



Turner & Townsend

Managing the contractual impact  
to construction projects across  
Africa

# We are opening up our contract helpdesk

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**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](mailto:csafricahelpdesk@turntown.com)**





# Areas of disruption

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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



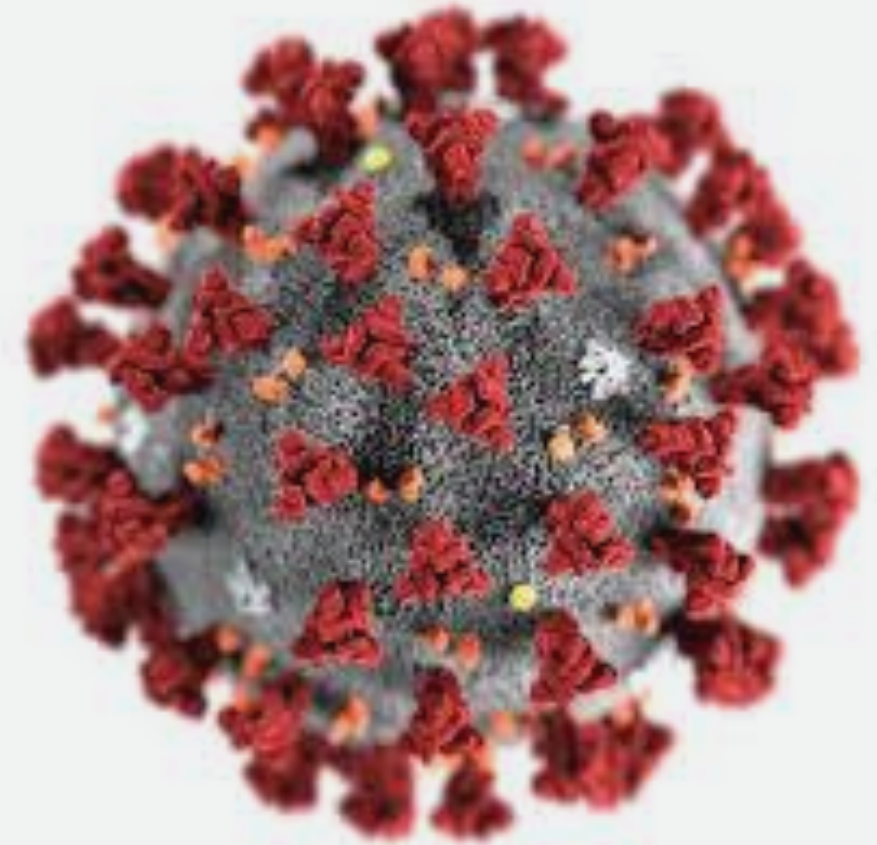
## Supply chain disruptions

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

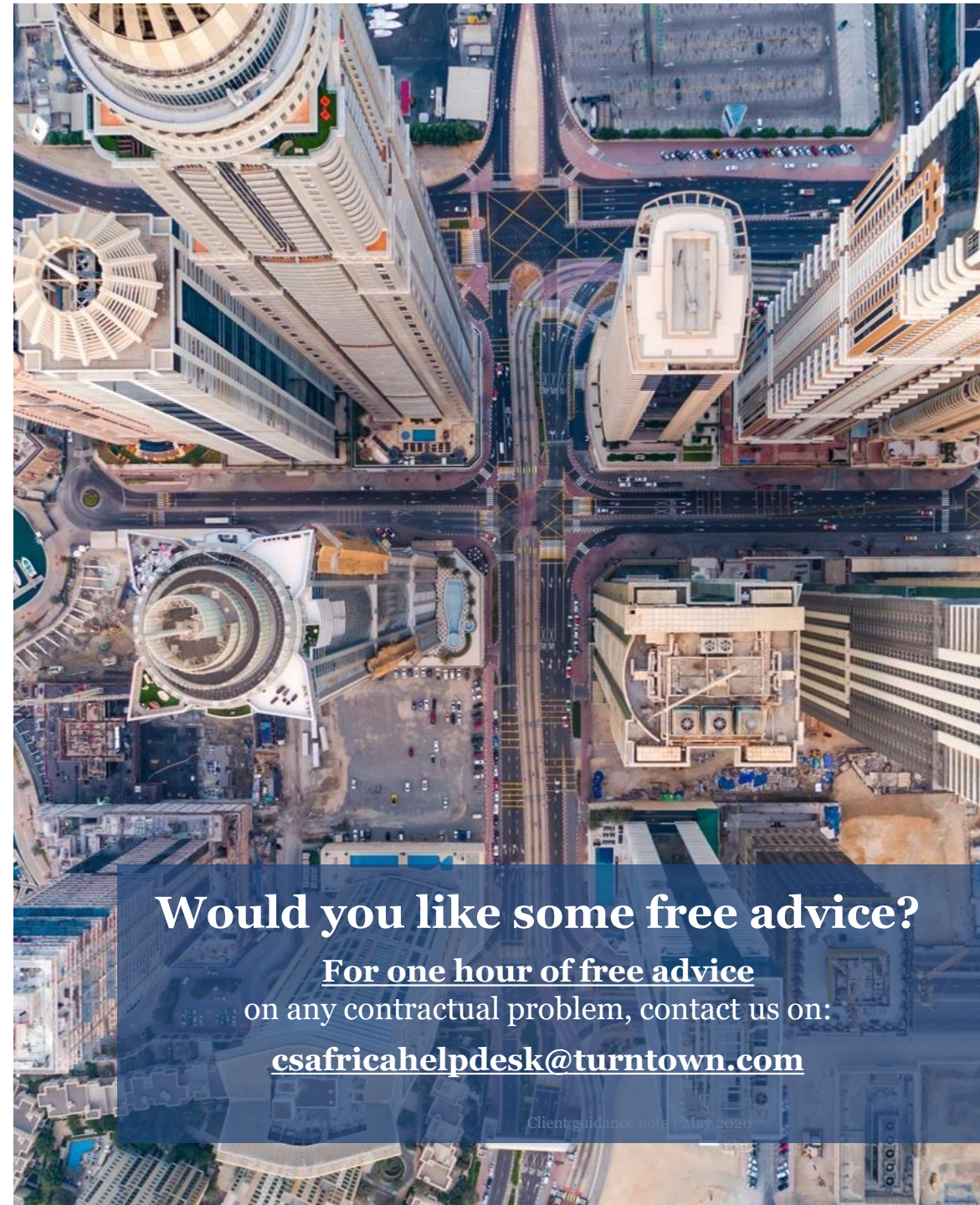
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**There are three key impact areas of focus for Construction clients to manage the risks created by COVID-19:**

