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CONSTRUCTION ENGINEERING & INFRASTRUCTURE

COVID-19: Further Considerations - Managing Contractual And Practical Implications On Suspended Or Ongoing Construction Projects

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International Construction and Insurance Law Specialists www.beale-law.com



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Introductions



+ **James Vernon**
Partner
T: +44 (0) 20 7469 0424
M: +44 (0) 7827 850 413
E: j.vernon@beale-law.com

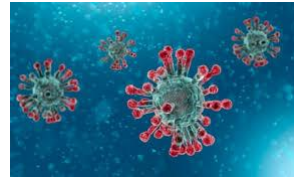


+ **Madeleine Kelly**
Solicitor
T: +44 (0) 20 7469 0430
M: +44 (0) 7388 949 067
E: m.kelly@beale-law.com

International Construction and Insurance Law Specialists www.beale-law.com

COVID-19: Agenda

1. Government and Industry Guidance and Advice
2. Measures to be taken if site closed / due to be closed
3. Requirements For First And Any Continuing Notices Under The JCT, NEC3, NEC4 and FIDIC Contracts
4. Impact Of Recommencement Of Works



1. Government And Industry Guidance And Advice (1)

- + Government and industry-wide push for greater certainty and impetus for construction works
- + Balance between safety of employees and public with economical and practical benefits of construction work continuing
- + Government advice on social distancing and hygiene, tailored to construction industry
- + Starting point from Government: site work can carry on in accordance with the social distancing guidelines wherever possible

1. Government And Industry Guidance And Advice (2)

- + To remain open site operators must carry out risk assessments
 - Starting point: Government guidance
 - Supported to industry advice
 - Make relevant to the project: type of work, location of workforce, supplies needed
- + Government advice based on social distancing – 2 metres
- + If social distancing cannot be followed, does the activity need to continue?
- + Avoid face to face meetings and keep operatives in small teams

1. Government And Industry Guidance And Advice (3)

- + Open sites need to ensure workforce can maintain hygiene requirements
- + Consideration for open sites (and those re-opening) – what is the impact on the Government guidance on the project including:
 - Programme – reduced workforce and/or practices
 - Cost – take longer and/or increased cost of materials and/or alternative methods of construction
- + Ensure contractual notices and processes are followed



1. Government And Industry Guidance And Advice (4)

- + Construction Leadership Council: Advice on Temporary Suspension of Sites

- + Build UK: Site Operating Procedures – Protecting Your Workforce
 - Updated version issued this morning - guidance on working distances
 - ELIMINATE: 2 metres should be maintained
 - REDUCE: where 2 metres cannot be maintained and works essential to project delivery, minimise frequency and time workers in that reduced space – be side to side not face to face
 - ISOLATE: keep workers operating in less than 2 metre spaces in small teams and away from other workers
 - CONTROL: where face to face unavoidable, keep below 15 minutes and supervise
 - PPE: Respiratory equipment a last resort
 - BEHAVIOURS: open and collaborate to minimise risk – take responsibility

1. Government And Industry Guidance And Advice (5)

- + CLC's letter to the PM: 1 April
 - Materials
 - Retention release – public contracts

- + CLC's statement on payments and contract operation: 8 April

1. Three Broad Scenarios (6)

+ Three broad scenarios for live projects:

1. Projects closed down following initial notices to suspend issued by the contractor or employer;
2. Projects closed down in collaboration between contractor and employer, but without any formal notices; and
3. Projects continue on site.

1. Projects Continuing Or About To Re-Open (7)

+ Practical issues:

- Keep records to show all guidance and advice being followed
- Ensure data of all who attend site including site deliveries
- Advice to site operatives
- Statement on why project continuing and steps put in place – PR exercise

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1. Design / Consultant Team (8)

- + Relates to all three broad scenarios

- + Maintain communication with design and consultant team

- + Establish what work can be done remotely during site closure or while work ongoing
 - Answer RFIs
 - Progress designs
 - Payment processes followed
 - Any necessary notices suspending their services

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2. Measures To Be Taken And Issues Arising During Site Closures Or If Sites Face Future Closures (1)

- + Measures to be taken done in consideration of your contract

- + Site survey

- + Site security

- + Maintenance of insurances – employer & contractor

- + Address any notices (payment or otherwise) promptly and in accordance with the relevant contractual terms

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2. Measures To Be Taken And Issues Arising During Site Closures Or If Sites Face Future Closures (2)

- + Identify work that can continue:
 - Progress the design for current or future phases
 - Consider previous entitlements to variations / previous claims – collate evidence, assess prospects and prepare submissions
 - What can be done to ease pressure with your sub-contractors and supply chain

