CLC TASKFORCE: COVID-19 CONTRACTUAL GUIDANCE

2: CONTRACTUAL BEST PRACTICE

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SUMMARY

- **Collaborative discussions and meetings should be entered into to help mitigate the impacts of COVID-19.**
- **Practical advice on how to resolve COVID-19 contractual issues for various stages of an ongoing contract, including a suite of letter templates.**
- **Key contractual topics to consider within collaborative discussions.**
- **Options if an agreement cannot be reached.**

1. INTRODUCTION

1.1. There remains concern that without fair and reasonable administration of construction contracts, COVID-19 could have a significant and detrimental effect on the construction industry. An industry which is expected to play a central role in helping the economy recover from the effects of COVID-19.

1.2. As the economy moves into recovery, the Construction Leadership Council (CLC) continues to ask that the industry works together to support the long-term health of our sector by constructively resolving all contractual disputes arising from the pandemic.

1.3. CLC best practice guidance was first published in May 2020, alongside a Cabinet Office guidance note on fair and responsible contractual behaviour. Both emphasised the same principle - to support the construction supply chain during the COVID-19 emergency through collaborative contractual behaviour in the performance and enforcement of contracts.

1.4. The CLC recognises that the COVID-19 situation is continually evolving, and many pre-pandemic contracts will now be closer to the fulfilment of obligations compared to the start of the pandemic. This guidance has therefore been updated to reflect this progression and it is recognised that parties may be at various stages of a construction or facilities management/maintenance/service contract – whether an ongoing pre-pandemic contract, a cyclical contract, a framework/call-off/strategic alliancing contract, a contract reaching settlement or new contract negotiations. The guidance seeks to provide examples of the types of issues that are likely to have arisen over the course of the pandemic, together with practical advice on how to resolve them in a constructive manner. It is a guide only and is not intended to cover all contract types and all issues.

1.5. This note applies equally to all those involved in the construction and maintenance supply chain operating in both the public and private sector alike. For ease of reference this guidance refers generically to Employers when referring to the appointing party under a contract (e.g. the employer/clients in "first tier" contracts and the contractor/consultant in "second tier" contracts etc.) and to Suppliers when referring to the appointed party under the contract (e.g. contractors, consultants, sub-contractors etc.).

2. CONTRACT ADMINISTRATION AND COLLABORATIVE DISCUSSIONS

2.1. Even at this stage of the pandemic, it is still important to have considered the risks of COVID-19 on live projects, framework, and service and maintenance systems, as it is

inevitable that delays and/or disruption will have arisen as a result of the impact of COVID-19. It is also likely that additional costs will have been incurred due to COVID-19.

2.2. In respect of delays, both Employers and Suppliers should have considered the impact of COVID-19 on the programme, completion dates and response periods. Where possible, amended programmes (KPI/call-out/response/service credit systems) should have been provided to reflect the impact of COVID-19 on the Works or Services and extended completion dates (call-off/strategic alliancing/maintenance response periods) agreed to reflect the extent to which the Supplier has been or has continued to be delayed by COVID-19.

2.3. The Supplier's entitlement under any contract to an extension of time and/or additional costs as a result of COVID-19 will very much depend upon the terms and conditions of the contract.

2.4. Employers and Suppliers should seek to have taken a collaborative approach towards successful project delivery and discussions over whether an extension of time can be granted, and any additional costs shared in any event, in light of the unforeseeable and unprecedented nature of COVID-19, as set out in more detail at section 4 below.

2.5. To assist collaborative discussions between Employers and Suppliers which have yet to be initiated, template letters from the Supplier and the Employer are available (Templates A & B) which acknowledge the impact of COVID-19 on the project and to encourage dialogue in respect of the impact of COVID-19 on the Contract and any Supplier Relief. These template letters reserve the Employer's and Supplier's rights and entitlements under the Contract. The templates also include the relevant guidance notes and options shown as "[***]" which should be considered and completed when using the template letters.

