



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



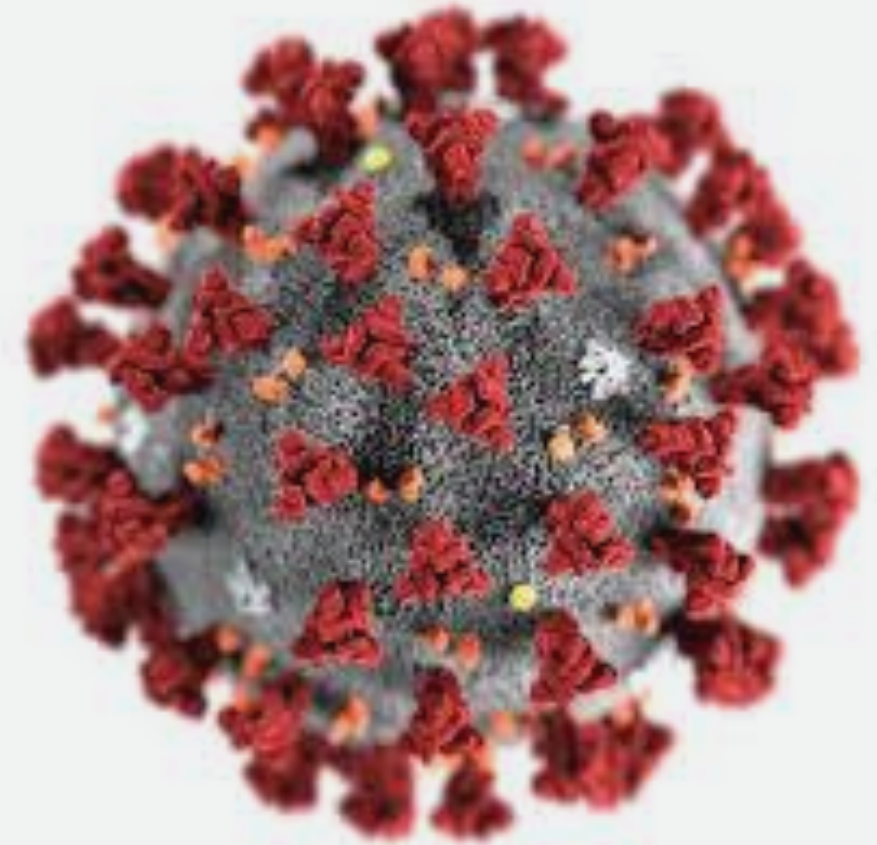
Supply chain disruptions

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.



