
    a. Changes to the parties' obligations will usually be carried out by a "variation", "change to Employer's Requirements", "change management" or "change control" clause (not to be confused with a "change of control" clause, which gives a party certain rights if there is a change in ownership or management of the other party).
    b. A "change control" clause requires the parties to follow a specific procedure when making general or specific changes to the contract. It aims to prevent informal and perhaps unintended variations being made to a contract. Possible changes to the contract requirements might include:
        i. provision for the supplier to be provided with an extension to the date of delivery if a coronavirus related event occurs;
        ii. flexibility in the event that costs increase (for example by reference to a pre-agreed baseline or external objectively-measured indices), such that those additional costs will be borne either, equally by the parties, or that one party will reimburse the other party up to a specified sum (or percentage of the value of the contract);
        iii. a sliding-scale of liquidated damages (or a liquidated damages holiday);
        iv. alteration to termination rights (for example the ability for parties to walk away from a mutually disadvantageous deal); and
        v. increased communication, management oversight and audit rights; and
        vi. a fast-track decision-making process within the change control.

c. The benefit of relying on the change control procedure is that there is no need to amend the terms of the contract itself.
d. Not all contracts will include such a procedure, so amendments to the contractual provisions might be necessary.

3. **Amendments to the contractual provisions**
   a. If amendments to the contractual provisions themselves are agreed (such as to the contract sum, the date for completion or similar) then there is often a standard clause that contracts contain, which provides that amendments to a contract must be made by written agreement between the parties and signed by a duly authorised representative of each party. It may also require the contract to be signed as a deed (with additional execution requirements). In some cases, an additional "variation agreement" may be entered into, which sets out how the original contract's clauses are to be amended.
   b. If the contract does not contain a variation clause, the parties can vary the agreement orally or in writing. However, it is always best to formalise any variation in writing to avoid potential disputes as to the agreement's terms further down the line. There will be certain requirements to ensure that the variation is valid, such as the variation agreement being executed as a deed if the original contract is executed as a deed.
   c. For an amendment to a contract to be effective, there must be some form of legal consideration. "Consideration" means that a party promising to do something under a contract (i.e. supplying goods and materials on a certain date) must be doing so in exchange for something given by the party receiving the benefit of that particular act. Usually contractual consideration will be the price. If only one party receives a benefit (e.g. a reduction in price) and the other party is not required to do anything in return, there may be no consideration. If there is any doubt that there is consideration, the parties should execute the Variation Contract as a deed.

4. **"Future proofing" prospective contracts**
   a. Ensure that contracts contain clear provisions allowing anticipated amendments so there is no ambiguity if changes are required.

E. Pandemic clauses

1. Parties should be aware of just adding a general "pandemic clause" to a contract or similar. There is no one size fits all in relation to the effects that could arise. It is best to consider the specific risks that could conceivably occur (in relation to timing, price, damages, changes to statutory requirements, termination and suspension) and add amendments to those clauses specifically rather than adding a clause with could contradict other clauses within the contract.

F. Changes to statutory requirements

1. It is vital for parties to keep up to date with the latest government guidance and regulation in relation to contractual, health and safety, and employer's obligations.

2. The effects of these on the performance of obligations under the contract will depend on the specific drafting of the contract. If a contract is to be entered into, the potential impact of these should be considered at the outset.

G. Materials

1. Many suppliers are experiencing growing issues with procuring materials, with delays at borders or an inability to source certain pre-agreed materials at all, as many countries are in complete lock down. This will depend heavily on the factual situation at the time, but it

would be sensible to assess whether there are any materials which may be delayed/difficult to obtain, particularly those which are coming from abroad. Unless there is provision under the contract for an extension of time (or equivalent), this will be of concern. Contractors and subcontractors may want to have a discussion to ascertain whether there are any reasonable alternatives that could be used. At the very least a conversation will enable an assessment of the potential impact on programme in more detail. Consider alternative, possibly local, suppliers and the impact on orders already made.

2. For future contracts, consider drafting the specification of materials as widely as possible. This could include, for example, wording which allows for substitutions, variations or reductions (to obtain from more than one source) in quantity of certain materials. Whilst drafting a tightly-defined specification may be necessary where the materials under the contract are highly specific or unique, allowing flexibility could enable the supplier to provide products from alternative sources without frustrating the contract (therefore mitigating the potential financial losses on both sides, caused by factors beyond the parties' control).

H. Insurance

1. The most relevant policies are likely to be:
    a. Business interruption insurance; and
    b. Existing buildings insurance and all risks insurance for the works.