- 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?**

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# NEC Contracts

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**The NEC is a family of contracts used by our Clients for procuring a diverse range of works, services and supply, spanning major framework projects through to minor works and purchasing of supplies and goods. It is used and promoted by the UK Government on a range of projects and has been widely used in South Africa for a number of years.**

**The choice of NEC contract will depend on the project complexity and level of risk the Client wishes to pass on.**

The NEC contracts do not specifically identify epidemics under the contract clauses, therefore consideration of the various contractual mechanism is required and the one which should be used will be heavily dependent on the specifics of the project.

When dealing with COVID-19 under NEC contracts, there are four key areas which may be applicable to the ongoing delivery of your project(s);

- Option X2 Changes in the Law
- Clause 19 Prevention and the associated compensation events
- Compensation events 60.1(2) and (4)
- Termination





# 1 Option x2: changes in the law

**If the secondary option clause X2 'Changes in the Law,' has been included as an option in a contract, which often is the case, then new legislation pertaining to the lockdown and health protection, which affects the works, would potentially be grounds for compensation.**

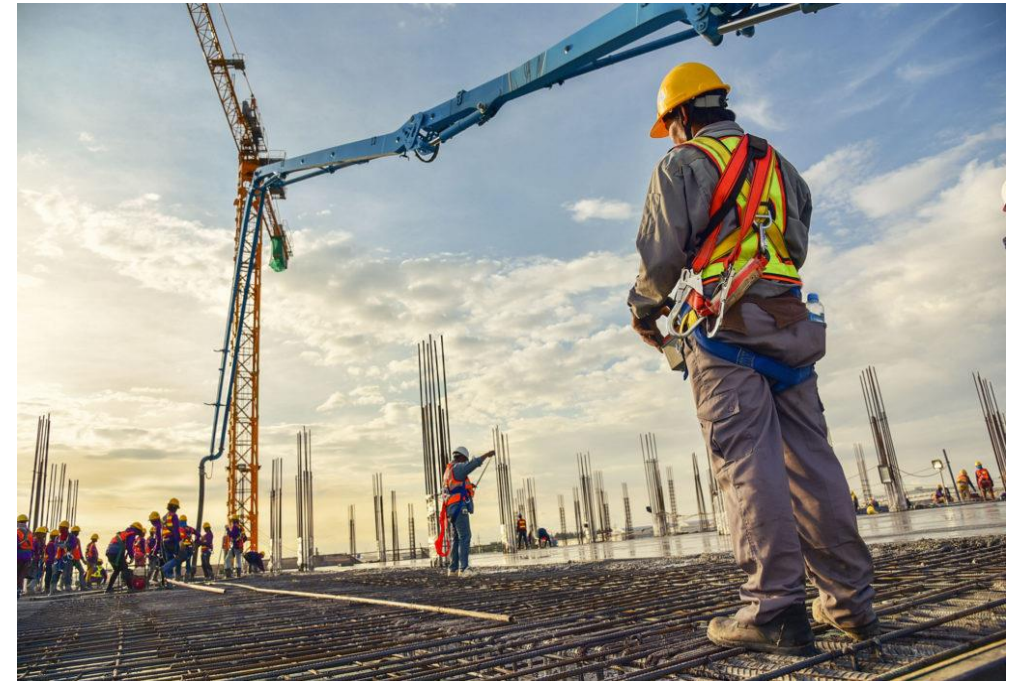
The wording under NEC3 and NEC4 is different. Parties should check the exact wording, to ensure compliance to the contractual requirements mandated, in order to provide notification of an event (such as COVID-19).

