Turner & Townsend

April 2020

COVID-19

Frequently asked questions

Client guidance

This insight shares some of the typical queries that our CS Helpdesk has been working on over the last few weeks. In all formal responses, a full response and a summary of next steps is provided. However, to keep this information sheet concise, key excerpts from responses are provided.

The importance of the Parties maintaining dialogue and working through these unprecedented events cannot be understated. It will be of no benefit for Clients to refuse to entertain mutual resolutions to the benefit of the project. Indeed the Government are doing what they can to create fiscal stimulation and putting extraordinary measures in place which recognise the plight of UK businesses and the construction supply chain.

If you cannot find a question that adequately addresses the specific circumstances on your project below, or are in any doubt about your contractual obligations or those of the Parties, then please do contact us on **cshelpdesk@turntown.com** where we have a team able to support you.

Please be mindful that circumstances and Government guidance are changing daily with the result that any response can be out of date very quickly and that there is no substitute for seeking professional legal advice where required.

Question 1

If the Contractor suspends the works due to the COVID-19 crisis would that fall under the ambit of Clause 19 (Prevention)? The requirement to maintain a distance of 2m between workers will inevitably have an impact on the execution of the works. Will this be covered by Clause 19?

The Contractor does not have the right to shut down the site and effectively suspend performance of its obligations under the contract. Generally, the Contractor's right to suspend its performance is linked to non-payment of the amount due by the Client in clause Y2.5.

The Contractor has notified a compensation event under clause 60.1(19) advising that it has shut the site for 48 hours while it assesses whether it can continue operations while enforcing Government guidance with regard to social distancing, cleaning and health measures related to the Coronavirus outbreak. Non-critical trades have been sent home to avoid crowds on site welfare facilities. The Contractor spent one day shutting down the site and securing it for site lockdown. Safety guidance has subsequently been issued from the Contractor's head office as to the measures to be implemented on site for works to be allowed to continue and the Contractor further advises that a cost will be incurred to make the site ready for operations.

Whilst the Contractor's actions do not fit neatly within the clause 19 criteria and thus associated compensation event (cl. 60.1(19)), the Contractor's measures can be directly attributed to the pandemic and Government guidance. In this case, the Contractor seems to be taking sensible steps toward doing the right thing firstly to shut the site whilst assessing whether it can implement a safe working environment adhering to Government instructions and maintain productivity at least on some parts of the works.

With the aforementioned in mind and understanding that this might be the Contractor's only recourse to extra cost associated with the identifying, assessing and implementing where possible the proposed measures to prepare the site for continued operations, it would be harsh of the PM not to accept the Contractor's notice of the compensation event and notify its decision that the Prices, Completion Date and/or Key Dates are to be changed and to instruct the Contractor to prepare a quotation in accordance with clause 61.4.

There is provision under clause 61.6 for the PM to state assumptions against which the compensation event may be assessed and which can be corrected at a later date if shown to be wrong. Any such correction would entitle the Contractor to a compensation event (cl. 60.1(17)).

Note that there is the option to agree with the Contractor to extend time periods for either the PM's notification of its decision (cl. 61.4) or for the Contractor to submit its quotation or the PM to reply to a quotation (cl. 62.5).

In response to the second part of the query, the Contractor has advised in its compensation event that cost will be incurred to make the site ready for operations. It could be expected therefore that such cost would capture implementing safe working practices including measures to maintain a distance of 2m between workers.

Question 2

How should we respond under an NEC contract when an early warning notice in respect of COVID-19 related impacts is received from the Contractor?

With reference to the NEC3 ECC Option A, receipt of the Contractor's early warning notice should be followed by a risk reduction meeting. Mitigation measures and/or contingency planning can be agreed (we will cover this later) together with a review of supply chain resilience. The Contractor is likely to subsequently notify a compensation event under clause 60.1(19). Both the PM and Contractor are incentivised to notify early warnings in that it affords the Employer greater opportunity to better control potential time and cost impacts and thus retain an element of completion and/or cost certainty whilst the Contractor does not forfeit the opportunity to fully assess the compensation event quotation.