2. Speak to your broker to see whether any of these policies cover the specific issues that you are facing. Whether or not you are covered will depend on the specific wording of the clauses, so it is worth engaging with your broker as soon as possible to ensure that no actions taken by you or anyone else invalidate the terms of these or other policies (including employer's liability, public liability and professional indemnity). For example, there may be additional precautions to take; such as keeping the site secure and not leaving it empty for a prolonged period of time.

3. In relation to business interruption insurance, bear in mind that following the 2003 SARS outbreak many policies have a pandemic exclusion clause, so it may be that the policy does not cover this, but it is important to speak to your broker as your coverage will depend on the exact wording of the policy.

I. Public Contracts

1. The government has issued a Procurement Policy Note (PPN 01/20) allowing contracting authorities (including central government departments, executive agencies, non-departmental public bodies, local authorities, NHS bodies and the wider public sector) to procure goods, services and works in extreme emergency which sets out options and advice regarding bypassing the normal procedure, accelerating timescales and extending or modifying a contract during its term.

2. There is also a Procurement Policy Note (PPN 02/20) covering contracting authorities' payment of suppliers. Until the end of June, they are required to take a number of measures to protect suppliers from insolvency including:
    a. Reviewing their portfolio and informing suppliers who they consider to be at risk that they will be paid as normal (despite the supply of goods or services being reduced, delayed or paused temporarily);
    b. Put in place appropriate measures to support supplier cash flow, including immediate payment of invoices, resolving disputed invoices quickly or paying them then reconciling later and encouraging suppliers to invoice more regularly;

c. Redeploying those who can't perform their contracts (for example transport services for children)
d. Varying contracts to allow payment;
e. Granting extensions of time; and
f. Waiving liquidated damages.

3. In return for this, supplying parties are required to act on an open book basis during this period to demonstrate that payments made to them during this period have been used for their intended purpose – paying staff the full amount on time and allowing cash to flow through the supply chain quickly.

Part 2 – JCT Contracts

Set out below are a summary of the main terms, which would be relevant in the event of a coronavirus related delay or price increase, referring to relevant clauses in the JCT Design and Build 2016 as an example (we refer to this contract form throughout for illustration purposes, other contract forms within the suite, including the sub-contracts contain similar provisions).

It is important to check the specific terms of your contract, including any schedule of amendments as many of the terms referred to below are commonly negotiated and amended.

A. Time and Programme (including force majeure)

1. The JCT contract terms do not specifically deal with coronavirus (or any pandemic). There are clauses in the JCT Design and Build Contract 2016 that may apply, depending on the circumstances, and entitle the Contractor to an extension of time. The following are Relevant Events under which a Contractor could seek to claim an extension of time for the direct effects of the pandemic:
    a. Clause 2.15.2.1: *… after the Base Date a change in the Statutory Requirements which necessitates an alteration or modification to the Works…*
    b. Clause 2.26.6: *any impediment, prevention or default, whether by act or omission, by the Employer, or any Employer's Person except to the extent caused or contributed to by …. the Contactor….*
    c. Clause 2.26.12: *the exercise… by the UK Government or any Local or Public Authority of any statutory power that is not occasioned by a default of the Contractor or any Contractor's Person but which directly affects the execution of the Works*
    d. Clause 2.26.13: *Delay in receipt of any necessary permission or approval of any statutory body which the contractor has taken all reasonable steps to avoid*
    e. Clause 2.26.14: Force majeure

        This is typically associated with an occurrence/event (1) beyond a party's control which (2) hinders performance under a contract or makes it impossible. It could apply if, for example, the government restricted access to the sites or applied any restrictions on the work. It could also apply if government restrictions make it impossible for a contractor to get a sufficient work force together, to work safely on a site, though this would be on a case by case basis.

2. Indirect effects of the pandemic (the Employer or those for whom it is responsible causing delays due to staffing difficulties and/or lock down) could lead to the contractor being entitled to an extension of time due to the following Relevant Events:
    a. Changes (see further below) (clause 2.26.1);
    b. Deferment of possession (clause 2.26.3); and
    c. Act or omission of the Employer (clause 2.26.6).

3. Whether or not there is a right to an extension of time will depend entirely on the factual situation, which is moving quickly and difficult to predict, and commercial considerations. It is likely that the most appropriate Relevant Event in the current circumstances would be a force majeure. In the event of staff shortages and blocked supply chains, it would seem difficult to deny an extension of time (though the usual contractual requirements apply).

4. If the UK enters full lock down, with sites closed, then Clause 2.26.12 would be relevant and an extension of time is likely to be granted.

5. It is also conceivable that clauses 2.26.6 and 2.26.13 would be invoked as there are likely to be an unprecedented number of delays from all parties, dealing with staff absences.

