



Turner & Townsend

Managing the contractual impact
to construction projects across
Africa

We are opening up our contract helpdesk

Over this period of uncertainty, our helpdesk is available to offer advice at no charge to support you with any African contract related queries you may have, be it to understand your current situation and where you stand, or to anticipate how you could be effected in the weeks and months to come.

We can help in particular with issues relating to: contract risks and effective management, detailed assessments, commercial impacts, guidance on potential delivery delay, and comprehensive supply chain audits.

We can assist in protecting your commercial interests should your project shut down or you require detailed protocols to be implemented if your site or project team's office needs to close. We're here to help you to maintain a focus on safety, speed and site security.

Our Contract Services Helpdesk is operated by a team of highly experienced contract and procurement specialists. They will guide you through your options and support you to navigate through COVID-19 and its short, medium and long term impacts.

Would you like some free advice?

For one hour of free advice

on any contractual problem, contact us on:

csafricahelpdesk@turntown.com



Areas of disruption

On the 11th March 2020, the World Health Organisation (WHO) declared the COVID-19 outbreak to be a pandemic. As global supply chains are affected, the virus is having a serious effect on the economy.

It is clear that COVID-19 is causing serious disruption and even suspension of works to projects due to labour and material shortages.



Contract changes

COVID-19 is a significant event and as such, is likely to be classed as an event/change under the contract. This does not mean that the Contractor is automatically entitled to full or partial compensation. The event will still need to be assessed and its impact understood against the progress of the works. If the project is already in delay for other reasons, COVID-19 may **not** lead to compensation



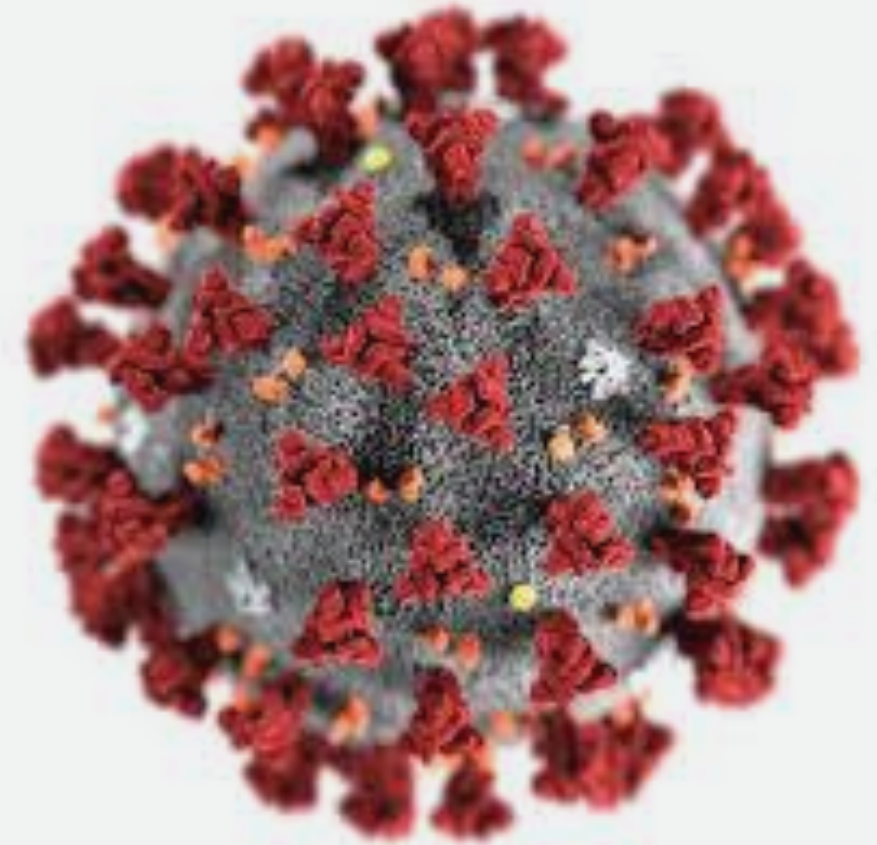
Supply chain disruptions

Supply chain disruptions, such as the temporary closures of factories and manufacturing sites, will lead to delays, shortages and a potential peak in product prices.



