

Government Guidance on contractual behaviour due to Covid-19

The construction industry faces the unprecedented challenge of how to deal with Covid-19. It has a key role in the UK economy and in rebuilding that economy through this crisis and in the years that follow. For years it has seemed that disputes are deep rooted into the psyche of the sector which suffers from low profit margins and poor cash flow. How then will the sector react to Government calls on the sector to avoid disputes and act responsibly and fairly in order to support the response to Covid-19 and protect jobs and the economy?

Time will tell but early signs have been positive. For some weeks now since Covid-19 was announced a pandemic on 11 March 2020, we have been advising clients to preserve their contractual rights whilst trying to communicate with and collaborate with their clients to find a mutually agreeable way to deal with the challenges of Covid-19. The feedback we have had to date is that contractors, subcontractors and clients have been supportive of the other and working together. Long may this continue.

The guidance

On 7 May 2020, the Cabinet Office published a note entitled: "Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency". See [here](#). It applies to the public and private sectors where the performance of contracts (including the obligation to make payment) is materially impacted by the Covid-19 emergency. It applies to England only and not the devolved administrations of Scotland, Wales and Northern Ireland. The guidance took immediate effect and will be reviewed on or before 30 June 2020. Further measures including legislation may also be required.

On the same day, the Construction Leadership Council Covid-19 Task force published practical guidance for all companies involved in the construction supply chain on how to minimise potential disputes. Guidance available [here](#). This is in response to the concern that the industry will become embroiled in costly and long running disputes if it does not look to engage now in collaborative discussions.

A summary of the key points arising from both sets of guidance is below.

Cabinet Office guidance

- This is non statutory guidance and whilst parties are strongly encouraged to follow it, it is expressly intended not to override specific guidance or procurement policy notes, any specific support or relief available in the contract, by equity or from the government in response to Covid-19 and any other legal duties or obligations and national security interests.
- Although not intended to override specific contracts of insurance, paragraph 8 encourage "responsible and fair behaviour where possible". To date, there have been many reports of business interruption insurance failing to respond to Covid-19.
- The guidance recognises that some parties may find it difficult or impossible to perform those contracts due to Covid-19 for various reasons including illness, effect of any restrictions on movement of people/ and goods, revised ways of working necessary for H&S, the closure of

businesses or reduction in financial resources.

- Paragraphs 14 and 15 set out the responsible and fair behaviour that should apply:

14. *Responsible and fair behaviour is strongly encouraged in performing and enforcing contracts where there has been a material impact from Covid-19. This includes being reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes), acting in a spirit of cooperation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party (or parties), the availability of financial resources, the protection of public health and the national interest.*

15. *In particular, responsible and fair behaviour is strongly encouraged in relation to the following:*

(a) requesting, and giving, relief for impaired performance, including in respect of the time for delivery and completion, the nature and scope of goods, works and services, the making of payments and the operation of payment and performance mechanisms;

(b) requesting, and allowing, extensions of time, substitute or alternative performance and compensation, including compensation for increased cost or additional performance;

(c) making, and responding to, force majeure, frustration, change in law, relief event, delay event, compensation event and excusing cause claims;

(d) requesting, and making, payment under the contract;

(e) making, and responding to, claims for damages, including under liquidated damages provisions;

(f) returning deposits or part payments;

(g) exercising remedies in respect of impaired performance, including enforcement of security, forfeiture or repossession of property, calling of bonds or guarantees or the initiation or continuation of insolvency or winding up (or equivalent) proceedings;

(h) claiming breach of contract and enforcing events of default and termination provisions (including termination rights arising by reason of the insolvency or potential insolvency of a party);

(i) making, and responding to, requests for information and data under the contract;

(j) giving notices, keeping records and providing reports under the contract (recognising that the need to keep records of contractual behaviours and Guidance on Responsible Contractual Behaviour 4 decisions, including the behaviours referred to in this guidance, is important);

(k) making, and responding to, requests for contract changes and variations;

(l) making, and responding to, requests for consents (including funder consents); (m) commencing, and continuing, formal dispute resolution procedures, including proceedings in court;

(n) requesting, and responding to, requests for mediation or other alternative or fast-track dispute resolution; and

(o) enforcing judgments."

