



Construction  
Leadership  
Council

COVID-19: MANAGING CONTRACTUAL  
DISPUTES & COLLABORATION -  
SUMMARY GUIDE

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# COVID-19: MANAGING CONTRACTUAL DISPUTES & COLLABORATION - SUMMARY GUIDE

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## INTRODUCTION

COVID-19 has had a substantial detrimental impact on the construction and facility management (FM) sectors and it is important that we all recognise the unique circumstances which we now face.

Work has paused on many sites or it has been streamlined and adapted in order to comply with public health guidelines and industry-wide site operating procedures – the pandemic may have impacted on productivity and the ability to deliver on contractual obligations.

Businesses are particularly concerned that they will become embroiled in costly and long-running disputes over the effects of the pandemic on project delivery under contracts which may or may not cater for the effects of the pandemic.

These fears may be allayed if all parties agree to work together to moderate the impact of COVID-19 across the supply chain and protect the long-term health, capability and capacity of our industry.

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## SUMMARY GUIDE

This short guide – which should not be viewed as a substitute for the full guidance – aims to help those working in England navigate these discussions with their clients and customers in order to find a solution that works for all, safeguarding project delivery and business continuity.

It has been written by the Construction Leadership Council (CLC) COVID-19 Task Force, applies to all in the construction, maintenance and FM services, and applies to both public and private sectors.

It transposes government advice to drive fair and responsible behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency.

## YOUR INDUSTRY NEEDS YOU

The objective of this guide is to help business achieve a collaborative settlement within the context of their contracts to accommodate the impact of COVID-19, which will allow all parties to survive and deliver successful projects.

Disputes compromise quality, delivery, commercial success and business continuity.

An inflexible approach will entrench aggressive positions using legal processes which will place the works/services and the stability of all parties at risk.

This summary guide sets out the following steps towards a collaborative solution to accommodate and moderate the impact of COVID-19:

1. Establish concurrent conversations.
2. Reality test and optimise your position.
3. Realistically off-set the time and monetary costs of adversarial behaviour, against the savings and benefits of a collaborative commercial dialogue.
4. Use the resources to formalise your deal.

# 1. Establish concurrent conversations.

Set out below are the key attributes of conversations that should be carried out simultaneously to achieve a collaborative solution allowing both parties and projects to move forward successfully.

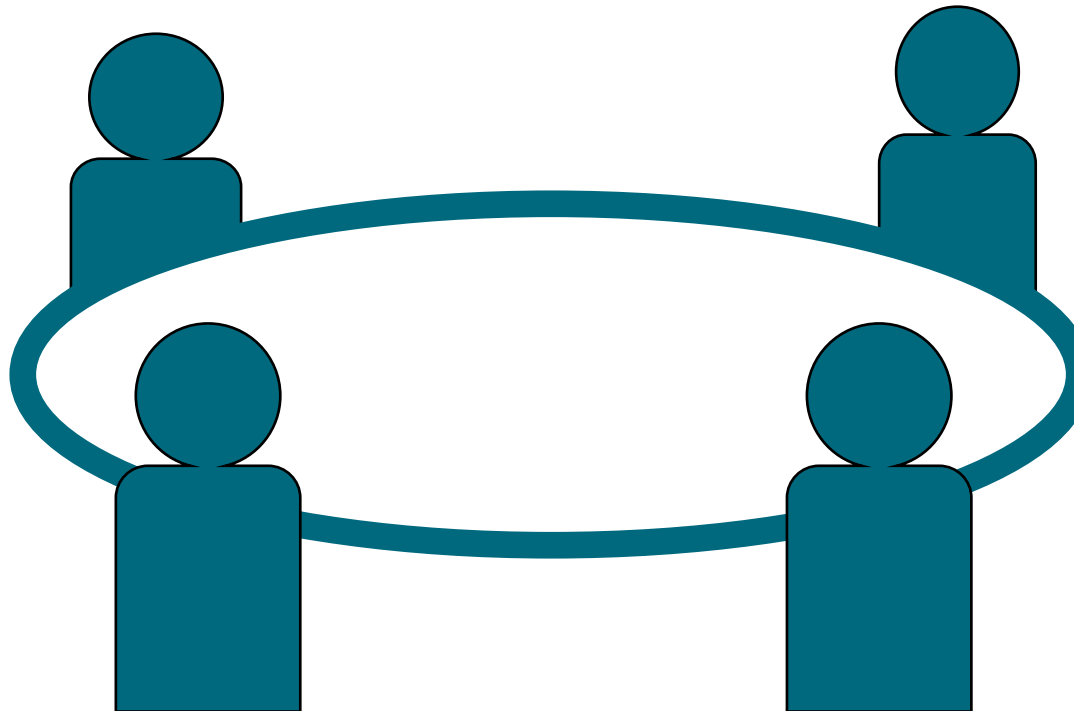
## 2. How to start the conversation

Use the template letters [here](#) to open a collaborative dialogue.