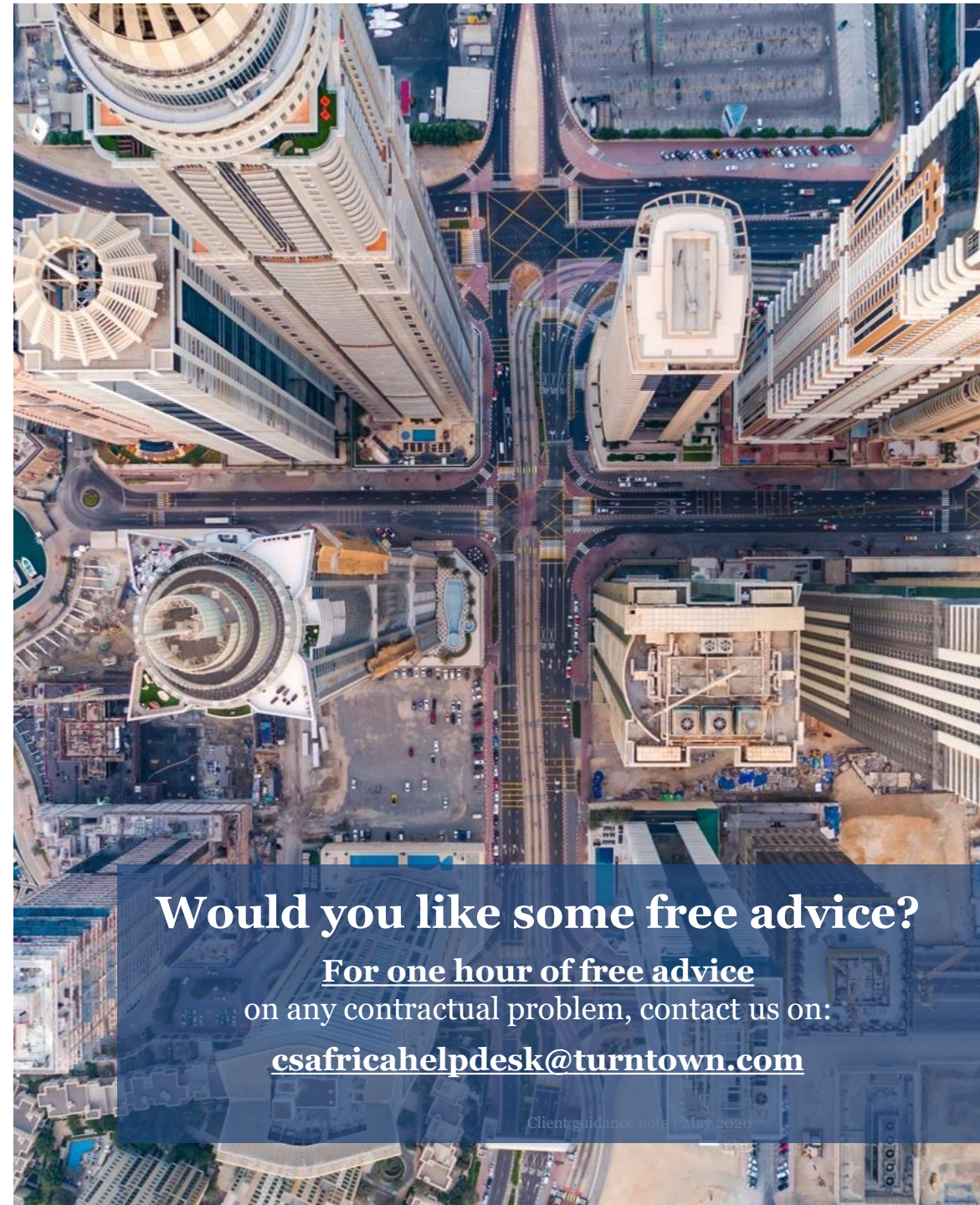
Where to start

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?**

FIDIC Contracts

FIDIC Contracts (contracts issued by the 'Fédération Internationale des Ingénieurs – Conseils' (International Federation of Consulting Engineers), have been around for the last 100 years and are used widely around the world.

Current FIDIC contracts have clauses provide specifically for epidemics, which should make it easier for parties to agree to time and money.

There are other contractual mechanisms that should be considered depending on the specifics of the project.

- ① Extension of Time**
- ② Force majeure**
- ③ Suspension**
- ④ Termination**



1 Extension of Time

FIDIC deals with Extension of Time, much better than other contracts. Both the 1999 and 2017 FIDIC Red Books include for 'epidemics' directly under the Extension of Time (EOT) section of the completion provisions.

For instance under 8.5(d) of the 2017 Red Book (8.4 (d) of 1999 Red Book), it states the following as reason for entitlement to an EOT:

"Unforeseeable shortages in the availability of personnel or Goods (or Employer-Supplied Materials, if any) caused by epidemic or governmental actions."

With the World Health Organisation (WHO) declaring the outbreak a "pandemic" on the 11 March 2020, this clause may be the obvious clause to use when needing to extend a project's timeline.

One thing to note: the claiming party is required to give notice of a claim within 28 days of becoming aware or should have become aware of the causing event or circumstance, otherwise risks losing entitlement.

2 Force majeure

Parties could use the force majeure clauses when looking to amend time or money related agreements. The 1999 FIDIC Red Book, under clause 19.1, defines 'force majeure' as an exceptional event or circumstance beyond a party's control which:

- such party could not reasonably have provided against before entering into contract,
- having arisen, such party could not reasonably have avoided or overcome, and
- is not substantially attributable to the other party

and it provides for:

- time and payment of costs (clause 19.4),
- suspension of work (clause 8.8), and
- termination (clause 19.6)

Under the FIDIC 1999 Red Book provision 19.2, it is stated that if a party is aware that it is not going to perform its obligations under the contract caused by force majeure, a notice should be issued within 14 days after the affected party becomes aware or should have become aware of the event. The term 'force majeure,' is not included in FIDIC 2017 editions however it does include the term 'exceptional event,' (under clause 18), with very similar implications and test to "force majeure" in the 1999 edition of FIDIC.

The circumstances relating to COVID-19, when tested against each of the above criteria in clause 19.1, give a strong argument that a force majeure event has occurred.

3 Suspension

Under clause 8.8 of the 1999 Red Book and under clause 8.9 of the 2017 Red Book, the 'Engineer,' may at any time, instruct the Contractor to suspend progress of part or all of the works, stating the date and cause of the suspension.

Where the Contractor suffers a delay and incurs cost due to the suspension, when resuming work the Contractor is entitled to an Extension of Time and/ or payment of cost plus profit.

The use of the suspension provisions is an option available to Clients but serious consideration is required given that if the works are suspended, the Clients can be liable for the time and costs of the Contractor.

4 Termination

Under clause 8.11 of the 1999 Red Book or clause 8.12 of the 2017 Red Book, if a Suspension of Work continues for 84 days, the Contractor may give a Notice to the Engineer requesting permission to proceed.

Under clause 8.13 ('Resumption of Work,' 2017 edition) if the Engineer fails to give a notice within 28 days, the Contractor can:

- agree to a further suspension
- after giving a second notice to the engineer, treat the suspension as an omission of the affected part of the works
- where suspension affects the whole works, may give a notice of termination under clause 16.2, 'Termination by Contractor.'

Clients should be aware of these clauses and discuss termination with the Contractor, if it is applicable to do so. Parties should seek legal advice if they are considering termination.

FIDIC Contracts: what can an Employer/Client do?

FIDIC contracts specifically site clauses relating to outlines that should be followed in the event of an epidemic. These clauses should effectively certify a level of agreement regarding entitlement.

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

- A **review of the contractual provisions** with the Engineer/lawyers/other advisors, to understand the benefits and risks of different provisions.
- **Checks to ensure that the programme is up-to-date** and that there is an understanding of the critical path and concurrent/ parallel delays. This will also make agreement of any extension of time easier.
- A **review of the records and confirmation that information exists** to support the above positions is required.
- The Contractor should be advised (where applicable) that **the procedures in Clause 20.2, 'Claims for Payment,'** (FIDIC 2017 edition) and/or those relating to extension of time, should be followed with 'detailed supporting particulars of the amount of additional payment 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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