

COVID-19

RISK ASSESSMENTS FOR SITE VISITS & SUBSEQUENT IMPACTS ON CONTRACTS

In light of the developing concerns around the Covid-19 pandemic, the Government has indicated that essential building works should continue. The Government and Construction Leadership Council ("CLC") have introduced procedures to safeguard workers whilst construction sites remain open.

The guidance from Government on works continuing on construction sites is clear and states:

"Construction sites have not been asked to close, so work can continue if it is done safely"¹

"The Government had advised that wherever possible, people should work at home. However, we know that for many people working in construction their job requires them to travel to their place of work, and they can continue to do so. This is consistent with the Chief Medical Officer's advice"²

"To help ensure that it is safe for you to operate in your workplace, the industry has worked to develop Site Operating Procedures (SOP), which were published by the Construction Leadership Council. These align with the latest guidance from Public Health England. As this health guidance updates, the SOP will reflect any changes."²

Members might be under pressure to attend construction sites and buildings that are not considered a 'construction site' to carry out their role. Members should determine if attending a site visit in person could be undertaken safely and within the guidance provided by the Government and CLC.

It is important that the Management of Health & Safety at Work Regulations (The Health and Safety at Work Act) and Construction (Design and Management) Regulations 2015 ("CDM") are also considered when determining the risks involved when visiting site.

The CDM regulations require the Principal Contractor to plan, manage and monitor the construction phase, co-ordinating matters relating to health and safety. The works on site should be carried out without risks to health and safety, where reasonably practicable. The

¹ www.gov.uk, Guidance published on 27th March 2020 which relates to Remediation and Covid-19: Building safety update.

² www.gov.uk, Letter from Department for Business, Energy & Industrial Strategy, dated 31st March 2020.

Site Operating Procedure will provide necessary guidance to the Principal Contractor.

Each construction site and site visit will present its own challenges in managing the risks identified by the Government concerning Covid-19. Therefore, members should consider the risks on a case by case basis and ensure that the contractor/building owner or occupier has made the arrangements to ensure that the correct measures have been taken prior to any site visit.

The purpose for the site visit should be assessed to determine if it is essential. Depending on the purpose of the site visit, alternative methods which could be adopted to avoid a physical site presence should be considered. For example:

1. Is it **essential** to carry out a site visit at this moment in time?
2. Can the site visit be attended remotely?
3. Can the site visit be carried out safely whilst adhering to the Government's and CLC guidance?

'Site visits are not always to building sites and some visits might be closer interactions with the general public. The member needs to determine the risk and manage the visit prior to attending to ensure that the Government guidance can be achieved'

To assist members in determining their risks in carrying out site visits; some considerations are provided below:

1. Site visit to construction sites. The contractor has possession of the construction site and those on site are generally separated from the general public.
 - a. These sites must follow the guidance released by CLC. CLC Site Operating Procedure.

Members should liaise with the site manager to ensure that the guidance provided by CLC is being adhered to. It is also an opportunity for the site manager to raise any changes, adaptation or areas of the site where the guidance could not be implemented. The member should then carry out their own risk assessment to determine if they can carry out their site visit safely.

2. Site visits to buildings/sites that are not under the possession of a contractor.

- a. The member needs to determine and agree with the building owner/occupier if the visit is essential and discuss how the visit could be achieved whilst adhering to the Government's guidance.
- b. The member should consider the following questions prior to visiting a building/site to determine if it is safe to do so. This list is an example of considerations and members should make reasonable judgements to safeguard themselves and others from Covid-19.
 - i. Is the site visit/work essential?
 - ii. Can the site visit be undertaken remotely?
 - iii. Is the proposed site visit to a home or place of work?
 - iv. Will the site visit require access into the building?
 - v. Are there any self-isolating persons within the building?
 - vi. Is there safe access and will the correct precautions be undertaken to provide safe access?
 - vii. Can social distancing be achieved in the building?
 - viii. Agreeing travel arrangements. Is car parking required?
 - ix. Agreeing a strategy in undertaking any works on site to ensure that the Government guidance is achieved.
 - x. Members having the correct PPE to cover the tasks to be undertaken during the visit and carrying out a risk assessment to determine if additional PPE is required to protect against Covid-19. If the member has no equipment and none can be provided, then can the site visit be undertaken safely.
 - xi. Anyone scheduled to attend the site visit that has developed COVID-19 symptoms must not attend site. Agreeing that members' attendance will be cancelled if they develop symptoms.