CLC Covid-19 Contractual Best Practice Guidance

- This supports the Cabinet Office note and sets out best practice guidance in relation to some typical issues that may arise. This guidance applies to the public and private sector and all those in the construction and maintenance supply chain. The terminology Employers and Suppliers is used to refer to the appointing party (employers/clients in first tier and contractor/consultant in second tier) and

to the appointed party (contractor, consultants, subcontractors etc.),

- The guidance refers to the previous guidance including:
 - Build UK Guidance on Contractual Issues caused by Coronavirus/COVID-19
 - CLCC statement on payment and contracts 8 April 2020
 - PPN 02/20 Supplier Relief due to Covid-19 and PPN 02/20; Additional Guidance, FAQ's and model terms for construction
- The risk of Covid-19 (delay and additional costs) should be considered and the impact of any delay considered on the programme, completion dates and response periods. Where possible, amended programmes should be provided.
- The Supplier's entitlement to time and/or money depends on the terms of the contract. However, notwithstanding the contractual provisions, Employers and Suppliers should take a collaborative approach and discuss whether an EOT can be granted and any additional costs shared in any event. Section 4 deals with specific issues that may arise and stances that may be taken.
- It is imperative that the parties reserve their contractual rights until agreement is reached on the impact of Covid-19 and parties comply with any notice requirements. Therefore, any correspondence and discussions should take place on a without prejudice and subject to contract basis.
- Proforma letters are attached to the guidance. Annex 1 and 2 relate to without prejudice dialogue between the Employer and Supplier, Annex 3 is a notice of an extension of time under the JCT Design and Build 2016 and Annex 4 is a notice of a compensation event under

NEC3/4 ECC. These letters relate to the unamended form of contract and must be adapted to reflect any schedule of amendments to the contract.

- The note encourages the continuation of progress/project meetings to discuss the progress on site and impact of Covid-19 including what measures have been taken, what on-site and off-site works have been progressed and whether works have been suspended
- Parties are encouraged to have collaborative discussions to seek if they can agree matters such as extension of time, termination triggers (and whether they can be waived), sharing additional costs, mutually agreeing to suspend the works, payments and valuations, instruction of any variations (i.e. to mitigate delays etc.).
- There is a reminder that parties may need to engage with third parties such as insurers, subcontractors/suppliers, funders, purchasers and tenants before any agreement can be reached.
- If an agreement cannot be reached, there is a reminder that disputes are expensive, time consuming and can damage commercial relationships.
- If negotiations fail to reach an agreement the note discussed the common forms of dispute resolution such as litigation, arbitration and adjudication. It also identifies alternatives to formal dispute resolution such as mediation and the RIC Conflict Avoidance Procedure. It also highlights the new low value model adjudication procedure launched by CIC on 1 May 2020 and the RIC 15 day adjudication service which will have capped fees.

10 Key takeaways

1. It is vital to reserve your existing rights under the contract and any attempts to collaborate should be on a without prejudice basis and subject to contract.

2. If you are not already in dialogue with your Employer, consider using the letter in Annex 1 as a basis for kick starting discussions to deal with the impact of Covid-19.
3. You should check your contracts carefully and comply with any notice provisions and other requirements.
4. If you have not done so already send notices of delay to your Employer. Consider using the drafting in Annex 3 and Annex 4 (as applicable) as a basis for this. Remember that notices may need to be updated to reflect current progress on site.
5. This guidance is encouraging collaboration and parties to share the risk of Covid-19. For example, a contractor may be agreeable to an extension of time but not additional money as a result of Covid-19. There needs to be some transparency on both parties to a contract as to the likely effects of Covid-19 so both parties can understand the risks and take a view on its allocation. As we often say to parties to a mediation, sometimes the outcome will be one which both parties may not like but are prepared to live with.
6. Do not rely on a handshake! Any agreement should be recorded in writing either as a deed of variation to the contract and/or a settlement agreement.
7. Be mindful of the need to engage with third parties such as insurers, funders and the supply chain before reaching an agreement.
8. If negotiations break down, try and explore alternatives (and possibly quicker and cheaper options) such as one of the low value adjudication service and mediation.
9. Social distancing may be in place, but the courts, mediators, adjudicators etc. are still open for business. Parties are using

services such as Skype and Teams to attend virtual mediations, negotiations and court hearings.

10. Keep clear and accurate records of progress on site and any discussions that take place including notes of meetings and conversations.

Written by



Ruth Wilkinson

T: [0118 960 4644](tel:01189604644)

M: [07920 112422](tel:07920112422)

E: rwilkinson@clarkslegal.com



Stephen James

T: [0118 960 4674](tel:01189604674)

M: [07884 188 021](tel:07884188021)

E: sjames@clarkslegal.com

Clarkslegal LLP

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