6. There is a requirement under clause 2.24.1 to give notice of delay forthwith "*if and whenever it becomes reasonably apparent that progress of the Works or any Section is being or is likely to be delayed*". It would be advisable to carry out an audit of contracts now and establish whether there is any current delay or there are any risks of delay and if so give notice. Consider any staff affected by school and nursery closures, any staff affected by illness/the need to self-isolate and contact suppliers to see whether they foresee any risks. If there are, notify as soon as possible, identifying whether any of the delays fall under a Relevant Event and following the procedure in the specific contract carefully.

7. There is an obligation under the JCT Design and Build Contract 2016 for the Contractor to *"constantly use his best endeavours in the progress of the Works of any Section, however caused, to keep the Employer fully and regularly informed in relation to any delays which the Contractor anticipates or which ought reasonably to have been foreseen by a competent and experienced design and build contractor, and to prevent the completion of the Works or Section being delayed or further delayed beyond the relevant Completion Date*" (clause 2.25.6.1)

8. To ensure that you are not responsible for a coronavirus related delay, check that any parties who are under your control have policies relating to the virus as you will not want the action/inaction of any of these parties to lead to an employer having the ability to invoke clause 2.25.

9. For contracts that are to be entered into, it is worth bearing in mind that none of the Relevant Events deal with matters occasioned by, for example, delays caused at the ports of entry or labour or material shortages, especially as you cannot rely on the force majeure provisions if entering into the contract after the pandemic. If these and other delays are to be covered by the contract, then specific express provisions relating to the adjustment of the completion date and corresponding amendments to the loss and expense provisions should be included.

B. Health and Safety

1. Bearing in mind the requirements of clause 2.25.6.1 and general health and safety legislation, it is important to consider duties in relation to the health and safety aspects of the coronavirus.

2. If a contractor is failing to take sensible and appropriate precautions to prevent the spread of the virus and/or are taking unnecessary risks which then delays the works, it could be argued that it has failed to comply with clause 2.25.6.1.

3. Make sure that you have robust policies and procedures in place (including plans in the event that you have to vacate site). All employers have an obligation to their employees to keep themselves and their employees informed about the risks of the pandemic and to take steps to ensure that there is good hygiene in the workplace (based on the facts and science of the pandemic) and that working practices do not pose undue risks to employees.

4. This is inevitably leading to site closures – some contractors have taken the view that given the government guidance on social distancing, requiring contractors to work 2 metres apart and other guidance, continuing to work on site is not viable. Whether or not suspending work will be considered a breach of contract will turn entirely on the terms of the individual contract and the factual situation at the time. Each contract should be considered on an individual basis. There is no one answer. Practically, contractors should speak to their employees and to the relevant employer. They should engage in commercial discussions now as over the next few months this is going to be more important than a

strict contractual interpretation. So far construction sites have not been instructed to close by Government but obviously this may change.

C. Price

1. In JCT contracts where fluctuations options (see JCT fluctuations) are not incorporated, the Contract Sum is fixed, with scope for the supplying party to be paid additional sums in accordance with the contract where, for example, there is a variation/change or where it is entitled to loss and expense by reason of specific delay events (Relevant Matters).

2. Variations
    a. Clause 2.15.2.1 (see Time and Programme - JCT Contracts) in the JCT Design and Build Contract 2016 may constitute a "Change".
    b. Otherwise to qualify as a "Change" in the unamended JCT Design and Build Contract 2016 (others in the JCT suite of documents have similar provisions) there must be a change/variation to the Employers Requirements which necessitate an alteration or modification to the design (in design forms), quantity or quality of the Works (apart from for rectification) or the imposition of certain restrictions or obligations by the Employer.
    c. It is conceivable that this could arise as a result of the coronavirus due to for example reduced availability of materials, but it would not cover the supplying party, where it has had to pay a higher price for materials due to price increases/sourcing alternative suppliers and/or higher staffing costs due to staff self-isolating or having to look after children. Therefore on current contracts, plan ahead where possible and/or discuss with the Employer to see whether the price increases can be agreed and mitigated by using alternative supplies or materials.

3. Loss and Expense
    a. The majority of the circumstances allowing for loss and expense for delay arise out of a default by the Employer or interruptions to progress on site due to the Employer. This is conceivable in the current circumstances (the Employer, its representatives and/or its consultants might not be able work or attend site), but would cover a limited number of circumstances, so review these terms in the event of price increases.