Updates to the Government guidance and CLC will continue to change and evolve and members should keep updated. Members should also consider the impact to their appointment and contract in not attending site if the site visit cannot be undertaken safely.

Impact on Appointments and Contractual Obligations.

Where Members cannot attend site safely and other options such as remote access have been considered and ruled out, Members will need to review the terms of their own appointments for options. This would include rights to suspend services and force majeure (see further below). It is advisable to engage pragmatically with clients to try to reach a reasonable agreement about how the situation can be managed most effectively without causing hardship for any one party.

Such circumstances may suggest construction works are not capable of operating safely within the terms of the CLC Site Operating Procedures for construction sites. Each project and site will need to be reviewed individually. Employers and contractors will need to consider their options under the terms of the building contract.

Each building contract must be considered on a case by case basis, but the following points are likely to be relevant for contracts that commenced before COVID-19 was widely known:

Force Majeure

1. Events that permit extensions of time to the completion date – building contracts usually permit extensions of time due to a force majeure event. If so, the question is whether the clause applies in light of the current circumstances and if so, the impact on other contract terms such as the contractor's entitlement to loss and expense. Members performing the role of contract administrator faced with an application for an extension of time on these grounds should consider whether the clause specifically refers to a "*pandemic*". If so, the position is likely to be clear as the World Health Organization has declared COVID-19 a pandemic.

Whether a force majeure clause has been triggered by a particular event will depend on the interpretation of the words that have been used within the clause and how the current events apply to this interpretation. If there is no contractual definition of force majeure, the position is uncertain. Force majeure is generally understood to cover circumstances that are not within a contracting party's control. This will have to be very carefully assessed in the context of the Government's view that construction sites should continue to operate provided that they can follow Public Health England guidance and have suitable measures in place to minimise the risk of COVID-19 spreading and against any contractual requirements to take steps to mitigate the effects of events that may cause delay. Service of relevant notices under contracts will need to be adhered to and contractors will still need to demonstrate that delay has been caused and in what way.

2. Employer's right to postpone the works – the building contract may permit an employer to instruct the postponement of the works. This is a matter for the employer and will involve consideration of the impact on other contract terms such as the contractor's entitlement to loss and expense.

3. Contractual rights to suspend performance should be checked. Under an unamended JCT, if a force majeure event goes on for longer than 2 months there is a mutual right of termination. The parties still have the option though to agree to extend this period.
4. Contractor's right to loss and expense – no right to loss and expense would generally flow from a force majeure event but would generally flow from an employer instruction to postpone. Again, each contract should be considered on a case by case basis. Parties may however, try to reach a commercial agreement to manage the current situation in both of their interests.

This is a fast moving situation where guidance is changing rapidly. The views above are subject to change and Members should take appropriate legal advice to assist their decision making.

Z Clauses in Procurement – COVID 19

In addition to the above, Members tendering for procurement projects at this time should be extra vigilant when agreeing to terms in contracts. In order to protect their interests during COVID, there has been an increase in what are known as "Z clauses" being added by those organisations procuring services. Some of these clauses may render the terms of the contracts unattractive in removing any rights to claim for "compensation events" for unforeseen additional costs due to COVID and not recognising the pandemic as a force majeure.

Members are advised to carefully consider the contents of any of these Z clauses and attempt to negotiate more favourable terms where they are felt to create unacceptable risks for Members.

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