2.6. Until an agreement is reached in respect of the impact of COVID-19 between a Supplier and Employer it is imperative that the existing contractual mechanisms have continued to have been followed to preserve each party's rights and remedies under the contract. This will have included complying with any notice requirements in respect of any potential delay and additional costs, as well as following risk management and early warning notice provisions. The general view is that on the majority of projects contracts were not being administered in accordance with their terms.

2.7. To assist the industry in adhering to their contracts template letters from: the Contractor and Employer in relation to an extension of time pursuant to the JCT 2016 Design and Build Contract (JCT 2016 D&B), and the Contractor and the Project Manager in relation to a compensation event pursuant to the NEC 3/4 Engineering and Construction Contract (April 2013 Edition) (NEC 3/4 ECC) have been and continue to be available since Q2 2020. (Templates C,D,E and F). (Note: the JCT and NEC 3/4 suite of contracts refers to the Supplier as 'Contractor').

2.8. The NEC and CLC Guidance for Dealing with the Effects of COVID-19 under NEC3/4 Contracts should be reviewed when considering the impact of COVID-19 and the steps to take to administer the contract, and for this to be reflected under any NEC contract.

2.9. The template letters set out the relevant contractual clauses and information to be provided in respect of the; cause of the delay, estimate of delay and other likely effects under the; JCT 2016 D&B or the NEC 3/4 ECC, on the assumption that the JCT or NEC form of contract has not been amended. However, as standard form contracts are

commonly amended, parties should adapt the templates to comply with their specific contracts. The guidance notes and options included within the templates should be considered and completed before using them. For strategic alliancing/framework/call-off contracts, specifically within the maintenance sector, the letter should be tailored to the contract and adapted to suit.

2.10. A project's usual progress/project meetings should still have been continuing (albeit where site based in-line with current official guidance), along with any other meetings specifically required by the contract, such as risk reduction meetings. In such progress/project meetings, the parties should have been discussing the following points as part of good project management:

- What measures have been taken to ensure the works are being carried out in accordance with: general health & safety, safe and responsible travel, Government and other Public Health England Guidance, and the CLC's Site Operating Procedures;
- What works, if any, continued in respect of on-site works but also off-site works such as procurement, design etc.;
- If on-site works were temporarily suspended why that decision was taken (including the provision of the risk assessment and amendments to the Construction Phase Plan (where relevant), substantiating the position); and
- If on-site works continued, how COVID-19 affected those works and the progression of the works. For example:
    - Delayed delivery of materials;
    - Lack of resources;
    - Loss of productivity due to complying with the guidance outlined at the first bullet point above; and
    - Whether any project team members had been furloughed and who took over their role.

2.11. It is very important that before the templates are used, the details of the contract are considered and advice taken if necessary. The relevant letter should be tailored to reflect the contract, previous correspondence and developments since inception of the pandemic and its impact on the project.

2.12. It is hoped that the template letters provide guidance to encourage collaborative and open dialogue between the Employer and the Supplier to agree a way forward that is mutually agreeable whilst in the meantime maintaining their contractual rights and remedies. Parties should carry out the collaborative and contractual dialogue concurrently but usually separately as most parties will want to ensure that collaborative discussions are held on a without prejudice basis and subject to contract.

3. WITHOUT PREDJUDICE AND SUBJECT TO CONTRACT

Without Prejudice

3.1. "Without Prejudice" negotiations allow parties to discuss the issues, offering concessions, suggesting compromises etc., without fear that their suggestions could be used against

them at a later date to harm their legal position, if a settlement is not achieved. The protection offered by "Without Prejudice" negotiations covers genuine attempts to settle all or part of a dispute by creating a 'safe place' for the parties to have free, open and collaborative dialogue.

3.2. The reason why the letters in templates A and B are marked "Without Prejudice" is that it sets the scene for future correspondence and negotiations making it clear that concessions etc. can be offered within the without prejudice dialogue, but these suggestions cannot be used at a later stage to prejudice either parties' position.