Operation shut downs

Without a crisis plan, site closures and the demobilisation of workers could have a serious impact on project timescales and costs.



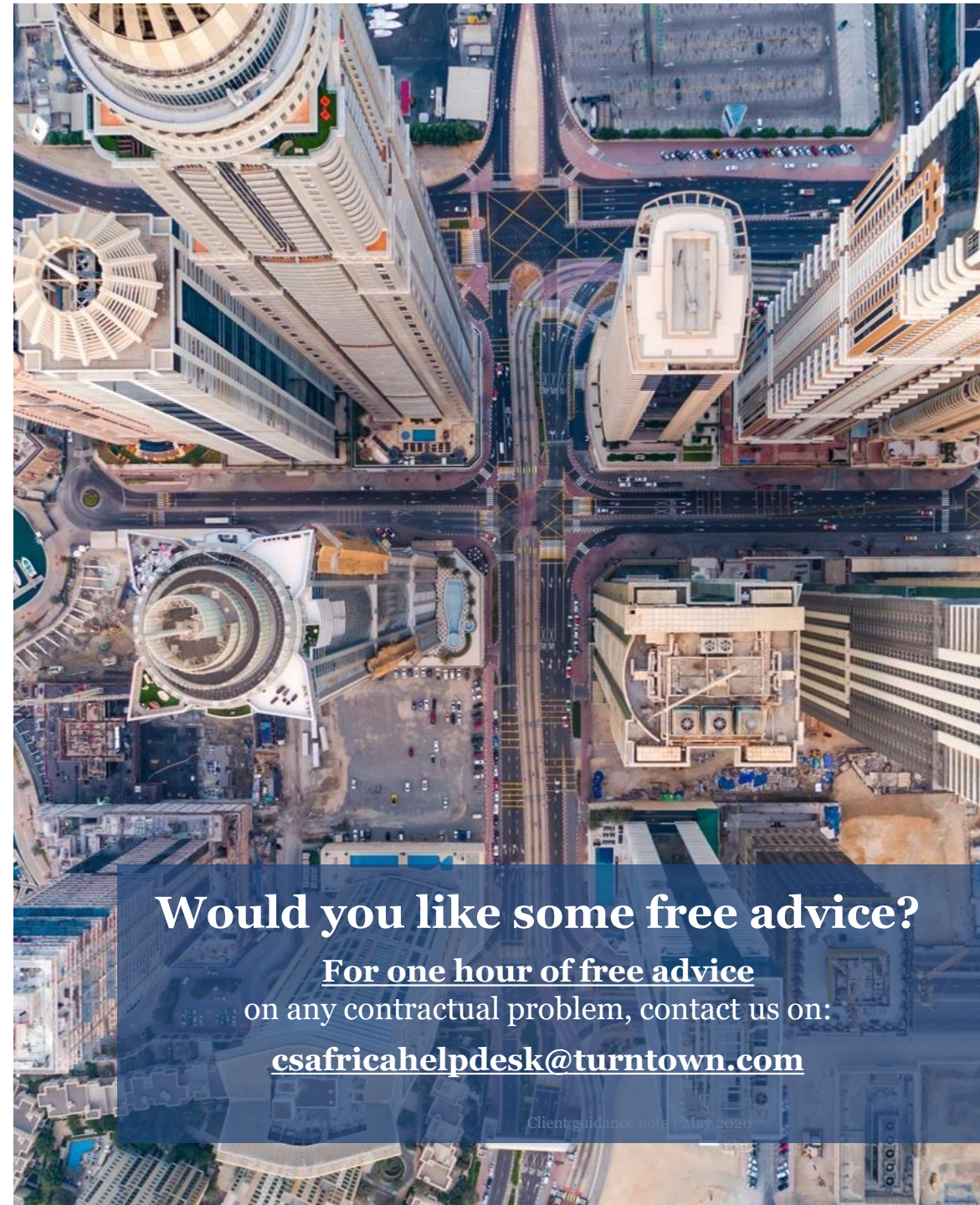
Where to start

There are three key impact areas of focus for Construction clients to manage the risks created by COVID-19:

