

COVID-19: CONSIDERATIONS FOR DEVELOPERS

Construction Principal Clare Reed and Construction Legal Director Caroline Watkins share their tips and advice for developers.

Health & Safety: safeguarding the welfare of the workforce

- **The rules of social distancing:** “If an activity cannot be undertaken safely due to a lack of suitably qualified personnel being available or social distancing being implemented, it should not take place.”

Robert Jenrick, the Secretary of State of Housing, Communities and Local Government stated “If you are working on site, you can continue to do so. But follow Public Health England Guidance on social distancing.”

Ensure the Principal Contractor and/or Principal Designer, and/or Project Manager is constantly assessing the behaviours of other contractors/sub-contractors on the site to ensure that they are following the social distancing guidance.

- **Communication:** Communicate effectively with the Principal Contractor and/or the Principal Designer to ensure that the health and safety processes implemented during the pre-construction phase have been adapted to meet the new government guidance on social distancing, and make any necessary changes.
- **The statutory duty:** The Principal Contractor has a statutory duty to manage the health and safety during the works and that obligation continues notwithstanding COVID-19, therefore steps must be taken to ensure that the building(s) are safe and can be left in a safe and secure manner should that be required.
- **Health and Safety legislation:** Speak to the Principal Contractor and/or the Principal Designer to check that all relevant health and safety legislation can be complied with when following the social distancing guidance. Ensure The Health and Safety at Work Act is being followed to safeguard the welfare of the workforce; consider the nature of the work activity and put in place practical measures that follow the government’s guidance on social distancing, including:
 - (a) strict measures to clean reusable PPE thoroughly after each use and dispose of single use PPE after any use
 - (b) disable security systems that require fingerprint scanning or touching of any kind - i.e. ensure that gloves are worn and implement a different system to secure the site
 - (c) avoid cross-contamination by stopping workers from moving across various sites or locations, and
 - (d) consider putting a system in place so that anyone visiting the site is asked to check their temperature each day before starting work.
- **The Construction Leadership Council (CLC):** The CLC has produced written guidance on “Site Operating Procedures – Protect Your Workforce”, which should be implemented to secure the health and safety of your personnel. Essentially, if you, the Principal Contractor and/or Principal Designer - i.e. anyone managing health and safety should feel confident that you could not have been expected to have implemented any further measures or procedures in order to try to safeguard the health and welfare of your workforce; if that’s the case then any HSE Officer attending the site should think the same.
- **Site considerations:** Generally, your Contractor won’t be making any moves that are outside of Government guidelines, so you must agree between you whether to take the risk of continuing to work on site, and the parameters that staff must follow. If the parties differ in their views in this respect or as to whether to return to site and on what grounds, there is enormous scope for disputes later on.

Site Materials: durability and practical considerations

- **Supply chain:** Maintain good communication with your suppliers and contractors, especially where different materials are required for different stages of the works; check when materials are due to be delivered to site. If a suspension of the works is contemplated, speak to the sub-contractors and/or the suppliers and renegotiate any relevant delivery and payment dates so that they can speak to the supply chain and you can postpone any such payments until the works can recommence.
- **Storage:** Check the site to see if it has sufficient storage and/or protective equipment to safely secure and cover any un-fixed materials left on the site in order to avoid damage; also check whether the materials are durable or non-durable before ordering any protective covering.
- **Ownership:** Check any relevant contractual provisions to see who owns the materials and ensure that the site is secure to protect against any potential theft or vandalism.