3.3. For example, in section 4 below, which deals with the agenda for a future meeting, one of the agenda items is whether an extension of time can be agreed. Either party to the discussion might suggest that (say) an extension of time be granted retrospectively rather than face the prospect of damages for late completion – this might have further conditions attached. As identified at paragraph 4.6 below, one or both of the parties might explain the financial impact of the delays/unproductive working/health and safety measures to (say) explain to those involved that it would like some form of financial contribution. When done in the context of a "Without Prejudice" letter or meeting these statements cannot be referred to at a later date in an adjudication/litigation or arbitration (see below).

3.4. Note, heading a letter "Without Prejudice" does not mean it automatically is. To be "Without Prejudice" the letter must be sent as part of a genuine attempt to negotiate/settle all or part of a dispute. The label "Without Prejudice" should be used for letters of this type to avoid any confusion going forward, but it is important to bear in mind it must be part of a genuine negotiation process (i.e. not just an excuse to berate or abuse the recipient).

Subject to Contract

3.5. Hopefully, negotiations can yet lead to a compromise on the way forward and this will normally be set out in writing as a variation to the underlying contract, making clear which of the contract terms continue to apply, which do not and which are amended, to avoid any arguments in the future as to what was agreed. The parties are still free to settle the contract retrospectively to avoid an acrimonious, lengthy and costly dispute.

3.6. The use of the phrase "Subject to Contract" seeks to make it clear that a binding agreement is not in place until the terms are put in writing and agreed to by both the parties – for construction/maintenance contracts this will normally be a Deed of Variation to the underlying contract.

3.7. For those who have or are progressing with collaborative discussions in relation to ongoing contracts, model Deeds of Variation suggesting subject-areas for amendments are available (Templates G and H), which are aimed at construction for the unamended forms of the JCT 2016 D&B and NEC3 ECC. Before these are used, any amendments to the underlying contract forms need to be considered as well as any amendments agreed outside the scope of those provided for in the template Model Deeds. In such cases advice should be sought.

3.8. A template Settlement Agreement is also available (Template I) aimed at construction and/or maintenance/framework contracts which have concluded, but with outstanding issues arising between the parties – regardless of which standard form of contract forms the basis of the relationship. The Settlement Agreement is "contract agnostic" but before these are used the contract it relates to (including any amendments to the underlying contract forms) need to be considered as well as any amendments agreed outside the

scope of those provided for in the template Model Deeds. In such cases advice should be sought.

3.9. Care needs to be taken however to avoid parties entering into a binding new agreement via their actions without the terms of the agreement being placed in writing as this may get round the "Subject to Contract" proviso. Accordingly, even if an agreement is reached with a (virtual) handshake in a meeting, it should remain clear and be expressed that this is "Subject to Contract" - i.e. distillation of the agreement reached in a written record expressly agreed to by both parties.

3.10. For these reasons stated at 3.9, it should be confirmed in any agenda to the meeting and in the meeting itself, that the meeting is indeed "Without Prejudice and Subject to Contract" (WPSTC) even if an agreement in principle is reached at the meeting itself.

4. COLLABORATIVE MEETINGS

4.1. Given the above, it is suggested that any collaborative discussion (to see whether any agreement/compromise on the way forward can be reached) is held on a "Without prejudice and Subject to Contract" basis. These should be in addition to any meetings required by the contract (i.e. risk reduction meetings) or a project's usual progress meetings, as set out in section 2 above.

4.2. The parties should consider which attendees are best placed to attend any WPSTC meeting. It is recommended that any meeting/negotiations take place with representatives from the parties who have authority to settle.

4.3. Each project and each party's position on a project will be different. It is a matter for the parties to agree the issues to be discussed at such meetings and whether any agreement can be reached in respect of the same. To assist we have set out some points that could be considered below.

Time

4.4. Is the Employer willing to agree to an extension/adjustment of time now (without full compliance with all the requirements of the underlying contract) and for what period? Are there any conditions attached to this? This could alleviate the issue of LADs for late completion.

