

Risks of Coronavirus for Construction Professionals

Review your contracts and ask for a Force Majeure Clause

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The impact of the outbreak of the Coronavirus, which has been declared a pandemic by the World Health Organisation, is still being considered and understood by the construction industry. Coronavirus has created real uncertainty for consultants and construction professionals and gives rise to a wide range of issues ranging from the day-to-day business management to compliance with contractual obligations in their appointments.

The UK government's latest advice, following the 23 March 2020 announcement of a wide-ranging lockdown, is that UK construction sites may remain open, subject to workers maintaining appropriate social distancing.

From a practical perspective consultants should consult their professional bodies' and professional organisations' websites for useful guidance and resources, including that set out on the Association for Consultancy and Engineering ("ACE") and the Royal Institute of British Architects ("RIBA") websites.

In relation to both current and future appointments, we set out below some of the key issues consultants need to consider to protect themselves from both a commercial and legal perspective.

Duty of Care and Early Warning

Consultants have a common law duty to exercise reasonable skill and care. This duty of care may include an obligation to warn clients of significant issues which may arise in respect of their services and the project as a result of Coronavirus and to advise on steps which could be taken to mitigate or avoid those issues.

Appointments also often include an express obligation for consultants to warn the client of issues that may affect the project programme or result in increased cost. For example:

- The RIBA Standard Professional Services Contract 2018 ("RIBA PSC") requires the Architect to inform the Client of any matters which may affect the project brief, the programme or the Construction Cost (clause 3.2.2).
- early warning notices are required under the NEC3 and NEC4 Professional Service Contracts (the "NEC PSC") and the ACE Professional Services Agreement 2017 ("ACE Agreement") (clause 4.2) in a range of circumstances.

Consultants should therefore keep their clients informed of the impact Coronavirus may have on their services and the project and consider whether an early warning notice should be given.

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Fees

Coronavirus is likely to delay services and the project and may require additional or varied services to be performed. A consultant's entitlement to an additional fee in such circumstances will very much depend on their appointment.

For example:

- RIBA PSC (clauses 5.5 and 5.6) and ACE Agreement (clause 8.2) provide for an entitlement to an additional fee if services are delayed, disrupted or prolonged due to circumstances outside the consultant's control, which could include Coronavirus.
- under NEC PSC the consultant will only be entitled to additional payment if one of the specified compensation events occurs (clause 60). For example, if a change to the Scope is instructed due to Coronavirus or if Coronavirus stops the Consultant completing the services or complying with the Accepted Programme.
- in the majority of bespoke appointments, an entitlement to an additional fee is dependent on agreement of fees in advance of the additional services and/or variations being performed.

This underlines the importance of discussing the implications of Coronavirus with the client as soon as possible. In addition, appointments often include timescales for notifying any events which give rise to additional payment (such as in the NEC PSC), which should be complied with.

In any future appointments consultants should seek to include an entitlement to additional payment for additional services and delay, disruption and prolongation arising out of circumstances outside their control.

Design Programme.

Coronavirus may mean that consultants are unable to carry out their contractual obligations to meet design

milestones or to comply with a programme. This could be as a consequence of staff shortages, site problems, delays in the planning system or other designers not providing information in time. Consultants should therefore review their appointments to check whether they have an entitlement to an extension of time and whether the contract includes strict obligations to comply with the programme or any applicable completion dates.

For example:

- the RIBA PSC provides that the consultant is not responsible for delays caused due to circumstances outside of its control (clause 2.3) and the ACE provides that the consultant is entitled to an additional payment following disruption caused by reasons outside the consultant's control (clause 8.2). Coronavirus would likely be outside the consultant's control.
- in the NEC PSC the programme and completion date must be complied with unless a compensation event has arisen (which it may not, see comments above).
- it is also not unusual for bespoke appointments to include strict obligations to comply with a programme with no right to an extension of time.

Any programme issues arising from Coronavirus should be discussed with the client and the project team as soon as possible and any extension of time requested or agreed if possible. Consultants should talk to other project team members and their advisors about ways of overcoming practical problems and keep accurate records of the issues they are experiencing. There could be arguments as to which party was the cause of a delay. It is also important to provide early comment on design deliverables programmes or information required schedules if they are unachievable or inaccurate.

There may well be current projects due to go on site next year where the delay in design could cause project start delays. Consultants should consider giving warnings that client delay in making decisions or giving approvals could

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threaten the programme. Also, delay in appointing other consultants or specialist contractors could delay the design programme.

Any future appointments should include an express entitlement to an extension of time if the Services are delayed due to circumstances outside of the consultants' control.

Construction Programme and Contract Administration.

Often consultants are appointed to perform the role of contract administrator and to review the works. In all cases contract administrators should ensure that they are correctly applying the contractual machinery and acting fairly and impartially as between the client and the contractor. Any claims for extensions of time and/or additional payment from the contractor will need to be assessed carefully.

It will be important for consultants to maintain detailed records of the stage of construction at any given time, both for the purposes of assessing contractor claims and to ensure that certified payments to the contractor do not exceed the value of works actually carried out on site

Suspension or Termination

Whilst suspension and/or termination may be an attractive "way out" of an appointment if the impacts of Coronavirus are significant, whether suspension or termination are an option will very much depend on whether the appointment entitles the consultant to exercise these rights.

For example:

- RIBA PSC (clause 9.2) allows for termination or suspension by the consultant on "reasonable grounds" which depending on the impact on the services, may include Coronavirus.

- ACE Agreement also provides for suspension if prevented or impeded due to circumstances outside the consultant's control (clause 13.3).
- NEC PSC only provides for termination by the client (and not the consultant) of the consultant's obligations where the consultant is prevented in performing the services due to no fault of either party (clauses 90.4 and 91.7 respectively).
- bespoke appointments often include limited rights for the consultant to suspend or terminate.

Existing appointments should therefore be reviewed carefully before deciding how to proceed. If possible to reduce the risk of a dispute, any "pause" to the services or termination of the appointment should be agreed with the client.

Consultants should request that all future contracts include an entitlement to suspension and termination for a force majeure event (the definition of which includes pandemics and epidemics). A force majeure clause should also exclude the consultant from liability as a result of the force majeure (we are aware that insurance advisors are now recommending this).

Frustration

The common law principle of contractual frustration may apply if Coronavirus makes it impossible for the consultant to perform its obligations (or is prevented from doing so). However, frustration can be difficult to prove and it is important to highlight that any claim for frustration should be very carefully considered (and legal advice sought) before any action is taken, so as not to risk breach (or repudiatory breach) of the appointment.

Keep Informed and Keep Appointments Under Review.

Consultants should keep the evolving situation under review. Existing appointments should be considered and may leave the consultant in a difficult position with limited

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entitlement to an extension of time, additional payment or to suspend or terminate.

To reduce the risk of potential liability it is therefore important that Coronavirus issues are discussed with the client and the project team as soon as possible and on a regular basis, with any required early warning notices given. Consultants should also create clear audit trails of advice provided to clients in relation to the issues.

Any future appointments should where possible expressly incorporate a force majeure clause, entitling the consultant to an additional fee and an extension of time, excluding the consultant's liability and including rights for the consultant to suspend and terminate following force majeure (including pandemics, epidemics and any circumstances outside the consultant's control).

If you have any queries and/or wish to discuss the issues in this article, please do not hesitate to contact Peter Sewell and Andrew Croft.

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