



Focus on  
**COVID-19**  
Coronavirus

**A&L Goodbody**

## Challenges faced by the construction industry

The COVID-19 crisis is having an unprecedented impact on the construction industry.

We have identified 8 key construction law issues in this note which may assist employers, contractors and consultants as we work through the COVID-19 crisis.



You will find a full range of timely materials for businesses in our dedicated **COVID-19 HUB** on our website.

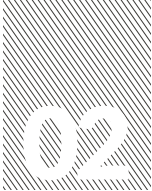
## Is it lawful to carry out non-essential construction operations in the United Kingdom?

In order to answer this question going forward, we would recommend staying alert to government legislation & guidance. You can keep up-to-date [here](#)

On 31 March 2020, the Secretary of State for Business, Energy & Industrial Strategy wrote an open letter to the construction industry advising that works **may** continue but should do so **in accordance with the Site Operating Procedures (SOPs)** published by the Construction Leadership Council. SOPs have been produced in order to help the construction industry implement the Government's social distancing recommendations on site but they also say that if an activity cannot be undertaken safely due to a lack of suitably qualified personnel being available, or social distancing being implemented, the activity should not take place. SOPs will be updated regularly and also cover issues such as site access, hygiene and PPE.

Further industry guidance has been published locally by the Construction Employers Federation (CEF) which can be accessed [here](#).

We would recommend that you regularly review both government and industry guidance to ensure that you are working safely and that any works that can progress in accordance with this guidance.



## What impact does COVID-19 have on Health & Safety issues and in particular the CDM Regulations?

All employers should continue to follow Health and Safety legislation. The latest advice for businesses in Northern Ireland generally can be accessed [here](#).

The CDM regulations also remain in place. As the Government's **current** position is that construction sites are not **required** to close so long as it is safe to keep working, a failure to close a site will not **automatically** put parties in breach of their CDM obligations.

However, CDM regulations must be applied to the particular site in the particular circumstances. This **may** require site closure but will at least require **additional measures** are put in place. SOPs should be reviewed carefully as although they don't refer directly to CDM regulations, they will likely be viewed as the benchmark for health and safety on construction sites generally.

Regulation 4 requires the **Client** to "make suitable arrangements for managing a project... [to] ensure that... the construction work can be carried out, so far as reasonably practicable, without risks to the health and safety of any person affected by the project...".

Regulations 11 and 12 require the **Principal Designer** to make sure all the designers' design comes together in a way that delivers a project that can be built and used safely (*regulation 11*). The Principal Designer also has a role in preparation of the construction phase plan (*regulation 12*).

Regulations 14 requires the **Principal Contractor** to "make and maintain arrangements which will enable the principal contractor and workers engaged in construction work to cooperate effectively in developing, promoting and checking the effectiveness of measures to ensure the health, safety and welfare of the workers..." and Regulation 15 requires the Principal Contractor to plan, manage and monitor construction work... to ensure that, so far as is reasonably practicable, it is carried out without risks to health and safety."

**Crucially, all parties have a role to play in ensuring the project complies with CDM regulations.** Employers, consultants and contractors should all be considering what action is required of themselves as the situation progresses.



## What steps should a Contractor take if the works are delayed or are likely to be delayed?

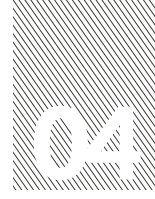
COVID-19 will almost certainly cause significant delays to the construction works. We would therefore recommend reviewing the contract as soon as possible to ascertain **where the risk lies, and whether any action is required in order to protect your position.**

COVID-19 may well be a force majeure event. Generally, a force majeure clause will apply where there has been an occurrence of events outside the party's control that may entitle it to suspend the works and an extension of time. It should, however, be noted that there is no embracing concept of what force majeure means nor will a force majeure event have the same legal consequences in each particular case. The precise operation of the force majeure clause will depend on how it is drafted and the governing law of the Contract, but typically it operates to allow one (or both) of the parties to be excused from performance, or allow a party to suspend performance of some or all of its operations under the Contract, if the event occurs and has an effect on the works.

If you are contracting under an **NEC** contract, an early warning notice should be issued by the Contractor and a (remote) meeting should take place to discuss the potential impact of COVID-19 on the programme. The Project Manager should also consider if he should issue a prevention instruction, which he is required to do if events have "stopped" the Contractor from completing the works on time.

COVID-19 may give rise to a number of Compensation Events, entitling the contractor to additional time to complete the works. **Contractors should check the contractual requirements to notify Compensation Events as there are usually strict timeframes in which to do so. Failure to comply with these timeframes may result in the entitlement to additional time being lost. It is critical therefore that all of the parties to the Contract continue to operate the Contract properly and comply with their obligations relevant to the applicable situation.**

Regardless of the form of contract/appointment there will almost certainly be clauses within the Contract which deal with delays to the works and which allow a contractor to apply for an extension of time to avoid having to pay liquidated damages. Strict compliance with these clauses will be of fundamental importance to a contractor, especially if the Contract contains a condition precedent which may bar the contractor from obtaining the required relief, if it fails to give the notice within a required timescale. Therefore, even if the contractor has a perfectly valid claim for an extension of time the relief may well be lost.



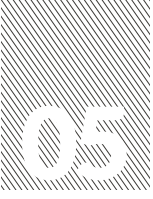
## Can a Contractor claim for Loss and Expense or Additional Sums as a result of delays to the Contract?