Disaster recovery: retention of workforce, project information and confidentiality

- **Resilience of your supply chain:** Make sure that materials, components and skilled labour will still be available should the works need to be suspended, or alternatively, make sure you have sufficient materials on site, protected and stored securely, ready for when the workforce can return to continue with the works. Taking a joint approach in relation to how you go about managing the disruption of COVID-19 should mean that you can respond quickly, avoid disputes and agree responsibilities.
- **Risk Management:** The impact of COVID-19 is likely to cause significant delay and cost increases to projects that are already underway. In terms of disaster recovery, it's important to speak to the Project Manager, Principal Contractor and/or the Contract Administrator/Principal Designer to assess the potential cost and financial implications that COVID-19 is likely to have on the completion date, and to put into place appropriate business continuity steps that work with a revised programme for the works. Depending on the costs, it might be worthwhile considering appointing a Risk Manager to carry out this process, which could involve:
 - (a) initiation of disaster recovery/communication;
 - (b) planning;
 - (c) execution of plan;
 - (d) controlling the process and implementing changes, and
 - (e) monitoring.
- **Mitigation:** The presence of a good disaster recovery plan could be extremely beneficial should it become necessary to make a claim against any insurance policy cover; for example, it could be used to show an insurer that you have put in place a sound disaster recovery plan in light of COVID-19, which could help toward mitigating your losses.
- **Forward planning:** Each project has its own peculiarities, including elements of the build that require a skilled workforce, so it's important to assess what they are and put plans into place so that they can be dealt with appropriately
- **Project information:** Be proactive to protect your project information by communicating with the Contractor to ensure that all project information is kept up to date and can be obtained from the sub-contractors if necessary and at short notice.
- **Confidential information:** If the project is at a stage where certain information should be kept confidential, consider having some candid and important conversations with your professional team to ensure that they are willing to act in good faith, co-operate and comply with any contractual obligations to protect confidential information and documentation.
- **Suspension:** If suspending the works is sensible, consider agreeing new terms with the Contractor for them to remobilise back to site within a short period of time upon you giving them notice, and negotiate any remobilisation costs that need to be incurred.

Contract management

- **Contract notifications:** If a party doesn't notify of changes to the way they need to carry out the works or the content, they can forfeit the right to compensation. Don't try to impose changes too soon and make hasty decisions – identify your most critical suppliers first and test the waters.
- **Early warning:** An example of an early warning requirement is clause 16 of the NEC3 Engineering and Construction Contract ("ECC"), which obliges both parties to notify each other as soon as they become aware of a matter that could affect time, cost or quality. The parties should then meet (or call) to discuss how to avoid or mitigate the impact on the project. If the contractor later seeks an extension of time or additional costs, the early warning notices issued will be very important.
- **Extensions of time:** Requests for extensions of time have already started rolling in, and we would expect to see a series of these coming through as the government guidance changes the landscape of what is permitted on site. Most contractors have issued blanket requests for extensions of time in line with the three week lockdown, which could be extended. Make sure that these are issued correctly and responded to according to the procedure in your contract.
- **Reporting:** What are the reporting requirements in your contract? Many contracts require the parties to meet regularly to discuss updates to programme and cost, amongst other matters. In the current context, these "meetings" ought to be stepped up. Users of CEMAR and other project management tools will be finding the tracking of notices and events facilitated by the software to be invaluable at present, especially where rights and obligations are triggered by certain events (such as service of notices). You should ensure that your contract administrator is keeping track, and recording when notices are received.
- **Payment notices:** Your supply chain will no doubt issue you with payment notices; work with your contract administrator to ensure that these are scrutinised for potential overpayments.

Changing your contracts: Statutory position, JCT and NEC position

Making interim changes to the contract can circumvent needing to terminate early, or enabling a party to hit the red button of claiming frustration of contract (due to being unable to carry out its originally contemplated obligations).

How to change your contract:

- Changes to the contracts will be governed by the drafting. You should ensure that you're making changes in writing and communicating them effectively. When drafting changes, you should have your "back foot" position in mind. Don't be tempted to take risks based on a rosy view of contingencies; it would be better to collaborate with your suppliers and funders so that you are fully apprised of any pitfalls coming from elsewhere. Engagement with your suppliers and consultants on changes will promote the relationship between you politically and practically too, which will be important in the months to come.
- Make sure your changes are as joined up as possible with the related agreement for lease, facility agreement, supply chain framework agreement or otherwise. You don't want to end up in a situation where adherence to one contract causes a breach of another, so it's important to run different scenarios through planned changes before setting them in stone formally.
- Unless the drafting is atypically insightful, a pandemic requiring social distancing and/or lockdown won't have been in contemplation at the time of putting the contract together. We would strongly advise agreeing the value of the changes brought on by the effects of the pandemic against the risk profile and formalising these quickly and effectively between the parties in writing.