Under NEC3, a change in the law after the contract date, allocates the risk to the Employer. The second sentence of the clause reads;

*"The Project Manager may notify the Contractor of a compensation event..."*

As this clause uses the word "may" in relation to a notification, it could be reasonably concluded that, if the Project Manager fails to provide notice, the Contractor will not be time barred under Clause 61.3.

Project Managers on NEC3 projects should ensure they give proper consideration to the recent COVID-19 legislation.





## Clause 19: Prevention

**The un-amended version of both the NEC3 and NEC4 ECC contracts, include Clause 19, 'Prevention and its associated compensation event 60.1(19).'**

In effect these clauses state that, if an event occurs, whereby neither party could have prevented the event and whereby there was a small chance of the event occurring, and where the event subsequently prevents the Contractor from completing the full works by the planned completion date... that it would have been unreasonable to have expected the Contractor to have allowed for it.

The wording of the clauses are slightly different between NEC3 and NEC4 but clause 19 in NEC4 states:

*"If an event occurs which*

- stops the Contractor completing the whole of the works or
- stops the Contractor completing the whole of the works by the date for planned completion shown on the accepted programme,

and which

- neither party could prevent
- an experienced Contractor would have judged at the contract date to have such a small chance of occurring that it would have been unreasonable to have allowed for it

the Project Manager gives an instruction to the Contractor stating how he is to deal with the event."

This clause sets out a number of conditions which need to be overcome, however we believe it is likely that COVID-19 would be an event pertinent to these provisions as it will impact the carrying out of the works.

The wording 'completing the whole of the works,' used in NEC4 could be interpreted as only being applicable in circumstances where there is no realistic way, that completion of the works can be achieved on time if in fact at all. If such an event does occur, it is required that the Project Manager issues instructions to the Contractor on how the event is to be dealt with.

This would be a compensation event in accordance with clause 60.1(19) and therefore, at the Employer's (or Client's) liability. Depending on the severity of the impact on a construction site, the compensation event could be challenging to assess in terms of both cost and time.





## Compensation events 60.1 (2) and (4)

Another alternative would be, where the Employer/ Client does not allow access to the site (Clause 60.1(2)) or the Project Manager gives an instruction to stop the works (Clause 60.1(4)), to use these situations as compensation events. These compensation events can be classed as normal and are probably the easiest to manage contractually and commercially.

Under Clause 60.1(2) the Contractor must show that the Employer or others have failed to do something by the date shown on the 'accepted programme,' in order to preserve entitlement. It is in the interests of both the Contractor and the Project Manager to have current, realistic and achievable 'accepted programmes.'



## Termination

Clause 91.7 of NEC3 and NEC4 gives the Employer/ Client (not the Contractor) a right to terminate the contract where an event occurs:

- which stops the Contractor completing the works,
- where completion of the whole of the works will be delayed by longer than 13 weeks,
- which neither party could prevent, and
- which an experienced Contractor would have judged at the contract date to have such a small chance of occurring.

This is similar to the prevention clause 19 and is effectively a force majeure clause. It should be noted that it only gives the Employer/Client the opportunity to terminate for this reason and not the Contractor. Termination should only be considered with the appropriate legal advice.

# NEC Contracts: what can an Employer/Client do?

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**Contractors under the NEC contract, (particularly cost based options C, D, E and F), should already be keeping comprehensive records of defined cost as required by the contract, together with additional records as required by the scope of works.**

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

1. A review of the contractual provisions with the Project Manager/lawyers/other advisors to understand the benefits and risks of different provisions.
2. Check to ensure there is an accepted programme and that the programme is up-to-date and complete with method statements and schedules of resources as required by the contract. In addition, there should be an understanding of the critical path and concurrent/parallel delays, which will make agreement of any change to the completion date easier.
3. A detailed understanding of the Contractor's cost records so that the defined cost of the compensation event can be readily and objectively assessed. Only defined costs in accordance with the relevant 'schedule of cost components,' is claimable. The theory behind the clauses set out in NEC contracts, should result in the Contractor being neither better or worse off, as a result of the compensation event.





# Overview

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## 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](mailto:csafricahelpdesk@turntown.com)**

# Get in touch

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