



DUNCAN GRIMSHAW
DIRECTOR
HKA

COVID-19: A Briefing on Claims for Loss and Expense

Introduction

COVID-19 is causing confusion and uncertainty across the construction sector. The Government's advice about closure of sites is ambiguous at best and can be interpreted in several ways. This article considers (very briefly) the issues that might give rise to claims for loss and expense, what the claims might include, and what records should be kept. It is written from the perspective of a principal contractor, but the matters reviewed could apply equally to subcontractors.

Some employers and developers have already taken the decision to shut their sites, while others continue to operate - for the time being at least. In either scenario it seems probable that contractors will suffer financial losses, and delays, in the short to medium term. For sites that remain working some employers might seek to levy liquidated damages for late delivery if the contractor's progress is slowed.

Standard forms of construction contract were not written with pandemics in mind, and COVID-19 is uncharted territory for all concerned. Many commentators have pointed out that reliance on 'force majeure' clauses is the best way to protect the contractor's interests. However, it is worth remembering that although these clauses will provide relief from damages for late handover, they may not automatically provide a mechanism for making claims for losses arising from prolongation or disruption. For example, JCT contracts list force majeure as a Relevant Event - which would allow for a possible extension of time, but force majeure is not a Relevant Matter (Relevant Matters are those which allow for the recovery of Loss and Expense).

Moreover, not all standard forms include force majeure clauses. For example, NEC3 does not list this as a Compensation Event, although a possible way of circumventing this problem could be to issue an Early Warning Notice (under Clause 16.1) following which the Project Manager can give an instruction changing the Works Information (and this is a Compensation Event). These are not straightforward matters however, and this type of resolution is something about which a contractor should consider seeking professional advice.

A reasonable argument for not proceeding as originally planned might be the contractor's health and safety obligations to its employees and subcontractors - and for principal contractors all the people on the site. But this should not be treated simply as a matter of expediency, if the contractor thinks it is unsafe to continue working, it should stop.

If any claim for additional cost is going to be made, the contractor should notify the employer as soon as possible to avoid time-barring restrictions such as in NEC3, which could prevent a claim being made at all. An alternative, which might avoid potential contractual difficulties, is for the parties to enter a supplementary agreement to cover the period that COVID-19 impacts on site operations, and that allows the original contract provisions to remain in force. This would of course need careful drafting.

Prolongation and Disruption Costs

Delay analysis is beyond the scope of this article, except to state that it is crucial to maintain detailed programmes to track events that: a) cause

prolongation – so that these costs can be claimed, and b) that cause work to be undertaken in a disrupted manner.

In respect of losses, heads of cost that might apply in these circumstances are:

- Site costs for maintaining operations during periods of delay or shutdown: such as security, fencing, pumping, storage and accommodation;
- Head office overheads and staffing costs, or a proportion thereof;
- Mobilisation costs for off-hiring plant and re-delivering on resumption of the works;
- Movement of labour about the site – maintaining 2 metres ‘social separation’ could affect transport of labour across sites, and times for breaks and access to canteen facilities;
- Costs arising from re-sequencing of trades to avoid congested areas;
- Impacts on productivity cause by time for health screening and sick leave or self-isolation;
- Abortive costs for making buildings watertight, terminating services, or backfilling trenches to prevent collapse then re-excavating;
- Costs for carrying out commissioning more than once;
- Material, tools and equipment shortages, and increased prices from suppliers and subcontractors;
- And, costs arising from absences of the employer’s staff or the employer’s consultants, meaning a slow-down in the flow of information.

Whether a loss caused by working 2 metres apart is compensable is perhaps debatable, because if it was safe to work at that distance pre COVID-19 it might have been economical to do so, and to start to do so now could be a breach of health and safety requirements.

Other causes of loss and expense might be:

- Shutdown of manufacturing facilities, delays to exports and deliveries, border closures, travel restrictions and 14-day quarantine periods.
- And, insolvency - the spread of COVID-19 will impose significant financial burdens on the supply chain, and some companies will not survive.

“It is worth remembering that although ‘force majeure’ clauses will provide relief from damages for late handover, they may not automatically provide a mechanism for making claims for losses arising from prolongation or disruption”

Record Keeping

Accurate record keeping is crucial in demonstrating entitlement. Those making decisions about what is due will want to investigate what tender assumptions were made about labour, plant and materials and programmes, and compare these with the facts regarding the impact of COVID-19 on the project. Accurate records will assist with showing the

links between cause and effect, which is often the key factor in making a successful claim.

The records should include:

- Contemporaneous evidence which is updated daily about progress in all areas of the site;
- Programmes, labour and plant records;
- Evidence of any plant or labour working at reduced capacity or standing idle;
- Evidence of any delays in the delivery of plant and equipment;
- A list of any staff or operatives who are unable to work;
- A list of work-fronts that cannot proceed;
- Delays to the work of subcontractors;
- And, Increased costs from subcontractors and suppliers.

Also, contractors should try to separately calculate the effect of COVID-19, since simply stating the project is delayed and losses are being incurred will open up the possibility of counter-arguments that the contractor was late and was incurring losses anyway, and therefore COVID-19 does not have any significant effect.

If possible a claim should include a comparison with unimpacted work, as comparing actual progress and costs against what was allowed for in the tender assumes that the original work would have been carried out with optimal productivity – which is unlikely to have been the case.

Summary

Suggested actions are as follows:

- Submit notices about potential claims for loss and expense (and delay) as soon as reasonably practicable, but also consider under which contract clauses claims might be made;
- Consider health and safety obligations;
- Maintain detailed and comprehensive records;
- Separate COVID-19 impacts from other causes of loss;
- If possible, compare impacted works with unimpacted works;
- Consider negotiating a suitable approach to costs and delay with the employer;
- And, if in doubt seek professional advice.

If you require any further information, please contact Duncan Grimshaw at duncangrimshaw@hka.com.