The early warning process recognises that both Parties will encounter problems during the course of the works and facilitates working to overcome them collaboratively.

At the time of writing, it is questionable whether a Contractor could notify a compensation event under clause X2.1 as strictly speaking the law has not changed. Rather, the Government has introduced measures such as stopping gatherings of more than two people in public and maintaining a social distance of more than 2m from other people, which are not yet law.

The Public Health (Coronavirus) Regulations 2020, whilst a new statutory instrument/legislation, are not impacting the ability for a Contractor to Provide the Works in the sense that this Regulation is largely for authorities to enforce screening or assessments on those individuals believed to be contaminated or those who pose a risk to contaminating others. Note that guidance on the above is changing daily.

Question 3

Our Client wishes to enter into a PCSA to enable programme ease and the placement of orders for long lead items. Would should we be advising the client before they enter into the PCSA? How should we value the works to ensure we only pay once items have been received?

If our Client can wait until the implications of COVID-19 are more certain then this would be the optimum approach. However, from discussions, we understand the Client needs to keep the project moving, so if this is the case, entering into a PCSA arrangement seems like a sensible approach.

The scope of the PCSA needs to be very carefully considered and should comprise activities that the Contractor is likely to be able to progress in the current situation. Each long lead item needs to be considered as to where the item is being procured from and whether it will be possible for the item to be manufactured and delivered in the desired timeframe (i.e. manufacturing facilities may be shut down, borders may be closed). There is no gain to be had in entering into an agreement that is unachievable from the start. An option may be to investigate alternative sources for the items in a location that is likely to be less affected.

The scope of work under the PCSA needs to be well defined with pre-agreed prices against each item. Careful consideration must be give as to any payment. Manufacturers often require deposit payments prior to manufacture. No payments should be made for items until they are in the Client's possession and have been tested and confirmed as in accordance with the Specification.

With regard to design and other service costs, again payment should only be made on the basis of deliverables received at the required quality.

Question 4

The Employer's Risks have been updated to include 'Coronavirus pandemic/epidemic'. The Contractor has requested that this be amended to state 'Coronavirus epidemic/pandemic and its consequences. Does the additional wording increase our Client's risk?

You should resist this additional Employer's Risk item. The NEC contract adequately addresses this risk under clause 19 Prevention and the inclusion of this as an additional Employer's Risk item could have unforeseen wide ranging consequences for the Employer. If any further amendments are proposed then you should seek legal advice.

Question 5

Under JCT DB 2016 the Contractor has issued a notice of delay. Should the Client formally respond to this and, if so, is this time limited and what are the implications that surround the issuing of such a notice?

The Contractor provided a 'Notice of delay to progress' citing the Employer owned Relevant Event of force majeure (cl. 2.26.14 of the standard 2016 JCT design and build contract) as a result of the Coronavirus (Covid-19) pandemic and/or Government directives.

Note that force majeure is not a Relevant Matter and so the Contractor would not be entitled to a claim for loss and/or expense under clause 4.21.

While the unamended standard form does not define 'force majeure' (English and Welsh law therefore defaults to the Doctrine of Frustration), the Framework contract provides a wide definition stating "… any unpredictable occurrence for which neither Party is responsible, attributable either to the forces of nature or to other circumstances not confined in their effects wholly or principally to the Parties, any Employer's Persons or Contractor's Persons, the Site or the Works."

The Employer has up to 12 weeks from receipt of particulars, yet to be received, to notify its decision and either award or not award an extension of time. The Employer is permitted to respond earlier than 12 weeks if desired.

The Contract Administrator (CA) should request justification from the Contractor as to the likely cause and effect in regard to each of the events raised in the delay notice, specifically how they will affect performance and the estimated delay in completion of the Works beyond the Completion Date (cl. 2.24.3). The CA should also request the Contractor's mitigation plan which seeks to minimise the effect on performance. Each event cited should be addressed separately and independently of any other point. There is no indication as to the effect of this Relevant Event.

