CORONAVIRUS - CONTRACTUAL ISSUES

Members may be concerned about the impact of coronavirus on their construction contracts and, in particular, the position if delays occur due to a shortage of materials or labour or in the event of site shutdown.

There may be remedies under your contract that can assist with any adverse impact coronavirus has on your construction projects, however this is entirely dependent on the drafting of the contract and the impact caused. We therefore recommend that you look at the terms of your contract and consider the following in particular:

1. The use of alternative suppliers or materials;
2. Force majeure clauses;
3. Extension of time clauses;
4. Delay and delay damages;
5. Termination rights.

IS THIS A FORCE MAJEURE EVENT?

Force majeure is not recognised as a standalone principle of English common law and it must be dealt with expressly in your contract. The protection that a force majeure clause will give depends entirely on the precise drafting. Members should review the definition of force majeure in their contracts to establish if the event is covered.

If force majeure is covered under the contract, you should consider the consequences of invoking the clause and ensure that you comply with any notice provisions. Generally, clauses will stipulate that no party is liable for their failure to perform their contractual obligations, but they must mitigate the effects of non-performance. Often, the other party will have a right to terminate the contract.

FRUSTRATION/ PREVENTION

Frustration of a contract occurs when an unexpected serious event, that is beyond the reasonable control of the parties, occurs and makes it impossible for a party to perform the contract. You do not necessarily need a clause in your contract allowing for frustration, but some contracts do set out what happens if a contract is frustrated.

If the effects of coronavirus have frustrated or prevented you from performing your obligations under a contract, you may be able to claim frustration to release you from any further performance. However, it is very difficult to establish frustration and you cannot use this if:

- you have already invoked a force majeure clause,
• there are other ways you can perform the contract (including at your expense),
• if you have been let down by a supplier or if it has simply become expensive for you to perform the contract.

**JCT/NEC POSITION**
The standard forms do not expressly contemplate epidemics or pandemics. Where there is an epidemic or pandemic that affects your business, you may have to rely on other clauses in standard form contracts, such as suspension rights, change in law clauses and the effect of instructions from others.

Under the NEC form of contract, the spread of diseases may be a Compensation Event but this will depend entirely on the core clauses chosen.

Under JCT Design and Build contracts, force majeure is identified as a Relevant Event but not a Relevant Matter. Force majeure is not defined in the JCT contracts, and there is no one legal definition of force majeure to fall back on. The general principle though, is that force majeure refers to an event outside of the parties’ reasonable control which prevents a party from carrying out its contractual obligations. If the effects of Coronavirus would amount to force majeure in your particular circumstances, under an unamended JCT you would be entitled to an extension of time but there would be no entitlement to losses and expenses.

The standard forms are often amended, and you should review the specific terms of your contract to see whether the standard positions stated above have been changed.

**PRACTICAL RISK MANAGEMENT**
We recommend that you undertake an audit of your existing contracts to check the terms for protection, including force majeure clauses. For new contracts it may be beneficial to add in a specific clause dealing with the spread of diseases, dependent on the nature of the project.

Other practical steps that can be taken include the following:

1. Check insurance arrangements—especially where supplies are being delivered from countries affected by the virus;
2. Conduct risk assessments for your projects, considering any specific supply or labour factors;
3. Provide an updated or revised programme if you experience or anticipate disruption to your works – even if it turns out you are not entitled to any relief due to the delay;
4. Give early warnings of delays and/or cost overruns to ensure you do not lose your entitlement to an extension of time or any losses and expenses incurred;

https://www.nhs.uk/conditions/coronavirus-covid-19/