- + Maintain relationships upstream and downstream plus with your supply chain

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3. Requirements For First And Any Continuing Notices Under JCT, NEC3, NEC4 and FIDIC

1. Force Majeure, Prevention, Frustration
2. First Notices To Be Issued
3. Ongoing Notices Regarding Time
4. Ongoing Notices Regarding Increased Preliminaries And Costs
5. No Notices Issued



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3.(i) Force Majeure



+ FIDIC Red Book 1999 Clause 19

+ NEC 3 and NEC 4 ECC Clause 19.1

+ JCT Standard Building Contract With
Quantities 2016 Clause 2.29.15

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3.(ii) Prevention And Frustration



3.(iii) First Notices To Be Issued



- + FIDIC Red Book 1999 Clause 20.1
- + NEC3 and NEC4 ECC Clauses 61.3 and 60.1(19)
- + JCT Standard Building Contract With Quantities 2016 Clause 2.27.1

3.(iv) Ongoing Notices In Relation To Time (1)



- + FIDIC Red Book 1999 Clauses 4.21 and 8.3

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3.(iv) Ongoing Notices In Relation To Time (2)



+ NEC3 and NEC4 ECC Clause 32.2

+ JCT Standard Building Contract
With Quantities 2016 Clause 2.27.3

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3.(v) Ongoing Notices For Increased Preliminaries And Costs.



+ FIDIC Red Book 1999
Clauses 20.1

+ JCT Standard Building
Contract With Quantities
2016 Clause 4.21

3.(vi) No Notices Issued

- + If no suspension notices issued:
 - Check your contract – what notices should have been given? Can they be give retrospectively?
 - What are the alternatives e.g. side letter / variation?
 - What should be covered in any separate contractual statement as to the impact of a closed site due to COVID-19?

4. Impact Of Recommencement Of Works

- + What are the correct contractual notices to re-start (JCT, NEC3, NEC4 and FIDIC)
- + Re-start Payment Processes
- + Practical Issues To Consider

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4.(i) What Are The Correct Contractual Notices To Re-Start (JCT, NEC3, NEC4 and FIDIC) (1)



- + FIDIC Red Book 1999 Clause 8.12 and FIDIC Red Book 2017 Clause 8.13
- + NEC 3 and NEC 4 ECC Clause 34.1
- + JCT Standard Building Contract With Quantities 2016 Clause 3.10

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4.(i) What Are The Correct Contractual Notices To Re-Start (JCT, NEC3, NEC4 and FIDIC) (2)



- + FIDIC Red Book 1999 Clause 8.9
- + NEC 3 and NEC 4 ECC Clause 60.1(4)
- + JCT Standard Building Contract With Quantities 2016 Clause 4.22

4.(ii) Re-Start Payment Processes



- + FIDIC Red Book 1999 Clauses 1.3, 14.4 and 3.5 and FIDIC Red Book 2017 Clauses 1.3 14.4, 3.7.3
- + NEC3 and NEC4 ECC Clauses 12.3 and 13.2
- + JCT Standard Building Contract With Quantities 2016 Clauses 1.7 and 3.10

4.(iii) Practical Issues To Consider

- + Put a procedure / timetable in place – even if planned in advance
- + Key issues to address
 - Revisit site survey
 - Update programmes and ensure submitted in accordance with the terms of your contract
 - Remobilising the project team including costs
 - Engaging with your supply chain, plant hire companies etc
 - Approvals/permissions
 - Safe site operating procedures
 - Remote working

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Conclusions (1)

- + Keep up to date on the Government and industry guidance

- + If your site is closed:
 - Issue the correct notices
 - Carry out periodic risk assessments to see if can re-start
 - Practical steps: ensure correct picture of the works is captured; maintain contact with the project team and supply chain; progress of works that can be done remotely; consider time/money saving alternatives; maintain insurances and site security = full steam ahead when sites re-open

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Conclusions (2)

- + If your site is open:
 - Carry out regular risk assessments for assurance that guidance can still be followed for the operations being carried out
 - If the health and safety of your employees becomes at risk – stop work
 - Work with your supply chain, who may be subject to different restrictions that could impact on availability of materials
 - Consider the impact on programme and cost of any alterations made to working practices because of COVID-19

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Future Webinars

- + Beale & Co are producing regular COVID-19 related material for all the jurisdictions we operate in
- + The webinars and articles produced to date are on our website:
 - + Webinars – www.beale-law.com/beale-and-company-previous-webinars.php
 - + Articles – <https://beale-law.com/publications.php>
- + Our website will also advertise upcoming webinars on our events page here - <https://beale-law.com/events.php>



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Partner
T: +44 (0) 20 7469 0424
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E: j.vernon@beale-law.com

+ **Madeleine Kelly**
Solicitor
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