



ARTICLE

COVID-19: Beyond Notification...What Next?

Much has already been written about the impact of the current COVID-19 pandemic on construction contracts, in particular with regards to notification and force majeure. However, in commercial terms, the most significant impacts of the virus may yet to be felt. Whether or not the pandemic is a neutral event under your contract or is a specified risk, or even if your contract is silent on the matter, there are certain steps that should have been taken and processes implemented to manage the risks associated thereto. In this article we briefly look at some of the areas you should be considering to mitigate those upcoming risks.

Securing your supply chain

What strategies have you developed to address supply chain interruptions?

Within the Asia Pacific region, as globally, a significant risk exists with regards to securing supply chains for resources and materials. With lockdown implemented in multiple countries across the region, major disruptions to the supply of materials, equipment and labour are not only being experienced, but can be expected to continue for a significant period. Furthermore, it is expected that many of the world's governments will initiate infrastructure projects to stimulate their economies, once the pandemic is under control, which is likely to put significant further stress on already weakened supply chains.

With this in mind, do you know:

- Where the major resources for your project originate from, and has that region been impacted by the virus?
- If there are alternatives (suppliers, products etc.)?
- If a change in specification could be agreed to for alternatives?
- If there are public procurement considerations in securing alternative suppliers?
- Which projects you should prioritise or how you will manage the supply of common materials across multiple projects?

Identifying COVID-19 driven events

The key to recovery of time and/or cost under your contract is likely to be your ability to link the cause and effect of any delay or additional cost directly to the COVID-19 pandemic. As such, do your:

- Current processes clearly identify the direct cause, and its impact on delays to progress and/or additional costs?
- Daily records record specific actions resultant therefrom and allow the demonstration of lost productivity?
- Existing records contain sufficient information to demonstrate prior performance?
- Personnel keep detailed diaries of their work (ideally prior to, during and subsequent to the impacted period)?
- Partners also have similar measures in place for maintaining records and if not, how can you help them implement such measures?
- Cost records separately identify discreet additional costs directly attributable to the pandemic?

Additionally, are you maintaining formal lines of communication which record, and update the other parties of the continuing delays, mitigatory measures employed and project status during the impacted period? These considerations are particularly important when your contract requires ongoing updates of notifications and claims.

Health and safety onsite

Health and safety is always of the utmost importance on construction projects, and never more so in light of the increased risks to health due to COVID-19. Have you revised and updated your health and safety procedures to:

- Account for any regulatory changes (social distancing measures etc.)?
- Train your workforce on the use of any additional PPE that may be required?
- Train your workforce on the symptoms of the virus and what to do if they display any of the symptoms?
- Ensure an adequate and timely response to any reported infections?

Suspension or termination of work

Whether or not a formal suspension of your project has been notified, for example under a force majeure clause,

it is possible that termination rights may be triggered. Are you aware of:

- What rights exist under the contract for suspension and/or termination of performance?
- Whether the suspension or termination notice has been issued strictly in accordance with the contract?
- Any upstream contractual interfaces that may trigger termination rights e.g. are there overriding development or concession agreements on the project?
- Whether the current situation meets the requirements for the legal doctrine of frustration, or the local equivalent thereof?

Additionally, are you complying with any specific requirements in your contract with regards to suspension or termination of the works e.g. notification, record keeping and/or demobilisation requirements?

Review your insurance policies

Whilst there is a significant body of information online stating that there is no insurance coverage for COVID-19, this position is not necessarily correct, and you should not automatically assume that this is the case. All insurance policies vary and it is the case that some do cover epidemic(s) and/or pandemic(s). All your insurance policies should be reviewed and where there is even the potential for coverage a claim should be reported, and the insured's rights reserved. As with a claim under your construction contract, you should maintain extensive records and documentation to justify a claim under an insurance policy. You should also keep in mind that a thorough and well-presented claim is more likely to be given priority by your insurance provider.

Negotiating new contracts

In addition to the impact on ongoing contractual relationships, the relationship between you and the counterparty to any new contract "post COVID-19" should also be closely considered. For example, would force majeure provisions still capture the potential delays to the contract, or would a new wave of COVID-19 be considered foreseeable? Likewise, would any statutory provisions still apply in a second wave of the pandemic?

It will be important to consider when negotiating a new contract, issues including, but not limited to:

- How may relief be sought as a result of future epidemic(s) and/or pandemic(s) and what type of

relief (time, cost or both), should a specific relief clause be included or should it be included as a relevant event?

- How notices should be served, will electronic forms be acceptable should a lockdown be enforced by a future epidemic and/or pandemic?
- Should dispute resolution procedures specifically allow for video conference hearings?
- Insurance arrangements (with specific regard to the inclusion of clauses relating to coverage for epidemic or pandemic and/or the effects thereof).
- Warranty, indemnification and limitation of liability provisions.
- Suspension and termination clauses. Should specific allowances or terms be included with reference to epidemic and/or pandemic?
- On a more practical level with regard to day-to-day project management, if there are to be travel restrictions in place, could the witnessing of tests be done via video conference?

The above highlights some of the initial considerations and actions that should be taken, whether or not there is entitlement to recover an extension of time and/or costs under your contract.

FTI Consulting is already working on numerous construction projects internationally where we are assisting our clients in addressing COVID-19 related impacts. Our experience with construction disputes, formal dispute resolution proceedings and effective claims management systems equips us to advise on strategies to avoid disputes, manage claims and mitigate your exposure to ongoing project risk as a result of the COVID-19 pandemic.

Now is the time to prepare your COVID-19 Recovery Plan. For more information on how FTI Consulting is best positioned to help you, please contact any of our APAC office leads below.

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