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We would recommend at an early stage considering whether, or not a party to the contract is entitled to additional sums due to COVID-19. The entitlement to additional sums is not likely to arise from the COVID-19 situation of itself, but may arise from, for example, certain delays or an instruction to postpone the Works.

As with extensions of time, there are often requirements for the Contractor to notify of any such entitlement within the timeframe set out in the contract (for example, NEC contracts usually require notice within 8 weeks and JCT contracts generally require notice as soon as the matter becomes reasonably apparent).

Whatever the form of contract, it should be reviewed to ascertain if there is any entitlement to additional sums and if any action is required to protect such entitlement. Again, Contractors should check the requirements of the contract very carefully to ensure that it complies with any condition precedent which requires it to give a notice within a particular timescale. As with claims for extensions of time, an entitlement to loss and expense or additional sums may well be lost no matter how meritorious the claim, if the Contractor fails to comply with the notice requirement set out in the Contract.



## Is it possible to rely on Force Majeure if there is no written Contract or if the Contract does not include a Force Majeure clause?

If the Contract does not provide for force majeure then it cannot be implied into a Contract as a matter of law and the parties will be forced to rely on the common law doctrine of frustration. This doctrine only applies in very limited circumstances and in particular it cannot be invoked by a party who finds contractual performance difficult or unprofitable.

While COVID-19 and the relevant restrictions imposed by the Government Regulations may amount to frustration if the performance of the particular Contract is impossible or radically different from what the parties anticipated, each case will depend very heavily on its own particular facts. If the Contract is frustrated, it will then be at an end and the parties will be discharged from any further obligations. Importantly, there is no compensation for what the parties expected from its performance and while a party may recover the value of a benefit obtained by the other party, the doctrine is of no real practical assistance in managing or apportioning losses.

Reliance on the doctrine of frustration will be of no practical commercial benefit to those parties who wish to carry on with their commercial relationship and they will not be able to avail or receive a temporary reprieve for any possible breach of Contract which the inclusion of a force majeure clause may have allowed them. Nevertheless, it is open to either party if they wish to commercially continue their contractual relationship to mutually agree to suspend their contractual obligations to one another so that no liability for breach of contract will arise.



## When can a Construction Contract be terminated as a consequence of COVID-19?

Whether, or not COVID-19 will entitle a party to terminate the contract will depend on the precise wording of the contract, the circumstances and the conduct of both parties. **Very careful consideration should be given prior to exercising any termination rights. We would always recommend legal advice is obtained prior to taking such a step.**

Generally, JCT forms of contract entitle a party to terminate the contract only where the delays are the fault of the other party. That cannot be said of COVID-19 of itself, but how either party deals with COVID-19 may give rise to a right to terminate.

In NEC contracts, there are a number of events which may occur that would entitle one of the parties to terminate. In particular, there is generally a right for either party to terminate the Contract if an event occurs that may delay the completion of the Works by more than 13 weeks.

Termination clauses should be considered so that each party knows their own rights, and that of the other party in these circumstances.

In addition to contractual rights to terminate, parties should also be aware of the common law doctrine of frustration. Frustration occurs when obligations can **no longer be performed or where the circumstances would render the contract radically** different from that which was agreed.

## Can urgent work be procured without offending the Public Procurement Regulations?

The Cabinet Office published a [Procurement Policy Note](#) on 18 March 2020 outlining how contracting authorities can procure Works, Services and Supplies urgently in light of the current pandemic. On 1 April 2020, the European Commission also published welcome [guidance](#) on using the public procurement framework in the “*emergency situation related to the COVID-19 crisis*”.

Both guidance documents confirm that contracts can be entered into by way of direct award procedures, however there are restrictions on when these options can be used. Case law has clarified that the use of a negotiated procedure without prior advertisement (i.e. a direct award) is exceptional and the circumstances justifying its use will be interpreted narrowly.

Contracting authorities must also be able to establish a “causal link” between the unforeseen event and the extreme urgency. Given the exceptional nature of the procedure, contracting authorities must be able to justify their choice of the negotiated procedure

The Cabinet Office guidance also outlines other permitted methods for Contracting Authorities to call off Works and Services urgently as a result of the current crisis, namely:

- call off from an existing framework agreement
- call for competition using standard procedures but under accelerated timescales
- extending or modifying an existing contract

The specific requirements around using these methods as a route to engage contractors are set out in the guidance note however one common theme across all options is that Contracting Authorities will need to justify their use of these options.

On 25 March 2020 [NI CPD published PGN 01/20](#). The guidance published in response to COVID-19 is aimed at assisting cash flow to those contractors engaged with the public sector by ensuring payments continues to prevent supply chain disruption. For example payment should still continue for Services even where they cannot be fully provided due to the current situation with a view to reconciliation at a later stage.

The guidance also states that the public sector should work with contractors to provide relief against contractual terms (such as meeting KPIs). The aim is to ensure continuity of these contracts and is considered the preferred approach rather than utilising other forms of contractual relief such as force majeure.

## What if a Construction Contract is in the process of being agreed?

Very careful consideration should be given in the current climate to entering into any new contracts. Generally speaking, **force majeure will not apply to recently entered into contracts** as the parties are aware of the issue upon execution of the contract.

We would recommend that you regularly review both government and industry guidance to ensure that you are working safely and that any works that can progress, do so in accordance with this guidance.



Please do not hesitate to contact A&L Goodbody if you wish to discuss any of the matters raised in this publication.



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