The Contractor is required to use its best endeavours to prevent delay, or further delay, to progress. Besides this obligation, the Contractor must demonstrate the events impact on the programme critical path and establish whether this event alone is the dominant cause of delay to the Completion Date when all other factors are taken into account. Our forensic planners in Contract Services are experts at disentangling delay events to establish dominant cause(s) of delay and/or disruption to progress of the Works.

The CA should not seek to advance a claim by asking for any further information at this stage other than the justification request stated above. Further requests for a CA decision should be based on the individual facts and circumstance of each claim, and take into account the response time periods afforded by the Framework agreement and the relevant building contract.

If force majeure causes the whole, or substantially the whole, of the Works to be suspended for a specified period, there is a procedure for either party to terminate the contract and provisions dealing with the consequences. (cl. 8.11.1.1).

Question 6

Our Client has awarded but not entered into a JCT D&B 2016 Contract. The Contractor has commenced work at risk. The Client has issued a letter of intent to a supplier which was intended to provide 'cover' to them until the main contractor was appointed. What are the Client's rights and obligations?

The award of the contract has been communicated to the Contractor and the LOI states that full contract execution will commence over the next few days. The Contractor has commenced work at risk and the lift manufacturer has been instructed to progress certain works under the LOI.

It would seem that the Client will be liable to pay the lift manufacturer for what it has done under the terms of the LOI, but payment should only be made on receipt of agreed deliverables provided they are of the requisite standard.

With regard to the Contractor, from the email and letter notifying them of contract award there probably is a contract in place, though it would be worth seeking legal opinion on this matter. The precise terms of the contract are still to be concluded, but clearly the intent is that they are the JCT Design and Build Contract 2016.

Our response is structured firstly on the basis of there being a construction contract in place and then on the basis of there being no contract in place.

Contract in Place

The Client would be obliged to pay for the work actually undertaken in accordance with the contract. The Client will need to operate the terms of the contract and decide how to proceed. Options would be to proceed and address the impacts of COVID-19 in accordance with the contractual provisions (probable extension of time, likely no money) or to suspend the works until the Government imposed restrictions on social distancing are relaxed to enable works to proceed safely, but this leaves the Client with significant uncertainty over delivery to the Completion Date. It should be noted that if the works are suspended for the period stated in the Contract Particulars (2 months in the draft contract) then the Contractor would have the right to terminate the contract.

In the event that the lift doors are unavailable due to factory closures in Italy then the Contractor may be able to argue that it is a force majeure event which has caused the delay and in this case he would be entitled to an extension of time but no money. The Client and Contractor need to discuss this issue as it appears to be something that is beyond the control of both parties and if this is going to delay the contract Completion Date then the issue needs to be addressed immediately.

Contract Not in Place

The Client would have no liability to pay the Contractor and could elect not to proceed with the contract at this time with little liability. There may be some liability if the Contractor has incurred cost in reliance on the instruction to engage the team on a quantum merit basis.

Question 7

How is Defined Cost dealt with under NEC3 ECC Option A with activity schedule and agreed under clause 93?

The relevance of Defined Cost under Option A upon termination is described below and based on an un-amended contract.