Termination Triggers

4.5. The parties should consider agreeing to waive any relevant termination triggers in the contract. For example:

- In the JCT 2016 D&B if all of the works (or substantially all) are temporarily suspended for more than the length of time set out in the Contract Particulars (usually two months) due to force majeure[1] either party can terminate the contract;

[1] Clause 8.11.1.1

- In the NEC3 ECC, the Employer may terminate the contract if a prevention event stops the Contractor completing the works by the date shown on the Accepted Programme and is forecast to delay Completion by more than 13 weeks.[2]
- In maintenance/framework/strategic alliancing/call-off contracts this could involve the right to terminate for failing to meet time-based Key Performance Indicators, or equivalent response time periods.

Additional Costs

4.6. What additional costs are likely to be incurred as a result of COVID-19 by both the Employer and the Supplier? Both parties should have put forward all likely additional costs[3] so they can all be considered in the round. It can then be discussed which party will bear the risk of such additional costs and whether that risk could be shared. Examples of sharing the risk of such costs could be changing the nature of the pricing system to 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.[4][5]

4.7. In the same vein, the parties could share details of any business support it received from the Government in respect of COVID-19, such as furloughing staff, loans, tax relief and cash grants to ensure that there is no double recovery of costs.

4.8. On a particular project and contract, it may be likely that a Supplier will be entitled to an extension of time as a result of COVID-19 but unlikely to be entitled to any loss and expense.

4.9. An Employer could consider:

- Its losses in respect of the delay and the cost for the Supplier to take additional measures to mitigate delays (over and above any contractual duty) and be willing to pay for the same;
- The risk of Supplier and supply chain insolvency, if it was not to share in some of the Supplier's 'pain' and, again, be willing to share in that pain; and
- Additional costs which could be incurred if the Supplier could have the right to terminate the contract if the works are suspended over a certain period of time (as set out above at 4.5 above).

4.10. Conversely, a Supplier could take into account:

- The fact that it will have the burden of proof in bringing any claim for both an extension of time and additional costs (in respect of both proving entitlement and substantiation of delay or additional costs), and the costs and time it is likely to incur in doing so; and/or
- That under some forms of contract the Employer may have the right to terminate the contract; in compromising its position or looking to mitigate its costs further.

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[2] Clause 91.7

[3] Sometimes referred to as an honesty system

[4] See for example NEC3/NEC4 Options C and D, Option 3 in the CLC Future-Proofing guidance and the CLC COVID-19 Impact Assessment Toolkit.

[5] Contracting authorities would need to consider and seek advice on any potential breach of procurement rules.

Mutually Agreeing to Suspend Works

4.11. The effect of COVID-19 on the project when taken as a whole could mean that the parties may have both wished to suspend all on-site works, even though some works could still be carried out safely. If so, the parties should have also looked to agree:

- The record of the status of works as at suspension;
- The steps to taken to demobilise and remobilise the works and when these should take place; and
- The practical issues such as security, storage, insurance, safety and any on-going payments in-line with the CLC advice on Temporary Suspension on Sites.

Payments and Valuations

4.12. Could valuations and payments be adjusted to assist the Supplier with the Employer potentially taking other security? For example:

- The repayment of retention;
- Advanced payments:
- Paying for off-site materials with appropriate vesting certificates;
- Increased frequency of valuation and payments;
- Potentially even changing the basis of the contract from lump-sum to target cost or open book and/or utilising project bank accounts to secure cash-flow; and
- Adjustment of time/resource related pricing formulae (e.g. KPIs).

Variations

4.13. The parties could discuss whether:

- Any specific materials were delayed and, if so, whether any variations could have been made to the specification to mitigate such delays (subject to issues such as compliance with planning permissions, building regulations and third party agreements such as development agreements/agreements for lease); and/or
- The works could be re-sequenced or sectional completion added or varied to reduce the Employer's losses or delay be reduced and/or to assist the Supplier in prioritising materials and/or labour.

