

CLC COVID-19: CONTRACTUAL DISPUTES & COLLABORATION GUIDANCE



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Record Keeping Guidance

1. INTRODUCTION

- 1.1. We highlighted in the [CLC COVID-19 Contractual Best Practice Guidance](#) the importance of complying with any obligations in respect of contract administration with regard to the risks of COVID-19 on live projects, as well as separately initiating without prejudice subject to contract discussions to try and reach an agreed way forward.
- 1.2. The objective of the Guidance and the [Summary Guidance](#) 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.
- 1.3. In the Summary, we identified four key steps from the Guidance which can be taken towards reaching a collaborative outcome safeguarding project delivery and business continuity – this states *'approach requires all parties 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'*.
- 1.4. The Summary contains a checklist to ascertain, build and preserve your position linking your evidence to the clauses and the issues. This exercise then allows you to take the second step of reality-testing and optimising your position.
- 1.5. In the context of those collaborative discussions, or if a way forward in respect of delays and/or additional costs arising from COVID-19 cannot be agreed then, if there is entitlement under the particular contract, fully substantiated claims will need to be made in accordance with the contractual requirements and possibly later a tribunal.
- 1.6. Not only can good records make or break a claim or defence before a tribunal, they can also help the parties resolve claims more efficiently between themselves and, if shared contemporaneously, they can help to mitigate the delay and/or additional costs.
- 1.7. 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. Claims which do not forensically prove a causal link between the impact on the project/business and COVID-19 (known as global claims) are likely to fail.
- 1.8. The Society for Construction Law's Delay and Disruption Protocol (2nd edition 2017)¹ (**the Protocol**) emphasises the importance of record keeping such that it is now one of the Protocol's core principals. Furthermore, detailed guidance on record keeping and dealing with claims is set out in the Protocol. Below we have set out some general high-level guidance to assist in the context of COVID-19 related claims.
- 1.9. It should be noted that the level of detail and the extent of records to be kept should be proportionate and relevant to each project. Keeping and maintaining records takes resources and we would expect more records (and more detailed records) to be kept on larger projects. Therefore, whilst we have set out a full range of the type of records that should be considered, not all of these may be relevant or proportionate for parties to maintain on a particular project.

¹ <https://www.scl.org.uk/resources/delay-disruption-protocol>

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2. AGREE THE TYPE OF RECORDS TO BE KEPT

- 2.2. Parties should look to agree on the type of records to be kept as well as the frequency of updates to those records. Such an agreement would simplify and assist in resolving claims.
- 2.3. Some contracts contain contract administration/risk management tools which set out detailed requirements in respect of record keeping and the communication of risks, but many contain little or no requirements.
- 2.4. If the contract does not contain requirements on the type of records to be kept (or has insufficient requirements), the parties should look to jointly agree these during the project. It should be noted that if an Employer seeks to unilaterally prescribe requirements in respect of record keeping post-contract this may constitute an instructed variation to the contract.
- 2.5. Records should be shared between the parties so that they can constitute an agreed contemporaneous record of what has happened on site and why. If they are not agreed this should also be recorded contemporaneously.
- 2.6. If records are not shared or agreed the Employer may wish to take steps (within its rights under the contract to visit site etc.) to maintain its own set of records on progress.

3. WHAT TYPE OF RECORDS SHOULD BE KEPT?

- 3.1. The aim is to be able to clearly evidence the effect (or projected likely effect) of COVID-19 on the project relative to your entitlement under the contract (i.e. a claim for an extension of time or loss and expense or both). To do this you will need to show how the works were planned to be undertaken as against how they now need to be undertaken as well as mitigation measures considered and/or implemented. This may include changes to the scope, specification, sequencing or method of carrying out the works, increases/decreases of activities/resources (being labour, plant and/or materials), preliminaries, head office costs etc. Short simple narratives should be used to explain the effects with reference to, and linking, the various contemporaneous records.
- 3.2. In respect of showing how the works were planned to be undertaken this could be shown by the original contract/tender programme, the planned resources and a detailed breakdown of the contract sum.
- 3.3. The Programme:
 - 3.3.1. There should be a detailed contract/construction programme showing how the contractor intended to carry out the works (the planned intent).
 - 3.3.2. This should be updated throughout the project in accordance with any contractual requirements to record actual progress and any disrupted, suspended and re-sequenced activities and issued for agreement/acceptance to the contract administrator/Employer. If it is not agreed the reasons why should be recorded. The contractor should look to:
 - 3.3.2.1. Incorporate the programme updates from its project team (suppliers/designers etc.) into the updated programme issued to the Employer; and

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3.3.2.2. Consider whether the updates to the programme mean that other documents should be updated, for example the activity schedule in the NEC form of contract.

3.4. Progress Records:

3.4.1. Daily/Weekly/Monthly Reports and/or site diaries detailing progress made, manpower used, work activities undertaken, working hours, materials delivered, and plant and equipment used.

3.4.2. Minutes of progress meetings.

3.4.3. Labour allocation sheets detailing what activities the labour was carrying out and when.

3.4.4. Photos or videos – evidencing site progress, any special measures undertaken, safety compliance and revised ways of working.

3.4.5. Revised risk assessments and/or method statements to show required changes in sequencing, logistics and temporary works.

3.4.6. Copies of instructions/RFIs/notices – including where issued orally, contemporaneous confirmation in writing (e.g. email, text, fax, messenger services etc.)

3.4.7. Quality assurance/quality control sign-off sheets.

3.4.8. Drawing registers and marked up drawings.

3.5. Contract Administration - letters and emails related to variations, early warnings and contract claims. Any verbal discussions should be confirmed in writing to corroborate the discussion and outcome.

3.6. Cost Records – the provisions of the contract need to be checked for an entitlement to additional costs and any limitations on the same. Records may be required to evidence:

3.6.1. Direct costs – labour, plant, materials and supply chain instructions, orders, claims, payments and contracts; and,

3.6.2. Indirect costs – on site and head office overheads, lost profits (i.e. evidence of works turned away), finance and/or hire charges.

These records need to be able to be identified as COVID-19 related costs.

4. HOW SHOULD RECORDS BE KEPT? – GO DIGITAL

4.1. Records need to be stored so that they can be quickly and efficiently retrieved. If the parties adjudicate the timeframes for responding and putting a case forward can be very short so records need to be accessed quickly. If the parties arbitrate/ litigate there will be disclosure obligations that could be costly to comply with if documents have not been organised well.

4.2. Documents should be kept electronically in a way that makes them easily searchable. There are technology platforms that can enable access to records, cost information,

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programming, fleet tracking etc. and allow this substantiation to be accessed by other parties. Parties should be mindful that some records should not be shared for business confidentiality and data protection reasons.

4.2.1. If possible, records should also be linked to, or stored with, other relevant records - i.e. linking progress records with updated programmes and cost reports. This could be done through referencing them in the short simple narrative referred to a point 3 above.

4.2.2. Companies should consider having document storage policies so that all documents are stored in the same way for consistency. Such a policy should identify the length of time records should be kept.

Your success depends on the detail of the records you can adduce to support your position.

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