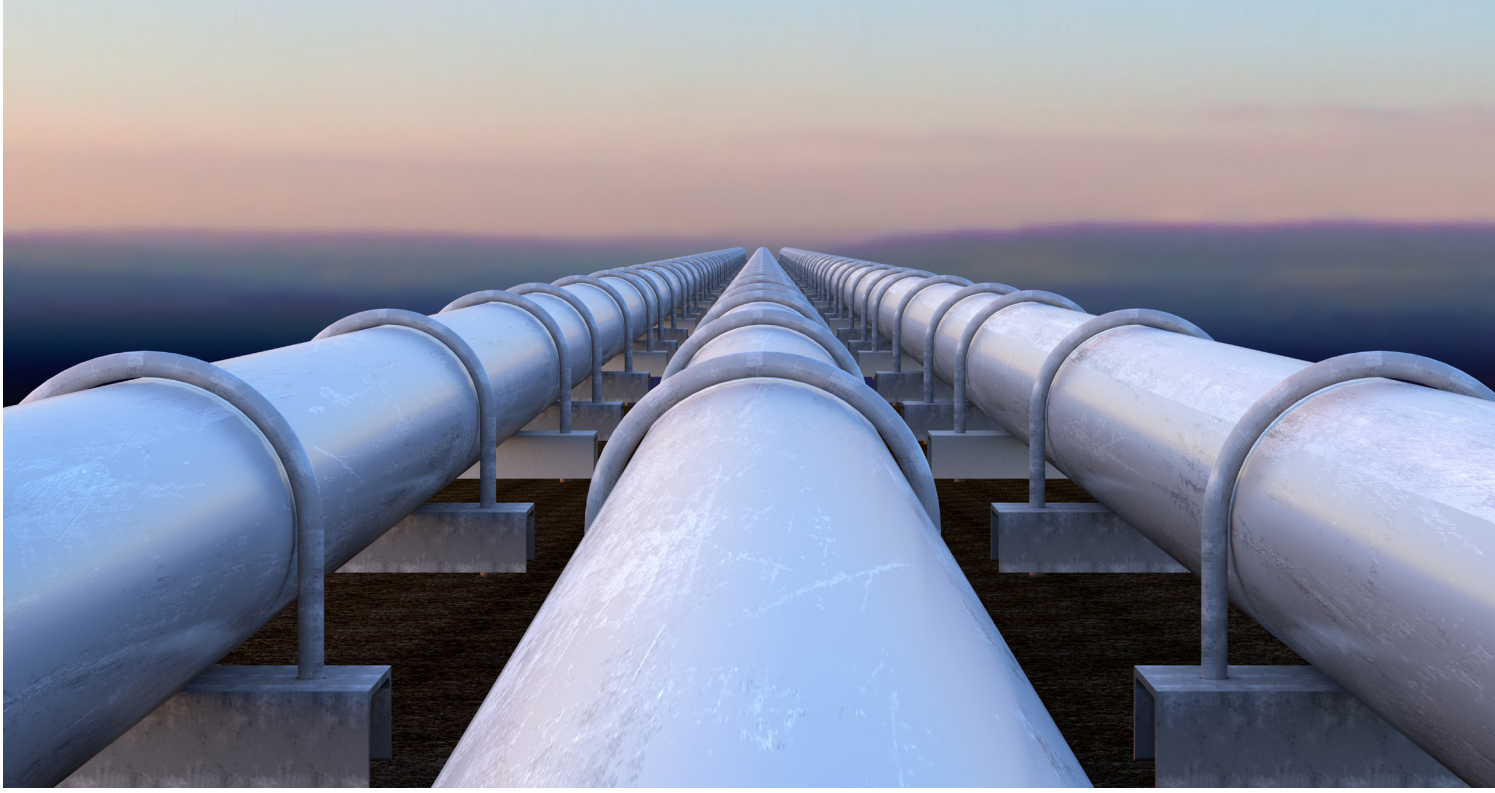
Firstly, we need to refer to the Termination Table in order to understand how to calculate the amount due (A1, A2, A3 and A4), noting that there is no force majeure or prevention clause in the amended contract you are dealing with.

If the Employer has the right to terminate for any reason under clause 90.2 (i.e. if this clause has not been deleted) then the Employer will need to state this in its notice to the PM under clause 90.1 (i.e. that the Employer wishes to terminate for a reason other than those in R1 to R21).