4.14. The time and cost effects of any such variations should be agreed at the same time for certainty.

Payment to Sub-contractors/Suppliers

4.15. The parties could consider how payments to the supply chain could be monitored and protected. Consideration could be given to the Supplier agreeing to provide evidence of the same (perhaps through a digital payment/ transaction management system) or the use of a project bank account (which is the default policy for the public sector in England, Wales, NI and Scotland) along with the advantages and disadvantages of the same.

5. THIRD PARTY OBLIGATIONS

5.1. Each party to the collaborative discussions set out above may need to have separate discussions with third parties (such as insurers) to whom it also owes contractual obligations, either before or after any collaborative meeting.

5.2. Suppliers may need to get agreement from their sub-contractors/suppliers before entering into an agreement with the Employer, as such an agreement may affect its obligations down the contractual chain.

5.3. Employers may be under obligations to funders, purchasers or tenants, and insurers, which will need to be considered. For example, under development agreements Employers may be under:

- Similar obligations to notify delays, in order to obtain an extension of time; and
- Obligations such as using reasonable endeavours to procure that the Supplier complies with the building contract and not to agree variations to the same without the third party's consent.

5.4. Such agreements should be reviewed carefully (and, if in doubt, advice obtained) so that parties are aware of their obligations and any consents which could be required. Similar collaborative discussions should be held with such third parties to ensure that any agreement reached between the parties would also be agreeable to such third parties, to the extent that their consent will be required (ensuring related issues such as insurance cover are not undermined).

5.5. If it is not clear whether third party consent will be given (but would be required) this should be made clear in the WPSTC meeting between the parties and that any agreement reached will be subject to the same.

5.6. Some parties may also have the benefit of delayed site start up insurance or business interruption insurance which may cover some costs. Any applicable insurance should be reviewed carefully to ascertain any notification requirements and whether the insurer's consent/approval would be required to any correspondence and/or agreements.

6. OPTIONS AND BEST PRACTICE IF AN AGREEMENT CANNOT BE REACHED

6.1 Disputes are expensive, time consuming, and often destructive to healthy commercial relationships. If possible it would be better to spend the time and money involved in achieving a compromise for the good of all those involved. Hence this guidance and its supporting templates try to give the parties every opportunity to seek an agreement on how to deal with COVID-19.

6.2 However, it is recognised not all negotiations will result in a settlement. It is therefore worth noting that RICS offers a Conflict Avoidance Procedure for early resolution of issues. For further details see www.rics.org.

6.3 Set out below some brief guidance on the main forms of dispute resolution. Which form is to be used may be dictated by the terms and subject of the construction contract in question and therefore contracts should be reviewed, and advice sought, if necessary.

Escalation Clauses

6.4 A few construction contracts, particularly those for large projects, have "escalation"/"dispute hierarchy" clauses. Hence the parties are encouraged to start with an informal collaborative and proportionate method of dispute resolution before working

their way through to other more formal means of dispute resolution. For example, named senior representatives, normally directors, of both parties can be urged to meet, possibly having had briefing papers from both sides, in an effort to see if an agreement can be reached without resorting to more formal dispute resolution which is normally far longer and more costly. However, parties should not look to invoke such clauses solely to prolong and protract a dispute in order to improve its short-term commercial position. Such use would not be in keeping with the Cabinet Office Guidance Note on responsible contractual behaviour in the performance and enforcement of contracts during the COVID-19 emergency.

6.5 Not all construction contracts contain such a provision and the process involved will vary from contract to contract, but collaboration should not be open to abuse.

Adjudication

6.6 For the vast majority (but not necessarily all) construction contracts the main method of resolving disputes is adjudication. The identity of the adjudicator (and if not identified in the contract, the organisation who will appoint the adjudicator), together with the conduct of the adjudication will often turn on the relevant terms of the contract.

6.7 Adjudication is a fast process - it can take as little as 4 weeks from the dispute being referred to the adjudicator to reach a decision. As adjudication is carried out at speed it can put a considerable amount of pressure on the parties to organise and present information quickly.