## 1. What is a safe space?

Set up a safe place to talk:

- Without prejudice: a label you give to meetings, calls or correspondence, as a method of formal protection to create a safe place for a free, open dialogue without recrimination.
- Subject to contract: a label you also give to your Without Prejudice meetings, calls or correspondence, to prevent your accidentally reaching agreement during negotiations.
- Attend all meetings and progress the works/services.



## 3. Continue to administer the contract

- Continue to operate the contractual clauses and fulfil your obligations in respect of the works/services, to optimise your commercial position.
- Use the checklist in section 2 of this guide to ascertain, build and preserve your position linking your evidence to the clauses and the issues.
- Adapt and tailor the JCT and NEC templates [here](#) to your actual contract and your positions.
- Comply with notice requirements; form and service requirements and remember to adhere to cut-off periods.

## 4. Keep good records

- Detailed record keeping is essential throughout this process.
- You can find guidance on how to do it [here](#).

# COVID-19: MANAGING CONTRACTUAL DISPUTES & COLLABORATION - SUMMARY GUIDE:

## 2. Reality test and optimise your position.

### Checklist to develop your position

#### Contract

- How was the contract made?
- Which form of contract are you subject to?
- If you are subject to a standard form contract which one?
- Was the standard form contract amended?
- Were any instructions, directions made or received? How?
- What was the scope and programme pre-COVID-19?
- Continue to manage the project and your performance in accordance with the contract and site safety COVID-19 secure guidance from the Government and CLC.

#### Information exchange

Both parties should identify, record and exchange details on:

- Where was the project pre-COVID-19?
- Additional COVID-19 safety systems, policies and procedures required and in place.
- Changes to risk assessments, method statements and information required to be maintained under the Construction, Design and Management Regulations 2015.

- Impact of COVID-19 issues on productivity rate – including rationale/basis for calculation.
- Status of off-site works/services (if any).
- If works/services are suspended (in whole or in part), why? What supporting information is available?
- Updated programme, completion dates and response periods due to impact of COVID-19 - including; any linked KPI/call-out/ response/service credit systems.
- Materials, orders, deliveries, payment, delays/ shortages due to COVID-19.
- Labour and personnel shortages due to COVID-19 (including furlough/Coronavirus Job Retention Scheme impact).
- Site access records, timesheets and progress reports.
- Mitigation plan - map out a record of measures (corroborated by supporting records) put in place and taken to reduce delay and costs incurred as a result of COVID-19.
- Provide a brief narrative of each area of the work scope; overview photographs (i.e. stood back) showing as much of the site as possible; general arrangement drawings marked-up /coloured in with dates of when work took place – perhaps the result of a weekly site walk?

- Ideally this should include every key operation (excavations, drainage, slabs and walls, dryline walls, M&E works, finishes, etc.)
- Site photographs should be taken at every opportunity, ideally daily but at least weekly. Supporting records should include photos, videos, SMS/WhatsApp/messenger services, project reports, emails, letters, faxes, meeting notes, diary records.
- The more detailed and compelling the evidence causally linking the item resulting from the impact of COVID-19 to the events occurring as a direct result of COVID-19, the more compelling that evidence is in determining the nature of any collaborative deal or decision that can be reached. Compiling records in order to corroborate and substantiate your position can be the difference between optimising your position, or losing out in the context of either a deal or a dispute.

### Variations/Changes

- Are any specific materials likely to be delayed? If so, can any variations be made to the specification to reduce/avoid the delay? Is this issue linked to planning permissions? building regulations? third-party agreements?
- Can the works/services be re-sequenced or sectional completion added/varied to reduce exposure for delay and to prioritise; sections, materials and/or labour, for the purposes of successful project delivery?
- Is there a way that the price can remain fixed, but the impact of COVID-19 can be shared by the parties?
- What are the time and cost implications of any changes/variations?

### Time

- Are there grounds for an extension of time within the contract? How is an extension assessed? What are the penalties for late delivery/completion?
- Have relevant notices been issued on time? In the right form? By the right means?
- Would an extension of time/time adjustment enable a better commercial position for the purposes of project delivery, regardless of the contract?
- Can existing suspension rights, penalties, termination rights under the contract be compromised in favour of an adjustment to time completion/KPIs/sectional completion?

### Payment

- Could materials be free issued? (i.e. sources and issued by the client)?
- Could materials be paid for upfront (advanced payment – off-site materials agreement)?
- Can the frequency of payments be accelerated to aid cash-flow?
- Could retentions be released?
- Could a Project Bank Account stabilise and accelerate supply chain payment, protecting monies for insolvency?
- Do pricing formulae need adjustment? Would another pricing structure be more appropriate? Target cost? Would a digital payment platform enable transparency of cash-flow and support managing expectations?