A reason for the Employer to terminate other than R1 to R21 means that the amount due to the Contractor is A1, A2 and A4:

- A1 includes:
  - An amount due assessed as for normal payments – this means ensure there is no duplication with any amount that is assessed as part of the normal assessment for completed activities
  - Defined Cost for Plant and Materials located within the Working Areas or to which the Employer has title and the Contractor has to accept delivery – we need to pay for amounts which, as above, might not be captured as part of a completed activity and which the Contractor has already committed to accept the delivery of
  - Other Defined Cost reasonably incurred in expectation of completing the whole of the works – this means under Option A, amounts for the work done to the date of termination on activities which were not completed at that time
  - Plus any amounts to be retained by the Employer e.g. retention (X16), uncorrected defects, deductions for the Contractor not meeting a Condition for a Key Date and un-repaid balance of an advance payment
- A2 refers to the Defined Cost of removing the Equipment (i.e. a cost which the Contractor would not have contemplated as necessary as it would be included in the lump sum Price). The Shorter Schedule of Cost Components can be referred to for calculating this Defined Cost.
- A4 refers to the direct fee percentage that the Contractor would be entitled to recover on the value of work that is outstanding at termination calculated using the total of the Prices at the Contract Date. Note that NEC3 makes no reference to the subcontracted fee percentage (whereas NEC4, which only utilises one fee percentage applicable to both Contractor direct works and subcontract works, would include fee on all works).

Finally, note the additional clause under Option A (cl. 93.3) which tells us to break down any groups of activities into individual activities for the purpose of assessing the amount due on termination.



Question 8

The Contractor is planning to close the site. In order that we can advise our client, are you able to provide your recommendation on X2 Changes in the Law; Clause 19 Prevention; compensation events and termination? How would we assess the future effects of a compensation event under clauses 63.1 and 63.3? In order to potentially lower costs could the Project Manager state assumptions under clause 61.6? Is termination the most cost effective option for our Client?

However we decide to proceed, we should do so in a spirit of mutual trust and co-operation as required by NEC3, so we need to be collaborative and work with the Contractor.

Forecasting the future effects of a compensation event which we don't know the extent of at present is problematic. As you suggest, the Project Manager should make assumptions against which the compensation event may be assessed which can be corrected at a later date. In order to forecast the effects into the future this will be difficult and will need to be a judgement based on the Contractor's quotation, but we should err on the side of caution.

Under NEC3, the Contractor is entitled to Defined Cost of work already done, Defined Cost of work not yet done plus Fee. As such, the Contractor is entitled to the cost of staff and labour being on site for longer due to the compensation event. However, the Contractor does have an obligation to mitigate its costs.

If the Client is considering stopping works on site then this should be instructed by the Project Manager under Clause 34.1 and would be a compensation event under Clause 60.1(4). In this situation it is important that a comprehensive record of progress is undertaken prior to shut down including photographs to enable the compensation event to be valued more easily and to avoid arguments as to the impact of the COVID-19 event. The Client should be made aware that if the works stop for 13 weeks or more then this gives rise to entitlement to either party to terminate.

Termination should not be undertaken lightly. It is an option under Clause 91.7 as stated in the Guidance Note, but the Client would need to pay the Contractor according to Clause 93.1 and 93.2 (A1) and (A2). We would recommend that legal advice be sought if the Client wishes to pursue this option.

With regard to restarting the project post termination, the Government has published a note relaxing some of the Public Procurement Regulations, but this would need to be reviewed in more detail.

Notably, the Government has published PPN 02/20 which allows Government Clients to grant temporary relief to 'at risk' suppliers whilst the COVID-19 event is continuing, potentially maintaining their cashflow. We would recommend discussing this with your Client.

Summary

Irrespective of which contract is used, clear, meaningful and continued communication is key to reaching a solution. There will always be an element of negotiation and we need to question whether it would be reasonable and appropriate for the Client to place all of the risk onto the Contractor for a once in 100 year devastating event. We are best placed to encourage the contracting Parties to manage these exceptionally challenging circumstances together to arrive at better outcomes for our UK construction industry.