4. Retention issues
    a. There have been cases of Employers having to postpone end of defects meetings at operational hospitals, care homes and other places where vulnerable people are present, due to the heightened risk of people attending the sites.
    b. Unless amendments have been made to the standard forms, there are no provisions covering this situation and there is a requirement under clause 2.36 for the issue of the notice of completion of making good defects not to be unreasonably delayed or withheld.
    c. Given the current forecast that isolation measures could last between 3-4 months, retention should generally not be withheld unless there are significant issues known to still exist at site. In these circumstances, it is prudent to engage in commercial discussions with the Employer and agree the amount of any retention that should be withheld and provisions for if further defects are found on the rescheduled end of defects meetings.

D. Termination

1. There are grounds for either party to terminate the contract if the works are suspended for a period of 2 months (or such other time period chosen by the parties) under clause 8.11.1 due to force majeure (see 2(a)(ii) above) and under clause 8.11.5 due to "*the exercise by the UK Government ….of any statutory power that is not occasioned by a*

default of the Contractor or any Contractor's Person but which directly affects the execution of the Works.".

2. Although the UK is not yet in complete lock down, it is conceivable that these grounds could apply in the near future.

3. If the site was shut down for a significant period of time, it is possible that either party could claim that the contract had become impossible to perform. However, this usually only applies once it becomes impossible to complete the contract.

Part 3 – NEC Contracts

Set out below are the key relevant provisions in the NEC4 (using the ECC as an example, others within the suite have similar provisions, but do review the particular clauses). In particular ensure that you review the selected secondary option clauses and any additional Z clauses.

A. Time and Programme (including force majeure)

1. In the NEC4 ECC there are compensation events listed at clause 60 which could cover direct delays arising out of coronavirus, including:
    a. Clause 60.1 (19)
        "*an event which*
        - *stops the Contractor completing the whole of the works or*
        - *stops the Contractor completing the whole of the works by the date for planned Completion 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 change of occurring that it would have been unreasonable to have allowed for it and*
        - *is not one of the other compensation events stated in the contract.*"

        (This is essentially a force majeure)
    b. Clause 60.1(21) refers to "*compensation events stated in the contract.*"
    c. At clause X2.1 of the secondary option clauses in the NEC4 ECC, there is provision to include a change in the law of the country in which the Site is located if it occurs after the Contract Date as a compensation event. The drafting of this optional clause is wide, so it is likely to cover coronavirus related delays for sites in the UK. Though it should be noted when selecting this clause that it allows for prices to be reduced in the event that the change of law causes such a reduction. The parties may take the view that such a reduction is unlikely.

2. For an event under clause 60.1 (19), the project manager is required to give an instruction to the client under clause 19.1 stating how this event is to be dealt with.

3. Indirect delays (arising out of for example staff shortages due to illness or inability to get materials to site) could be covered by the following compensation events:
    a. "*The Project Manager gives an instruction to stop or not start any work or to change a Key Date*" (Clause 60.1(4))
    b. Access restrictions (Clause 60.1(2))
    c. Changes (Clause 60.1(1))
    d. Breach of contract (Clause 60.1(18))
    e. Delays for which the client is responsible (Clause 60.1(3) and (5))
    f. "*The Client does not provide materials, facilities and samples for tests and inspections as stated in the Scope.*" (Clause 60.1(16))

4. A key clause in NEC contracts is "*The Parties, the Project Manager and the Supervisor act in a spirit of mutual trust and co-operation*" (Clause 10.2 in NEC4 ECC), so in the spirit of the contract, parties should be discussing the risk of coronavirus related delays now, if they haven't already and working to mitigate likely effects. Coronavirus related delays should be logged on the early warning register, early warning meetings held to discuss any issues foreseen and the programme kept up to date.

5. Where the Project Manager or Supervisor has not notified the Contractor, there is an obligation for the Contractor to notify the Project Manager of a compensation event under clause 61.3. Be aware that a claim for additional time or money may be time barred (under clause 61.3) in the event that it is not notified within 8 weeks of occurring.

B. Health and Safety

1. The "*spirit of mutual trust and co-operation*" referred to in clause 10.2 would include health and safety considerations and robust policies to deal with the pandemic. Therefore, the advice under JCT – Health and Safety is also appropriate.

C. Price

1. The compensation events (see Time and Programme), could also entitle a supplying party to additional sums. There are also options within the ECC (and the ECS, TSC, TSS, PSS and PSC) which allow for different pricing options, which could apply to costs and/or time increases due to the coronavirus.