### Costs

- Both parties should promulgate an open book cost analysis with evidence to support each item.
- Sharing the risk of such costs could be a pain/gain target cost arrangement or an open book payment mechanism which applies for the duration of the period within which productivity is materially impacted, i.e. “lockdown” or until the end of the Project.
- Both parties should share government support information to ensure no double recovery of costs.
- How do costs of delayed completion and/or insolvency during the project balance against delay, disruption, safety and/or acceleration costs? Does one outweigh the other?
- Is termination triggered if suspension goes over a specific period? What are the costs of termination before project completion?

### Suspension

- Were the works/services suspended? By who? Why? What records exist?
- What is/was the status of works/services/goods/plant/progress and damage at the date of suspension?
- What steps are/were required to demobilise and remobilise works/services? and when?
- What practical issues need to be addressed: security, storage, insurance, safety, plant/facilities hire and on-going payments?



### Third parties and the supply chain

- What is the impact of the deal on third party agreements; funders/bondsman/sureties/insurers, parent companies, purchasers, tenants, consultants, sub-contractors, suppliers?
- Do you need their agreement in order to commit?
- How will the deal impact your financing and cash-flow position?
- How will the deal impact your insurance cover?
- How will the deal impact your position with finance, insurance, tenants, consultants, suppliers and sub-contractors?
- Do any existing insurance policies cover the time and monetary impact being addressed by the deal?

### 3. Realistically off-set the time and monetary costs of adversarial behaviour, against the savings and benefits of a collaborative commercial dialogue.

THE DISPUTE PROCESS - the following is an overview of various dispute resolution mechanisms.

#### Remember:

##### Disputes are

- **time intensive and protracted.**
- **expensive - financial costs & time involved in dispute resolution can rapidly escalate, often outweighing the value in dispute.**
- **in evaluating a collaborative solution, the time & monetary costs of dispute resolution should be offset against the amount in dispute.**
- **you instruct your claims representative (lawyer), your representative shouldn't instruct you - own the outcome.**

The following table is a brief comparison of how various forms of dispute resolution work in terms of privacy, where a decision is made and how flexible that decision is, together with the time and monetary costs involved with each method of dispute resolution.

You should know: How long it would take to succeed with a claim? And, how much would it cost to succeed in a claim? Would a deal today be worth more than a win later?

Form	Time	Cost	Expert	Private	Other
<b>Disputes escalation system</b>	Medium	Very Low	No	Yes	Can ensure conflicts are managed at appropriate level with proportionate costs. Can also be used to artificially delay.
<b>Mediation</b>	Very fast	Low	No	Yes	In most cases, one day neutral third party assisted negotiation process. Doesn't require representation. Doesn't result in a decision. Voluntary Requires preparation. Useful if a settlement is agreed in a written record which can be global and flexible compared to a judgement.
<b>Adjudication</b>	Quick (28 days)	Medium	Yes	Yes	Decision can be quick and enforceable, but also incorrect. Decisions can be superseded. NB: RICS Low Value Dispute Adjudication - 15 days.
<b>Arbitration</b>	Slow	High	Yes	Yes	Often as time-consuming and expensive as the Courts. Involves a judge with technical knowledge. Private and confidential. Must have a clause in the contract for arbitration to apply.
<b>Courts</b>	Slow	High	No	No	Expensive, time-consuming and public where the decision is restricted to the claim made and an award of money. Also, remember that there are prescribed court rules to follow before you can launch a claim.

## 4. Use the resources to formalise your deal.

### Tips for successful collaboration

- Is the deal recorded in writing?
- Is the deal labelled 'without prejudice'?
- Are all the elements of the deal detailed in the agreement? Are they in the right order?
- Does the deal cater for further pandemic related disruption? What supporting records and information will be required in the future?
- Does the agreement amend the original contract to reflect the deal?

**The following sources of information have template letters, settlement agreements, issues to consider and avenues to explore with your negotiations:**

- Full guidance
- Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency
- CLC statement on Payment & Contracts
- PPN 01/20: Responding to COVID-19
- PPN 02/20: Supplier Relief due to COVID-19
- PPN 02/20: Additional guidance, FAQs and model terms for construction
- PPN 04/20: Recovery and Transition from COVID-19
- CLC advice on Temporary Suspension of Sites
- Pre-Action Protocol for Construction and Engineering Disputes
- Construction Industry Council Low Value Disputes Adjudication
- RICS offers a Conflict Avoidance Pledge for early resolution of issues
- Royal Institution of Chartered Surveyors Low Value Dispute Adjudication - 15 days service.

Talk to us - we need to know this guidance is useful, if it enables you to establish a collaborative tone to your negotiations, and if it has a positive influence on the behaviour and outcome of your negotiations - find us at: [construction.enquiries@beis.gov.uk](mailto:construction.enquiries@beis.gov.uk)