This does not constitute legal advice

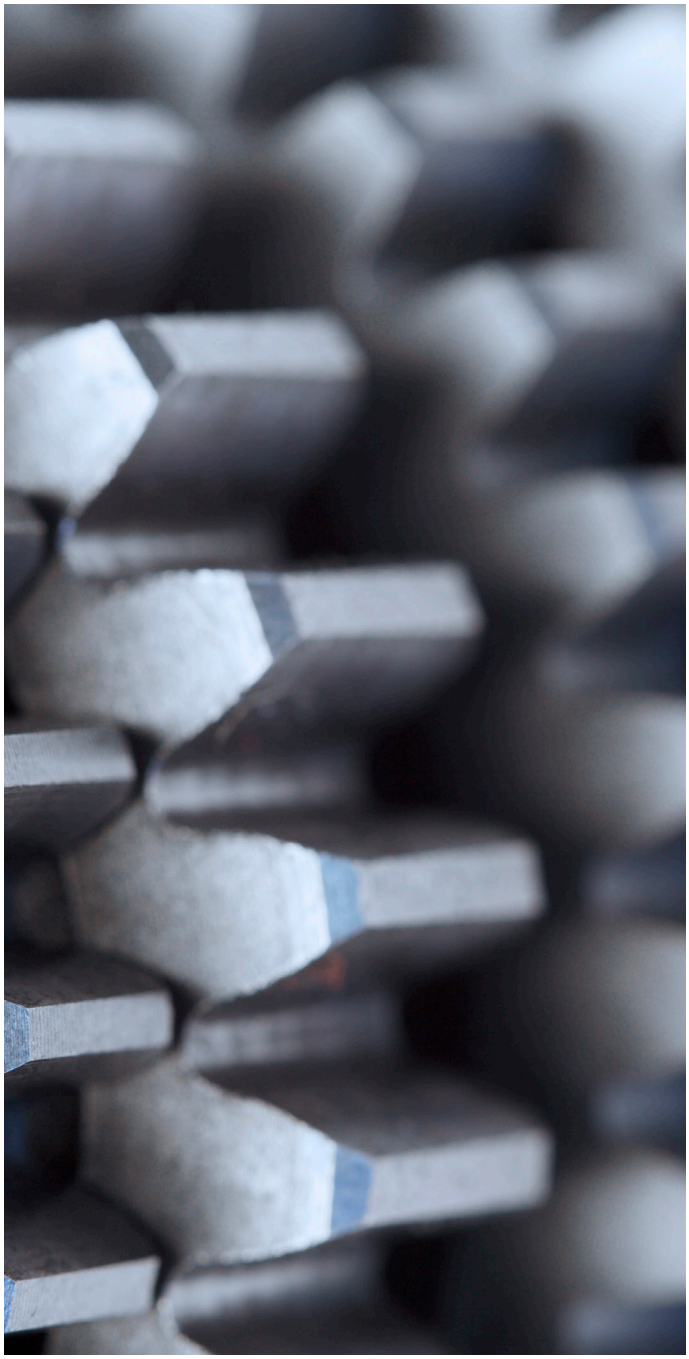
This guidance does not constitute legal advice and should not be relied upon by any party to a construction contract (or any of their advisors).

The appropriate course of action for each and every party to a construction contract should only be determined with reference to (i) the specific terms and conditions of their individual contract(s); and (ii) the facts as they are presented on a case by case basis.

Health, safety and wellbeing

The guidance provided is focused narrowly on relevant contractual provisions; identifying steps that should be taken as part of good-practice contract management.

This narrow focus should not be mistaken for 'prioritising' contract administration over the health, safety and wellbeing of employees, their families and wider society. While good contract administration is important to protect the exposure of contracting parties, the health, safety and wellbeing of our people always comes first.



About Turner & Townsend

Turner & Townsend is an independent professional services company specialising in programme management, project management, cost management and advisory services across the real estate, infrastructure and natural resources sectors.

With 110 offices in 45 countries, we draw on our extensive global and industry experience to manage risk while maximising value and performance during the construction and operation of our clients' assets.

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