

## Construction Law Update

### COVID-19 or “Coronavirus” – Additional Guidance from NEC

As the consequences of COVID-19 continue to be felt throughout the construction industry, increasing numbers of clients and contractors are now having to tackle the contractual complexities of sites shutting and projects being delayed. Helpfully, the NEC4 contract board has provided some additional key points of guidance for both clients and contractors looking to make sense of their obligations and legal standing under NEC4 contracts.

#### **Will clause 19 (Prevention) apply to new NEC4 contracts going forwards?**

Clause 19 applies in situations where work has to be stopped or suffers a delay due to an event which it would be unrealistic for the contractor to have allowed for within its pricing and programme at the time that the contract was entered into. However, given that the effects of COVID-19 could now be argued to be ‘reasonably foreseeable’ for contracts not yet entered into, any consequential delays are less likely to fall within the scope of clause 19 and the corresponding compensation event (“CE”) clause 60.1(19).

It is important to be very clear about how the potential risks of COVID-19 are shared and managed when negotiating future contracts. The NEC4 contract board recommend that the simplest way of dealing with this is to introduce an additional compensation event in the form of a ‘Z’ clause.

Alternatively, choosing one of the cost reimbursable main options such as Option E rather than a fixed rate lump sum could be an alternative way of addressing this same issue.

#### **Will Secondary Option Clause X2 apply if there are changes to the law due to Covid-19?**

Where Option X2 has been selected, a contractor may become entitled to a CE where the impact of changes to legislation has caused delay. However, whether contractors can rely upon Option X2 in relation to COVID-19 related changes to legislation depends upon

how the restrictions are applied. In the UK, for example, most restrictions confirm what you should do rather than creating an absolute legal obligation. Parties must, therefore, be cautious when relying on Option X2.

#### **Should sites close in order to comply with social distancing rules?**

The NEC4 contract board advise that a site should not be closed purely because of social distancing. The UK government confirmed that contractors can continue work on site as long as it is safe to do so. Social distancing is one thing that needs to be taken into account but if there are other ways that a contractor can safely operate it is expected that they should try to carry on. The key point is to work out what is the serious issue that is causing the need to close the site down. Having established there is a safety issue, steps must be taken to try to deal with it.

Before a site is closed, there must be a very clear understandable reason why it is unsafe to carry on with the work which should be settled and agreed between the project manager and the contractor at an early warning meeting as soon as possible. In any event, certain activities would need to continue, such as site security, in order to ensure that the site is safe.

#### **What should a sub-contractor do if it is told by the contractor that the site is going to close?**

The sub-contractor should expect to receive an instruction from the contractor closing the site which will entitle the sub-contractor to a CE. It is important that the sub-contractor does not simply walk away from site but instead works with the contractor to find out what the problem is and whether there is another way of resolving it which does not involve the sub-contractor leaving the site. However, if a solution cannot be reached, the sub-contractor should clearly discuss with the contractor the consequences in terms of the cost of closing the site down and any work which must be done by the sub-contractor to make its works

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safe. The early warning process should be used to facilitate these discussions at an early stage.

### **If clauses 19 and 60.1(19) have been deleted are the consequences of COVID-19 the contractor's responsibility?**

On the face of it, the deletion of clauses 19 and 60.1(19) appear to suggest that the entire risk of prevention events has been transferred to the contractor. But it isn't that simple, there are other aspects to consider. As stated above, if Option X2 has been included in the contract, it may provide some relief if the requirements of law are impacted as a result of the COVID-19 outbreak. Also, the project manager has the power to instruct how to deal with the issue. Such instructions may be classed as a change to the scope and therefore give rise to a CE. An instruction to stop or not start work would also constitute a CE.

### **How can contractors recover the costs of people working from home?**

Under the ECC, people are chargeable wherever they are working on the contract as long as they are usually site based. A similar principle applies under the Term Service Contract and there are no geographical restrictions under the Professional Service Contract.

### **Are the contractor's demobilisation and remobilisation costs recoverable?**

Yes, such costs would be covered by the schedule of cost components under equipment costs and people costs. In addition, if materials need to be replaced following remobilisation, this would also be recoverable.

### **Does the contractor have to mitigate costs?**

Yes, the contractor has an obligation to mitigate costs and not incur unnecessary costs, any such costs would be Disallowed Costs.

### **Comment**

Whilst the above provides general guidance, we strongly recommend seeking legal advice as to a company's protection/obligations in any specific contract.

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