

Coronavirus update: CECA members' legal and contractual position

Webinar for the Civil Engineering Contractors Association on 28 May 2020



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Agenda

- The coronavirus legislation and the background in health and safety law
- Latest version of the Site Operating Procedures
- Insurance considerations
- Managing your contracts to mitigate the impact of the pandemic

Coronavirus legislation and illegality

- Coronavirus Act 2020
 - Temporary measures designed to amend existing or introduce new statutory powers to mitigate impacts of coronavirus on reduced workforce and pressure on health and death management services
- The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020
 - Closure of businesses and restrictions from 26 March 2020
- The Health Protection (Coronavirus) Regulations 2020
 - Provides for the detention, screening and other requirements, restrictions to be imposed on certain persons, isolation and enforcement measures.

Coronavirus legislation and illegality

- Supervening illegality and discharge
 - Under English law governed contracts, a contract is discharged if its performance becomes illegal by English law.
 - Doctrine requires illegality to prohibit performance.
 - Hindering or making it more inconvenient is not sufficient to constitute a vitiating factor.
 - *Waugh v Morris* (1872) the ship was prevented from landing the cargo by the authorities because of a fear about the spread of cattle disease.

"the performance by receiving the cargo alongside in the river without landing it at all was both legal and practicable".

Health and Safety obligations - 1974 Act

- Health and Safety at Work Act 1974
 - Section 2
 - “It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees”
 - Section 3
 - “It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety”
- *R v Swan Hunter (1982)*
 - main contractor had duty under section 3 to ensure subcontractors working safely

Health and Safety obligations - CDM 2015

- Construction (Design and Management) Regulations 2015
 - Client
 - reasonable steps to ensure that the principal designer and principal contractor comply with their CDM duties
 - Principal contractor
 - construction phase plan to be reviewed, and updated to ensure that works undertaken without risks to health or safety
 - required to consult workers on matters connected with the project which may affect their health, safety or welfare
 - Contractor
 - plan, manage and monitor construction work carried out either by the contractor or by workers under its control to ensure that so far as is reasonably practicable it is carried out without risks to health and safety

Site Operating Procedures 1/4

- Construction Leadership Council
- Guidance intended to introduce consistent measures on construction sites of all types and sizes in line with the Government's recommendations on social distancing and ensure employers and individuals make every effort to comply.
- Version 4 published on 18 May 2020. Incorporates a number of technical changes as a result of the recently published Government guidance on Working Safely during Coronavirus (COVID-19) - Construction & Other Outdoor Work.
- *Baker v Quantum Clothing Group (2011) per Lord Mance:*
“There is, in my opinion, no basis for the court to disturb the judge’s conclusion ... that the Code of Practice was an official and clear guidance which set an appropriate standard upon which a reasonable and prudent employer could legitimately rely in conducting his business.”

Site Operating Procedures 2/4

- Travel to Work

- Wherever possible workers should travel to site alone using their own transport.
- Where public transport is the only option for workers, consider:
 - Changing and staggering site hours to reduce congestion on public transport
 - Avoid using public transport during peak times (05:45 - 7:30 and 16:00 - 17:30)

- Site Access and Egress

- Stop all non-essential visitors
- Plan site access and egress points to enable social distancing
- Use signage to ensure 2 metre distance is maintained between people when queuing and reminding workers not to attend if they have symptoms and to follow guidelines

- Cleaning

- Regularly clean common contact surfaces in reception, office, access control and delivery areas and across the site.
- Particularly in communal areas and at touch points including door handles and push plates, hand rails on staircases and corridors, lift and hoist controls, machinery and equipment controls

Site Operating Procedures 3/4

- **Toilet Facilities**

- Restrict number using facilities at any one time and enhance cleaning regimes

- **Canteens and Rest Areas**

- Where possible, workers should be encouraged to bring their own food. They should also be required to stay on site once they have entered it and avoid using local shops.
- Where there are no practical alternatives, workplace canteens may remain open to provide food to staff with appropriate adjustments for social distancing. Canteens should provide a takeaway service providing pre-prepared and wrapped food only.

- **Changing Facilities, Showers and Drying Rooms**

- Increase number or size of facilities
- Restrict number using facilities at any one time

Site Operating Procedures 4/4

- Close Working

- Where distancing cannot be followed in full in relation to a particular activity, businesses should consider whether that activity needs to continue for the business to operate.
- If the activity is necessary, it should be risk assessed using a hierarchy of controls below and take all the mitigating actions possible to reduce the risk of transmission between staff.

- Hierarchy of controls

1. Eliminate
2. Reduce
3. Isolate
4. Control
5. PPE

Potential liability in relation to spread of infection at workplace

- **Civil liability**
 - Negligence / breach of statutory duty
 - Duty of care, breach, causation and damage

- **Criminal sanctions**
 - Unlimited fines
 - 2 years' imprisonment
 - Corporate Manslaughter and Corporate Homicide Act 2007

Insurance

- ABI: UK insurers expecting £1.2 billion in claims
- Construction
 - Professional Indemnity
 - Public Liability
 - “All Risks
- Business Interruption
- Employer’s Liability

Impact of the pandemic

- Large number of projects suspended, with progress severely curtailed on sites remaining open
- Particular issues relating to working in London and other major population centres

Who bears the risk?

