CONSTRUCTION ENGINEERING & INFRASTRUCTURE

COVID-19: Mitigating Impacts on Construction Projects
Introductions

+ Will Buckby - Partner
  - w.buckby@beale-law.com
  - +44 (0) 20 7469 0411
  - +44 (0) 7557 285841

+ Nadir Hasan - Associate
  - n.hasan@beale-law.com
  - +44 (0) 20 7469 0438
  - +44 (0) 7884 666959
COVID-19: Agenda

1. Effects of COVID-19
2. Impact on Projects
3. Notices and Operating the Contract
4. Consultants: ACE and RIBA
5. Safeguarding Your Contractual Position
6. Your Entitlements (Time and Cost)
7. Force Majeure?
8. Managing Your Projects
9. The Way Forward

- Your principal duty will be to your staff
- Ban on “non-essential” travel for “non-key workers”
- Must consider methods of working
- Keep the situation under review
Effects of COVID-19 (2): Effect on Your Projects

Ban on all ‘non-essential’ travel for ‘non-key workers’

Guidance from the Construction Leadership Council
Effects of COVID-19 (3): Effect on the Market

- 2020 Budget – spending 😊
- Impacts on employers
- Impacts on funders
- Generally: significant uncertainty
Impact on Projects (1): Delays

- Delays to construction projects very likely
- Shortage of labour
- Impact of industry and government guidance / measures
- Shortage of plant and materials
- Potential site shutdowns
Impact on Projects (2): Cost Overruns

- Increased costs and expenses very likely
- Cost increases caused directly by delay
- Cost increases caused by shortages
- Cost increases caused by late changes driven by COVID-19
Comply with your Notices

- Stringent notice requirements
- In all standard-form construction contracts
- In most standard-from consultancy agreements
- Time limits for giving notices
- Giving notice can be a condition precedent
- Very important: give notices in accordance with your contract
- If you don’t, you could lose your entitlements
- Take legal advice
Contract Administrators, Service Managers, Engineers

- Construction contract mechanisms are detailed
- Not just relevant to contractors
- Most construction contracts administered by consultants
  - Engineer under FIDIC
  - Project Manager under NEC ECC
  - Service Manager under NEC4 PSC
  - Architect / Contract Administrator under JCT
- Very important that consultants properly operate contract mechanisms
  - Review all notices given (including for timeliness / conditions precedent)
  - Assess all entitlements (including to time and money)
- Consultant ‘in charge’ has control of contract
ACE 2017 and RIBA 2018

+ **Common standard-form consultant appointments – reasonably straightforward**

+ Notice requirements?
  - RIBA? Yes: Clause 3.2.2
  - ACE? Yes: Clause 8.2 (and Clause 4.2, “early warning” – discussed later)

+ Extension of time entitlement?
  - RIBA: Yes: Clause 2.3
  - ACE: Yes: Clause 8.2

+ Additional payment entitlement?
  - RIBA? Yes: Clause 5.5
  - ACE? Yes: Clause 8.2
Safeguarding Your Contractual Position (1): Warnings

+ **Does your contract / appointment require you to give a ‘warning’?**
+ FIDIC Rainbow Suite 2017 (but not 1999 or earlier) - Clause 8.4
+ FIDIC White Book 2017 (but not earlier) - Clause 4.3.3
+ NEC3/4 ECC and PSC - NEC3 ECC Clause 16, PSC Clause 15
+ ACE PSA 2017 - Clause 4.2
+ Bespoke forms of contract / appointment
Safeguarding Your Contractual Position (2): Notices, Claims

+ **Does your contract / appointment require you to give notices / make ‘claims’?**

+ FIDIC Rainbow Suite (2017, 1999, previous versions) - Clause 20.1


+ NEC3/4 ECC and PSC - NEC3 ECC and PSC Clause 61.3

+ JCT Suite (2016 and previous versions) - SBC/Q 2016 Clauses 2.27.1, 4.21.1

+ Bespoke forms of contract / appointment
Safeguarding Your Contractual Position (3): Updates

Does your contract / appointment require you to provide updates?