Changes under the standard forms:

- **JCT:** Changes under the JCT are managed under clauses 5.1 and 5.2. Changes are defined as "the imposition by the Employer of any obligations or restrictions in regard to the following matters ... access to the site ... Limitations of working space ...[or]... hours". The effects of COVID-19 will hit almost all of the criteria. You have the option to agree the value of the change between you or it can be assessed against the valuation rules in the contract.
- **NEC:** Under the NEC, changes to the Works Information must be notified to the Contractor by the Project Manager (on the Employer's behalf) under clause 16 of the ECC. The Works Information should be checked throughout for items which are affected by adherence to the Government guidelines. COVID-19 will probably constitute a compensation event under the NEC3 ECC (see Clause 60.1(19)), so NEC users can expect to see at least one coming their way.

- **Suggested changes – a non-exhaustive list**
- **Longstop dates:** If you can add a longstop date in your agreements with your investors, you can buy some time to prepare. For example, if drawdown is forfeited by the project not reaching milestones set down in the facility agreement, could a longstop date be added in the circumstances to moderate the forfeiture (to, for example, 50%) for interim contract certainty?
- **Force majeure:** The JCT 2016 contract lists force majeure as a Relevant Event (which enables extensions of time to be legitimately and objectively made), but no definition of what force majeure might constitute is offered. You might consider redefining it in your contract (with the advice of your respective insurers) so that a pandemic is included in the definition, if it isn't already. This is particularly useful in avoiding potential disputes over the right to suspend later on.
- **Notifications:** It's worth tightening up the notifications provisions in your contracts so as to avoid any surprises in future. It's possible that in months to come, declarations as to COVID status for site workers will be implemented for construction work so including provisions for reporting future compliance with legislation and Health and Safety Executive guidance is a sensible move.
- **Collaboration:** In a situation where no one holds the cards and collaboration is the key to project safeguarding, it would be wise to add in contract provisions such as regular all party calls, and adjusted KPIs if these aren't there already. By creating measurable contract success in the current climate, you'll be adopting a positive strategy to problems that could otherwise be divisive.

Other options / considerations

- **Third parties:** Parent company guarantees, overseas funding agreements, sub-contracting – all of these can ease the pressure on the contracting parties to deliver at all costs. Can you draw on a third party agreement, for example pulling in available funding elsewhere? Can you agree who will carry the cost of bespoke materials, such as the manufacturer? Transparency between upstream and downstream contract parties can reveal options and give a fuller picture of what's available to prop the contract up.
- **Check position with lenders and landlord:** What will drive the need for recovery of loss is the decisions made by the lender, investor or landlord and this influence will vary. They are likely to be concerned about their rights in terms of step-in should the project become abortive, and you are more likely to receive a warm response if you illustrate the key risks now.
- **Check supplier solvency:** Your supply chain will be making moves to preserve its solvency, and you should be aware of which of those risks are most critical. Look for warning signs, like inflated payment notices from your suppliers or movement of materials offsite. Make regular checks online for credit scores, and encourage your suppliers to be upfront about risks. Consider the support available for critical national infrastructure projects and whether your supply chain will be protected by this.
- **Insurance:** You should also be consulting with your insurer to establish whether there are any gaps and whether an additional cover is required. If you are an investor, it is worth investigating whether you can be added as a named insured on your supply chain's insurance cover so that you are indemnified in the same way as the developer.

Get in touch

If your business needs legal support with any issues arising from COVID-19, please get in touch with Clare or Caroline below.



Clare Reed
Principal
Dispute Resolution

0345 074 2342
clare.reed@emwllp.com



Caroline Watkins
Legal Director
Real Estate

0345 074 2496
caroline.watkins@emwllp.com