



BEALE&CO

CONSTRUCTION ENGINEERING & INFRASTRUCTURE

COVID-19 & Professional Consultants in Ireland: Contract and Payment Issues, BCAR and H&S concerns

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Introductions

+ Tara Cosgrove - Partner

- t.cosgrove@beale-law.com
- +353 (0) 1 536 9610
- +353 (0) 87 227 6896



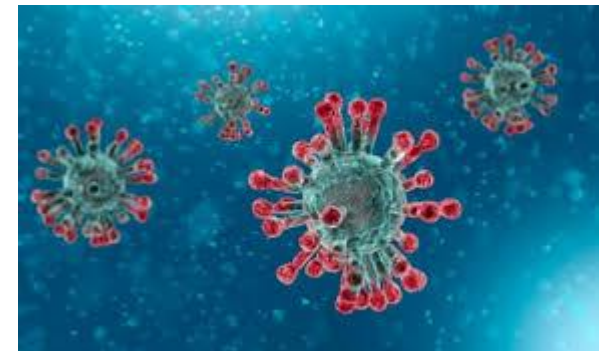
+ Killian Dorney - Partner

- k.dorney@beale-law.com
- +353 (0) 1 536 9629
- +353 (0) 86 032 1205



COVID-19: Agenda

1. The Current Position
2. Effects on your business
3. Contract Matters:
 1. Delays
 2. Suspension
 3. Termination
4. Public Works Contract
 1. Consultants under COE1
 2. Consultants as Employer's Representative
5. BCAR, Health & Safety
 1. Inspection
 2. Certification



Effects of COVID-19 (1): Effect on Your Business



+ Current Restrictions:

- Until 12 April, everyone is urged to stay in their home wherever possible.
- You can buy food, attend medical appointments and get out for exercise.
- There are exceptions for some workers in key businesses.

Effects of COVID-19 (1): Effect on Your Business



+ Legislative Framework

- Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020
- Emergency Measures in the Public Interest (COVID-19) Bill 2020

Effects of COVID-19 (1): Effect on Your Business

- + Primary duty is to your staff
- + Must consider methods of working and implement social distancing
- + Keep the situation under constant review
 - Department of Health: <https://www.health.gov.ie>
 - Health and Safety Authority: <https://www.hsa.ie/eng/>



Effects of COVID-19 (2): Effect on Your Projects

+ Projects

- Maintain communication with your Client
- AND....FIRST
- Read your contract!



Effects of COVID-19 (2): Effect on Your Projects

What does your contract say?

- Delays
- Suspension
- Terminations
- Force Majeure
- Claims



Focus: Public Works Contracts – Acting as Consultant

- + Is your project essential? Query with Client...
- + If it is
 - carry on, but comply with Department of Health and HSA guidelines
 - Note guidance issued by office of Construction Procurement Reform – indicate to Client if necessary.
 - <https://constructionprocurement.gov.ie/category/news/>

Focus: Public Works Contracts – Acting as Consultant

- + If your project is not essential...
- + COE 1 Provisions:
 - Clause 4 & 5, Delay & costs of delay: note “Special circumstances” resulting in receiving no costs of delay
 - Clause 4, Suspension: What payment are you due? Check Schedule B “Percentage of Stage Fee for Suspension”
 - Clause 11, Client’s Charges: A potential method to recovery
 - Clause 14, Termination: provision for termination “at will”. Recovery only of proportion of fee for completed services prior to termination.

Focus: Public Works Contracts – Acting as Employer's Rep

- + If your project is essential...
- + Works will carry on:
 - Co-operate pursuant to Clause 4.1
 - Implement Department of Health and HSA requirements
 - Request proposed instruction from Contractor?
- + Event 15 – is it the answer? Time but no money for the Contractor
- + Contractor may propose a Change Order pursuant to Clause 10.4 to obtain both time and money.



Essential Workers

- + Construction on essential health and related projects relevant to the Covid-19 crisis and supplies **necessary for such products, repair/construction of critical road and utility infrastructure and delivery of certain emergency services to businesses and homes.**

Post COVID--19

- + Health and Safety is not an option-its an essential.
- + Failures will give rise to both liability to your employees and even worse the risk of prosecution.
- + 19th of March the Government's own Note on Procurement said

“Under no circumstances should the service continue if the level of resources are such that they impact on key health and safety requirements. Should this arise, having exhausted alternatives, the client should suspend the service”

Health & Safety Risk Management System

- + Policy and commitment
- + Planning
- + Implementation and operation
- + Measuring performance
- + Auditing and reviewing performance

Requirements

You need to:

- + Identify the hazards
- + Consider who might be affected and how they might be harmed.
- + Evaluate the risks and take precautions.
- + Document and implement your findings.
- + Update and review.