- 1** Contracts
- 2** Supply Chains
- 3** Operations

Being proactive and carrying out detailed reviews of projects to identify strategies that can manage these risks, will help to reduce the impact on your projects.

Every project has its own unique challenges – professional advice will identify the best solution for your specific situation.



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1 Key impact area: Contracts

Do you understand the risks of your contract, where risk lies and how to manage it?

Contract Review:

What does your contract say about:

- Force majeure, epidemics or pandemics
- Suspension provisions
- Termination provisions
- Extension of Time provisions and entitlement to time and money

Insurance:

Check whether your insurances cover any of your losses and seek specialist advice with regard to existing insurance provisions.

Future contracts:

Instruct lawyers to include 'express infection disease/epidemic' provisions in new contracts and, where possible, amend existing contracts. You should consider who will hold this risk as well as how it can be managed and by whom for upcoming projects.

Other agreements

Consider if there any other agreements, such as development agreements, off take agreements, lenders agreements or agreement for lease, which need to be notified of delays and/or increased costs.

Records

Request/mandate that main contractors collate detailed records of resources and additional costs incurred as a pre-requisite to claims for additional time and/or money on projects.





Key impact area: Supply chain

Do you know what issues your supply chain has – and the impact to your project?



Audit supply chain

Conduct end-to-end supply chain audits to identify possible delivery delays, shortages and increased costs.



Monitor supply chain

Monitor supply chains for early warning signs of distress, such as requests to change payment terms, deliveries not in accordance with the programme, lack of communication, or where suppliers are not delivering in accordance with agreed schedules or contract terms.



Key impact area: Operations

Do you have a “Plan B” that helps project teams will approach problems consistently?



Site shutdowns

Produce protocols to be implemented if a site or project team's office needs to close. Consider how this can be done safely and quickly, whilst maintaining the security of the site. Take note of any insurance requirements.



Health and safety

Understand your health and safety obligations to both your employees and Contractors. Consider what facilities you need to provide to minimise the risks (e.g. increased washing facilities).



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**Do you fully
understand the
risks of your
contract, where
risk lies and how to
manage it?**

Joint Building Contracts Committee (PBA)

Whilst FIDIC contracts are widely used across Africa, in the SADAC region the JBCC is also often used.

The JBCC (PBA) is often used across sectors and on projects of various complexity and value. The JBCC documents have been approved by the Construction Industry Development Board (CIDB) and are often used by national, provincial and local authorities in South Africa.

We have encountered the use of the JBCC in other neighbouring countries mostly in the SADAC region. The JBCC (PBA) has undergone a few revisions and our comments are premised on the current May 2018 (edition 6.2).

To illustrate this, we have highlighted differences between the 1999 and 2017 FIDIC Red Books and the JBCC focusing on the following topics:

- Force Majeure;
- Suspension; and
- Termination.



1 Force Majeure

Like the 1999 FIDIC Red book the JBCC uses the term “Force Majeure”. The definition of Force Majeure used in the JBCC is similar to the 1999 FIDIC Red book definition used in clause 19. As mentioned above, the 2017 FIDIC Red book refers to “exceptional circumstances” as opposed to Force Majeure.

The JBCC does not refer to a “*pandemic or epidemic*” but within the definition, there is a list of examples provided for grounds that would satisfy the Force Majeure test. The list provided in the JBCC is not an exhaustive (similar to the list in FIDIC) but are examples of events that would satisfy the JBCC test for a Force Majeure event.

