

Guidance

Construction and Engineering Industry Coronavirus – (COVID-19) – JCT 2016 and 2011 (Design & Build and Standard Building Contract)

- 1 This note addresses some of the key issues in relation to Coronavirus (Covid-19) (“Coronavirus”) in relation to the JCT 2016 and 2011 Design & Build (DB) and Standard Building Contracts (SBC). The focus of this note is advising on contracts that have already been entered into.
- 2 Please note that this a fast moving evolving event and there are likely to be further updates in due course. We will issue a revised note following any updated guidance from the government.
- 3 The three key considerations (the first two are linked) are:
 - 3.1 [claims for delay](#);
 - 3.2 [payment provisions](#); and
 - 3.3 [termination](#).
- 4 For information as to the position regarding insurance, please click [here](#). The view of the market is that unless Coronavirus is referred to in the policy (which is unlikely) it is not covered.

Claims for Delay

- 5 Such claims fall into two parts:
 - 5.1 [Claims for time](#);
 - 5.2 [Claims for money](#)

Time

- 6 The most frequently mentioned basis for a contractor to claim more time in respect of Coronavirus is force majeure.
- 7 Force majeure has no definitive meaning. Keating on JCT Contracts refers to a 1920 case which stated:

“This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control ... thus, war, inundations and epidemics are cases of force majeure; ...”

- 8 It seems likely, now that the WHO has declared the Coronavirus a pandemic, that the Coronavirus will, in principle, be treated as a force majeure event (at least in relation to those contracts entered into before the scale of the effect of Coronavirus became apparent). There are also other requirements to satisfy a force majeure event such as that the event is the sole cause of the delay.
- 9 Both the un-amended JCT 2016 and 2011 DB and SBC provide that force majeure is a Relevant Event but not a Relevant Matter i.e. a contractor gets time but not money.
- 10 In order to claim an extension of time for force majeure (or indeed for any other Relevant Event) under JCT, a contractor will have to show that the event has delayed the works and that as a result the completion of the works or any section is likely to be delayed beyond the Completion Date. The burden of proof lies with the contractor.
- 11 A contractor will also need to show, under JCT, that they have demonstrated “best endeavours” to mitigate the effects of any such delay. In order to comply with this, a contractor might have to, for instance, ensure that all on-site workers required by the latest government guidance to self-isolate do so for the appropriate period of time so as to avoid other workers becoming infected.
- 12 Other Relevant Events may come into play including:
- 12.1 If the government issues a decree which amounts to a change in law after the base date which causes delay;
or
if there are delays caused by statutory undertakers.
- As with force majeure, these are neutral events.

Money

- 13 There is also the possibility of any or all of the following, which are both Relevant Matters as well as Relevant Events. In other words they entitle a contractor to time and money:
- 13.1 The issuing of instructions (including instructions to postpone work). The issue of instructions to ‘change’ on-site access requirements, for example or the introduction of increased ‘cleanliness’ procedures may amount to a Change/Variation for the purpose of the JCT contract as it imposes an additional restriction on working arrangements or an instruction to alter working hours or access to parts of the site. Employers Agents/ Contract Administrators should think very carefully before issuing any instructions or guidance generally and in particular regarding:
- 13.1.1 working hours; and/or
- 13.1.2 access and/or working space.
- 13.2 Delays to permissions and approvals; and
- 13.3 Delays caused by employer impediment, prevention or default. This is very broad. It could cover where the employer has taken the risk of obtaining approvals from a local authority and there is a delay in receipt of an approval (due to Coronavirus). Another example may be where a contractor requires information from the

employer but there is a delay in receipt of information due to the employer staff having to work from home or a lack of access to documents.

- 14 If a contractor is able to show that it is entitled to a Relevant Matter, it will also need to demonstrate that it has mitigated the effects of that Relevant Matter (ie mitigated its losses). So for instance, during the Coronavirus event the contractor would not be expected to claim for its full prelims, but it might try to ask for de-mobilisation, re-mobilisation costs and any supply chain re-engagement costs.
- 15 Where there is a claim for time and money the issue of concurrency should be considered. The common law position is that where a Relevant Event occurs which is concurrent with something which is the contractor's risk (such as pre-existing delays in its supply chain) the contractor gets time but not money.
- 16 Employer's Agents and Contract Administrators should ensure that they carry out a review of the programme and the progress minutes to ensure that they understand the contractor's programme. This will enable them to determine the actual cause of delay. Contractors should ensure they keep full and accurate records of any delay and any costs associated with any delay.

Payment provisions

- 17 All parties should ensure that all notices required under the contract are issued on time. This is especially important for the employer in relation to both payment.

Payment

- 18 If the contractor makes an application for payment (which could include loss and expense for delay resulting from Coronavirus), which the employer does not agree with then it must serve a payment notice and/or pay less notice within the timeframe required (which is very tight). If the employer fails to do this, the contractor will be entitled to recover the amount it applied for. The employer is unlikely to be able to raise any defences to what is known as a 'smash & grab' adjudication. Employer's agents and Contract Administrators should be alert to this.

JCT - Termination

- 19 There is provision (clause 8.11) that either party can terminate by notice for force majeure before practical completion. This can happen if there has been suspension for the relevant continuous period. The period is stated in the Contract Particulars. This then has to be followed by a notice that unless the suspension ceases within 7 days of receipt of the notice, the contract may be terminated. Please note that there therefore needs to be:
 - 19.1 notice of suspension;
 - 19.2 7 day notice; and
 - 19.3 notice of termination



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