It will be extremely important to keep this under constant review. If you don't have the in house skills to assess this you may need external advice from a Health and Safety Professional.

BCAR

Both the 2014 Regulations and the September 2016 Code of Practice

Standard for Designers, Builders and Certifiers is reasonable skill, care and diligence.

Co-operation

Communications and stakeholder engagement is critical.

Hopefully the planning, commencement and design phases of projects will be able to continue.

If for any reason the works cannot be executed in compliance with health and safety regulations, **works simply will not be possible.**

Inspection Plan

- + Health and Safety is at the core of the Inspection Plan.

- + To quote 7.1 of the Code

“The test of the Inspection Plan will be its success in achieving **reasonable standards of health and safety** in or about buildings, and of energy conservation, accessibility and sustainability for building users.”

BCAR Cast List

- + **Building Owner** must ensure that adequate resources and Competent Persons are made available to design, construct, inspect and certify the building works.
- + **Contractor** is clearly central and is supervising and in control of the works on the site.

PSCS

PSCS on the site will never before have been more important, and more under pressure.

Unless the PSCS and the Contractor satisfy you that site, arrangements are adequate then you should not proceed to let your staff back on site.

Assigned Certifier

- + Inspect, and to co-ordinate the inspection activities of others during construction, and to certify the building or works on completion
- + To plan and oversee the implementation of the Inspection Plan during Construction and prepare the Preliminary Inspection Plan and oversee adherence to this plan,
- + Identify all certificates required and obtain them
- + Act as the single point of contact with the Building Control Authority during construction

Building Control Authority

If a dispute arises is that the Assigned Certifier can seek advice from the Building Control Authority, in respect of compliance matters relating to the building **or works where disputes or differences of opinion** arise between the parties to the project.

Legislation

- + The Safety, Health and Welfare at Work Act 2005 and the provisions of the 2005 Act
- + The Safety, Health and Welfare at Work (General Applications) Regulations 2007
- + The Safety Health and Welfare at Work (Construction) Regulations 2013
- + Safety Health and Welfare at Work **(Biological Agents) Regulations**, 2013, S.I. No. 572 of 2013, and the relevant HSA Code of Practice

Evaluation of Site Specific Risks

- + Proceed on the basis that **every site is an infection potential site.**
- + Implement all latest recommendations from the HSE and, where appropriate, the HSA.
- + Printing and scanning in hard copy everyday any new HSE/HSA/Office of procurement/Client guidance

Risk Review

- + Meetings held in a different way (e.g. by video conferencing or conference calls).
- + Only certain teams within the site.
- + Staggering work programmes.
- + Considering other good hand washing facilities including soap, tissues, sanitisers etc.
- + To what extent are sites being cleaned.
- + Monitoring, monitoring, monitoring of this on all occasions is critical by the PSCS.
- + Training for anyone onsite in relation to hygiene and self-isolation is also critical.

Risk Review Continued

- + All of your staff will be highly likely to speak good english, however, the question is do all of those working on sites and has there been full and adequate consideration given to this?
- + What about traveling, it is not just about traveling within the site; it is about traveling around the site and to and from the site. Own transport is essential.
- + What about facilities for entering the site, access points, canteens and any changing facilities if appropriate?
- + Are there COVID-19 free declarations that are being required by the PSCS and anyone entering the site? GDPR and privacy issues could arise here.
- + Clearly, there are particular concerns if there are outbreaks onsite. What precautions are there?
- + PPE reusable and one off gear needs to be reconsidered. It's a new dawn for that.

Risk Review Continued

- + Adhering to social distancing rules, carrying out regular hand washing and using gloves is just not enough to my mind.
- + Sites are often intensively close and you need to be absolutely certain that if there is to be an inspection that there is appropriate distancing at all times. It just may be impossible in some cases, even if you are carrying out an essential service.
- + Could distancing itself cause a non-infection related serious accident risk.
- + Inspections simply may or may not be possible depending on the nature of what is to be done. Is it really possible if you put some alternative inspection in place such as video, I doubt it.
- + How are health checks being carried out? Twice daily temperature checks are in use in Singapore.

Further Reading

- + BCAR Code of Practice September 2016
- + UK the Construction Leadership Council Guidance
- + HSA Guidelines on the Procurement, Design and Management Requirements of the Safety Health and Welfare at Work (Construction) Regulations 2013
- + The Safety Health and Welfare at Work (Biological Agents) Regulations, 2013, S.I. No. 572 of 2013, and the relevant HSA Code of Practice

Contact Details

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WHEN YOU CAN USE IT

- As your legal team
- Overflow work
- Maternity/paternity cover
- Extra body of support for existing legal team
- To fill a recruitment gap
- Where a rapid service is required due to a deadline

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