  - Rainbow Suite 1999 Clause 4.21
- NEC3/4 ECC and PSC - NEC3 ECC and PSC Clause 32.2
- JCT Suite (2016 and previous versions) - SBC/Q 2016 Clauses 2.27.3, 4.21.3
- Bespoke forms of contract / appointment
Your Entitlements (Time and Cost) (1): FIDIC

- **Do COVID-19 / its effects (including government action) entitle you to relief?**

- FIDIC Rainbow Suite (2017, 1999, previous versions)
  - “Employer’s Risk” in unamended contracts (Clause 17.3)
  - Extension of time available for delays due to shortages (Clause 8.4(d))
  - Extension of time available for suspensions / site closures (Clause 8.4(e))
  - Entitlement to additional cost will depend on contract (e.g. Red v Silver Book)

  - “Exceptional Event” under 2017 White Book (Clause 4.6)
  - And “Changed Circumstance” under 2006 White Book
  - Extension of time available (2017 Clause 4.4.1, 2006 Clause 4.5.2)
  - Payment of additional cost available (2017 Clause 4.4.3, 2006 Clause 4.8.2)
Your Entitlements (Time and Cost) (2): NEC

- NEC3/4 ECC and PSC
  - “Employer’s Risk” in unamended contracts (Clause 80.1)
  - “Compensation Event” (ECC Cl 60.1(19), PSC Cl 60.1(11))
  - Suspensions / site closures / failures of others
    Extensions of time and payment of additional cost available (Clause 63, 65)
Your Entitlements (Time and Cost) (3): JCT, Bespoke

+ JCT Suite (2016 and previous versions)
  - “Relevant Event”; extensions of time available (Clause 2.29)
  - E.g. if it is ‘force majeure’, or if government action directly affects the Works
  - Unlikely to be a “Relevant Matter; additional cost unlikely (Clause 4.22)
  - Suspensions / site closures are likely to be Relevant Matters

+ Bespoke forms of contract / appointment likely to be more restrictive
  - But check for ‘circumstances outside the control of the contractor / consultant’ wording; this may provide some entitlements
Force Majeure (1): Contractually: FIDIC

+ Does COVID-19 comprise force majeure under your contract / appointment?

+ FIDIC Rainbow Suite (2017, 1999, previous versions)
  – These contain detailed force majeure provisions (2017 Clause 18, 1999 Clause 19)
  – COVID-19 probably constitutes force majeure (1999 Clause 19.1)
  – An extension of time will be available (1999 Clause 19.4(a))
  – Additional cost is unlikely to be available (1999 Clause 19.4(b))

+ FIDIC White Book (2017, 2006)
  – ‘Exceptional event’ / ‘changed circumstance’ provisions apply (see above)
Force Majeure (2): Contractually: NEC

+ NEC3/4 ECC and PSC
  – These contain brief force majeure provisions (ECC Clause 19, PSC Clause 18)
  – COVID-19 is likely to constitute force majeure
  – The effects of force majeure on time and cost are not stated
  – **Get an instruction!**
Force Majeure (3): Contractually: JCT and Bespoke

**JCT Suite (2016 and previous versions)**
- Force majeure is a Relevant Event (but not a Relevant Matter) (see above)
- An extension of time will be available (but not additional cost / expense)
- However “force majeure” is not a defined term in the JCT suite
- Will be given its ‘natural meaning’

**Bespoke contracts/appointments**
- Unlikely to contain specific force majeure clauses
- Unless specifically negotiated (e.g. for major / high-risk projects)
- But check for ‘circumstances outside the control of the contractor / consultant’ wording
- May be forced to rely on common-law doctrines (see below)
Force Majeure (4): At Common Law

- English law has no doctrine of ‘force majeure’ (unlike civil law jurisdictions)
- The prevention principle
- Frustration
Managing Your Projects

+ **Operate the contract!**
  - Issue warnings, give notices, make claims
  - Update programmes and budgets
  - Keep any remedies under review

+ **Communicate**
  - With your clients and with your subcontractors / suppliers
  -Ascertain their intentions (and any changes to these intentions)
  - Inform them of your intentions

+ **Safeguard**
  - Keep your employees safe
  - Mitigate the effects of COVID-19 on your projects
  - Follow government and industry guidance
Way Forward

+ **We think the following is a sensible ‘plan’ – at the present time**

+ If your employer has closed site / issued notice of suspension, comply

+ If not, carefully consider your position: stay on site if you can

+ Your entitlement to time and money – “Mexican standoff”?
  
  – Your first priority is health and safety: are the risks manageable?
  
  – If not – stop work! Inform your employer why, give all relevant notices
  
  – If yes, can you strictly follow the guidance (PHE, CLC, any others)?
    
    • If not – stop work! Inform your employer why, give all relevant notices
    
    • If yes, carry on working – but make sure you follow all updated guidance

+ There are real risks

  – To your employees’ health, safety and wellbeing
  
  – To the project
  
  – To your reputation
Future Webinars

**Upcoming webinars on COVID-19:**

- COVID-19 & Professional Consultants in Ireland: Contract and Payment Issues, BCAR and H&S concerns – *1 April 2020*

- COVID-19 GCC workshop: your questions answered – *2 April 2020*

- [webinars@beale-law.com](mailto:webinars@beale-law.com)
Contact Details

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