The declaration of the COVID-19 outbreak as a ‘pandemic’ by the World Health Organisation (WHO) on 11 March 2020, would likely satisfy the definition of ‘*Force Majeure*’ referred to in Clause 1.1 (Definitions) in the JBCC.

This could therefore present grounds for a revision of the Practical Completion Date to the extent that the Contractor is able to demonstrate that a Force Majeure event has occurred (clause 23.1 of JBCC). The Contractor is not entitled to an adjustment of the contract value.

As is the case with the FIDIC contracts, the Contractor is required to submit a notice of claim within 20 days (clause 23.4 OF JBCC) of the event arising and risks losing entitlement if they fail to do so.



2

Suspension

The 1999 and 2017 FIDIC Red Books, permit the Engineer to instruct the suspension of the works. The JBCC allows the Contractor in clause 28 to suspend progress of part or all of the works. The Principal Agent in the JBCC does not have the authority to instruct a suspension of the works.

JBCC permits the Contractor to suspend the works for events that pertain mainly to payment, insurances and failures by the Employer or Principal Agent (clause 28). There is no provision that would allow the Contractor to suspend the performance of the works due to Force Majeure.

Where the Contractor suspends the works, the Contractor shall instruct each subcontractor to suspend the n/s subcontract works. If the Contractor suffers a delay and incurs cost due to the suspension, upon resumption it is entitled to a revision of the date of practical completion and an adjustment of the contract value.

The use of the suspension provisions should be a serious consideration for Clients if practical circumstances and/ or government directives dictate that works need to be stopped due to the outbreak of COVID-19.

3

Termination

Unlike the 1999 and 2017 FIDIC Red books that contain a provision dealing with prolonged suspension, the JBCC does not have a similar clause.

The JBCC permits either Party to terminate the Agreement if the Force Majeure events persists for a period of time.

The JBCC states that if the progress of the works ceases for a continuous period 90 calendar days or intermittent period totalling 120 calendar days as a result of Force Majeure or the exercise of statutory power by a body of state or public or local authority that directly affects the execution of the works, either Party may give notice of intention to terminate (clause 29.20.2).

In the above clause the ground for termination is not solely attributable from the occurrence of a Force Majeure event but also the exercise of a statutory power. The pre and post legislation issued by the Government may satisfy the second condition of clause 29.20.2.

Clients should be aware of this clause, obtain legal advice and discuss termination with the Contractor if such circumstances arise.

JBCC Contract: what can an employer/client do?

JBCC contract provides somewhat different provisions to the 1999 and 2017 FIDIC Red Books.

It would therefore be prudent for Employers to ensure that the following are carried out:

- A review of the contractual provisions with the Principal Agent/lawyers/other advisors, to understand the benefits and risks of different provisions.
- Consideration of how the JBCC contracts and Force Majeure provision is to be interpreted within the framework of the laws of each jurisdiction (outside of South Africa).
- Checks to ensue that the programme is up-to-date and that there is an understanding of the critical path and concurrent/ parallel delays - this will assist in the agreement and award of any extension of time.
- The Contractor should (where applicable) be advised that the contractual procedures relating to claims for revision of the date of practical completion and adjustment of contract value (where applicable), should be followed. The Contractor should also be advised that detailed supporting particulars of the amount of any adjustment of the contract value claimed will be required.



Overview

TOP TIPS:



- ☐ **Ascertain what the governing law of the contract is**
- ☐ **Verify if the contract you have has a Force Majeure clause**
- ☐ **Have you given a notice?**
- ☐ **Assess what the actual progress of the works were prior to the COVID lockdown**
- ☐ **Ascertain if transfer of ownership of equipment pre-ordered has been transferred to employer**
- ☐ **What records exist to support the above position?**
- ☐ **What is your strategy for restarting the works?**

For more information email csafricahelpdesk@turntown.com

Get in touch

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