- General rule is that risks are borne by the Contractor except where the contract specifically provides otherwise
- Position straightforward where the Employer closes the Site or the Project Manager/Employer's Representative gives instructions to stop work
- What if the Site remains open, and work can continue, albeit at a slower rate of progress?

NEC3/NEC4 Engineering and Construction Contract 1/4

- Clause 60.1(19) compensation event (“Prevention”):
- An event which
 - stops the Contractor completing the [whole of the] works or
 - stops the Contractor completing the [whole of the] works by the date [for planned Completion] shown on the Accepted Programme

NEC3/NEC4 Engineering and Construction Contract 2/4

- and which
 - neither Party could prevent,
 - an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it and
 - is not one of the other compensation events stated in this contract
- The Project Manager must give an instruction to the Contractor stating how he is to deal with the event (Clause 19.1)
- The Employer may terminate if forecast delay to Completion is more than 13 weeks (Clause 91.7)

NEC3/NEC4 Engineering and Construction Contract 3/4

- Option X2.1: a change in the law of the country in which the Site is located is a compensation event if it occurs after the Contract Date.
- Coronavirus legislation gives little or no grounds for a compensation event based on a change of law, except in Wales, where Regulation 6A of the Health Protection (Coronavirus Restrictions) (Wales) Regulations (as amended on 25 April 2020) provides that
 - *“a person responsible for work being carried on any premises must.....take all reasonable measures to ensure that a distance of 2 metres is maintained between any persons on the premises”.*
- Where Option X2 is not incorporated in the contract, consider whether the Works Information/Scope includes an illegal or impossible requirement, and if so notifying the PM under Clause 18.1 NEC3/ Clause 17.2 NEC4
- But this is similar to frustration at common law and almost certainly does not apply

Infrastructure Conditions of Contract (ICC)1/1

- Current suite of forms includes the With Quantities Version published in 2014, and others which follow the same format, including Design and Construct, Target Cost and a back to back Sub-Contract
- Network Rail use their own versions, including NR09 (Design and Construct), and NR12/ NR12A (Target Cost)
- Shared Risks entitle the Contractor to an extension of time, (*i.e.* relief from liquidated damages) but not payment of additional cost
- In the ICC but not the NR versions Shared Risks include “other special circumstances of any kind whatsoever which may occur”
- In both the ICC and the NR versions Shared Risks include Force Majeure

Infrastructure Conditions of Contract (ICC) 2/1

- Force Majeure is defined in Clause 14 as “any circumstance outside the control of either party and not attributable to the default of either party which renders it impossible or illegal for either party to fulfil his contractual obligations”
- This encapsulates the doctrine of frustration
- NR forms add reference to specific events “including natural catastrophes such as fire, earthquake, tsunami, volcanic activity or hurricane”
- Current pandemic is probably not a “natural catastrophe”, and NR contracts have probably not been frustrated BUT NR should accept the pandemic as a Shared Risk having regard to government guidance on relief

CECA Sub-Contracts

- CECA Sub-Contracts published in 2011 for use with the ICC Measurement and Design and Construction Versions published in same year
- Sub-Contractor has back to back rights in relation to an extension of time
- Similar provisions in relation to additional payment, but limited to adverse physical conditions and artificial obstructions
- Contractor otherwise has no liability in respect of any circumstance which affects the execution of the Sub-Contract Works
- CECA Generic Sub-Contract due to be published this year: position is as above but Clause 10(2) (Notices and claims) has been expanded

Government guidance on mitigating the impact of Coronavirus 1/2

- Procurement Policy Notes 02/20:
 - Supplier relief due to COVID-19
 - Guidance notes on Model Interim Payment Terms
- Government concerned about supplier insolvencies resulting in loss of employment:
 - *“The public sector must act quickly and take immediate steps to pay all suppliers as a matter of urgency to support their survival over the coming months. Where goods and services are either reduced or paused temporarily, authorities should continue to pay at risk suppliers to ensure cash flow and supplier survival.”*

Government guidance on mitigating the impact of Coronavirus 2/2

- Focus is on providing interim relief and support
- Cabinet Office guidance issued on 7 May urges parties to contracts to act “responsibly and fairly”.
- In a coordinated publication on the same date, the Construction Leadership Council issued “best practice guidance” for construction firms in dispute over contractual obligations during the coronavirus crisis.
- Both notes have status of guidance only but if followed should provide a framework for negotiated outcomes

Recommendations and conclusions

- Prevention/Force Majeure clauses could assist depending on exact terms
- Change of law provisions (outside Wales) unlikely to assist unless powers are exercised by the government under the Coronavirus legislation
- Comply with contractual provisions in relation to the service of notices (e.g. Early Warning/Risk Reduction Notices and compensation event notices under NEC3/NEC4)
- Keep detailed records of delays and additional costs incurred due to site closures and loss of productivity
- Encourage employers and PMs/contract administrators to implement Cabinet Office/CLC guidance
- Ensure that any contracts you agree going forward have specific Coronavirus risk allocation provisions

Q&A



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