2. In NEC4 ECC there are six pricing options:
    a. Under Options A (Priced contract with Activity Schedule) and B (Priced contract with bill of quantities), there is a lump sum for the works and the supplying party carries the cost risk, save for compensation events allowing for more time or money, or risks allocated under the terms of the contract.
    b. Options C (Target Contract with Activity Schedule) and D (Target contract with bill of quantities) are contracts where parties agree a target price for the works and respective shares of savings (where the works come in under budget) or overrun (where the target price is exceeded).
    c. Under Options A, B, C and D there is the option for parties to incorporate secondary option clause X1 which allows for price adjustment due to inflation.
    d. With Options E (cost reimbursable contract) and F (management contract) the parties agree levels of overheads and profits and the Client pays the agreed overheads and profits, plus the actual cost of the works, so in effect the Client carries the risk on costs (though under Option F risk allocation can be varied by the options chosen in the sub-contract).

3. Therefore, incorporating secondary option clause X1 under Options A to D, to cater for inflation or using options C to F, which allow for price fluctuations could provide protection to the supplying party against price increases arising out of the coronavirus. If using options A and B there is the ability to allocate risks associated with the coronavirus, so that they are not all on the supplying party.

D. Termination

1. There is a right for the client to terminate under clause 91.7
    "*if an event occurs which*
    - *stops the Contractor completing the whole of the works or*
    - *stops the Contractor completing the whole of the works by the date for planned Completion shown on the Accepted Programme and is forecast to delay Completion of the whole of the works by more than thirteen weeks,*

    and which
    - *neither party could prevent and*
    - *an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allow for it*."

2. Whether or not this is deemed to apply, will depend on the circumstances at the time.

Part 4 – Practical Advice (including reset agreements/ variations)

A. We are in completely unchartered territory and no business will be immune from the effects of the pandemic. With this in mind it is more essential than ever that parties work together to think of commercial solutions to the problems.

B. Where a delay and/or price increase occurs, ensure that you check the precise terms to see who carries the risk. It is important to check the precise terms carefully, as provisions regarding time and price are often amended with a schedule of amendments (for JCT contracts) or by the use of secondary option clauses and additional Z clauses (for NEC contracts). Make sure that this includes a review of the Relevant Events (compensation events in the NEC or equivalent in other contracts) to see whether the contractor is entitled to additional time in view of the current pandemic situation.

C. Ensure that any notification procedures in the contract are followed carefully and promptly and take reasonable steps to mitigate the delay. In particular, for NEC contracts be aware that a claim for additional time or money may be time barred (under clause 61.3) in the event that it is not notified within 8 weeks (unless amended) of occurring. If costs increase, consider the variation/change, loss and expense and fluctuation provisions under the contract (or equivalent, for example compensation events and pricing options for NEC) to see whether the contract sum could be increased and/or a claim could be made.

D. On existing contracts, this may mean negotiating a variation to the contract terms (sometimes called a reset agreement). Ensure that this is clearly documented and appropriate legal advice is taken so that it is an effective legal variation of the contract. The variation should take into account all of the items set out at E1-5 below.

E. On future contracts, ensure that you have upfront honest discussions covering all current and future risks. This is important to do prior to entering into the contract, because parties would be unlikely to be able to rely on force majeure provisions if entering into a contract now as the situation and the anticipated delays are foreseeable. Other provisions (such as change in law) would also not apply if entering into contracts after the event. As part of these discussions you should make contact with all parties who could have an impact on the cost and time. It can then be decided between the parties, how the risks should be documented using a schedule of amendments or equivalent (Z clauses for NEC). Items which should be considered include:
    1. the variation/change provisions;
    2. loss and expense (or equivalent) provisions;
    3. widening the scope of events which allow additional time (Relevant Events under JCT contracts, compensation events under NEC contracts);
    4. the application of a liquidated damages (Delay Damages in NEC contracts); and
    5. a liquidated damages holiday or reduced liquidated damages for specific coronavirus related events, which could be incorporated using a Coronavirus Related Event definition. This should be tailored to the particular risks to be covered, which could include changes in law, delays to imports, unavailability of materials and staff shortages. A general definition which simply refers to any delay caused by the coronavirus is unlikely to work legally because it gives rise to uncertainty of whether the coronavirus alone has caused the delay.

F. The employing party may request clauses excluding extensions of time (compensation events or equivalent) for coronavirus delays, which contractor parties should either resist or take account of that risk in the price.

G. Bearing in mind all of the above (as it is important to protect your contractual position), it is absolutely vital to have open and constructive dialogue up and down the contractual chain to try to agree and document an approach. Commercially now is not going to be the time for strict legal positioning but in planning your actions, be mindful of the position that may be taken by the other side later, hence the importance of agreeing what you can now. Everyone in the industry is in the same situation and it is in their best interests to act pragmatically.

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