6.8 Partly due to the speed involved some adjudications can lead to what is perceived as a rough and ready decision and overturning an adjudicator's decision, even if the adjudicator gets the facts and law wrong save for exceptional circumstances (e.g. the jurisdiction or breach of natural justice), can be difficult. A party faced with an adjudicator's decision achieved in a matter of weeks, which it may not agree with, will still have to comply with the decision, but will then have to go to court or arbitration to have the dispute reviewed again should it wish to (say) recover any monies paid as a result of the adjudicator's decision.

6.9 Whereas the object of adjudication is to reach a fair, rapid and inexpensive decision upon a dispute arising under the Contract, there is evidence that Parties are deterred from using adjudication because of the costs involved. The Construction Industry Council (CIC) launched a Low Value Disputes Model Adjudication Procedure in May 2020. In collaboration with the CIC, the Royal Institution of Chartered Surveyors now offers both a low-value dispute adjudication (sum claimed is less than £50,000 and do not involve multiple or complex issues) and a summary adjudication (claim below £20,000). For further details see websites for the CIC and RICS.

Litigation

6.10 Before litigation in court even commences the parties are encouraged to engage in the Civil Procedure Rules Pre-Action Protocol for Construction and Engineering Disputes (the Protocol) whereby both parties exchange the basis of their dispute and attend a without prejudice meeting to see if they can compromise all or some of their differences. The Protocol will not apply if the dispute in question has already been subject to an adjudicator's decision.

6.11 Should this fail, litigation via the courts can then commence. Litigation is governed by a detailed set of court rules which sets out formal procedures under which each party

sets out its case, disclosing documents such as emails etc., exchanging witness and expert's reports. As a result, litigation can prove to be proportionately very costly and take a long time to resolve. Construction cases involving substantial sums can take months (if not years) to resolve.

Arbitration

6.12 Arbitration is an alternative to litigation but will only apply if the contract contains an arbitration clause. An arbitrator, who is normally a construction professional, will deal with the dispute using their powers under the contract/the Arbitration Act. As a broad rule, arbitrations (although private and confidential) tend to follow the same procedures as litigation in court, but this is not by any means always the case.

6.13 Accordingly, arbitration often involves disclosure of documents, emails etc., expert reports and witness statements and the arbitrator will have to be paid for their time. Arbitration for particular major construction disputes can also be very costly and time consuming. The reality is that arbitration often incurs similar time and cost implications as litigation whilst having the benefits of expert decision makers and confidentiality (like adjudication).

Mediation

6.14 Mediation is a process whereby a trained professional becomes involved to see if they can encourage the parties to compromise and settle their differences in a WPSTC forum. There is no formal process to mediation, mediators and the parties alike can adopt whatever procedure they think will result in a settlement.

6.15 Mediations normally start by the parties presenting written submissions of their case to each other and the mediator, followed shortly by a meeting. The mediator will meet the parties together and separately, normally over the course of a day, in an effort to achieve a settlement.

6.16 Most mediators seek to encourage settlement by highlighting to the parties, either on their own or with each other present, the strengths and weaknesses of the facts, evidence, law and commercial positions, together with what would happen if a compromise is not reached? For example, a mediator might remind an Employer that without a financial settlement, the project may take even longer to complete and have even more severe financial repercussions as a result. Mediators might remind Suppliers that a compromise on some items, could avoid the cost and delays involved in adjudication, litigation etc., and even then the outcome of these processes are never certain.

6.17 The benefits of a mediation are that it is confidential, extremely quick, relatively cheap and the parties can record their agreement in a binding settlement that can be far wider in nature than a court judgment or arbitrator's/adjudicator's award/decision. However, the process does not guarantee a successful outcome - although the likelihood of a settlement once a mediation is underway, either at the mediation or shortly thereafter is quite high.

6.18 The mediator will still have to be paid, and there can be costs involved in preparing the mediation agreement, the documentation and the time spent at the mediation. Although these are usually low compared to more litigation, arbitration and adjudication.

6.19 Mediation is usually a voluntary process and so parties cannot be compelled to mediate, although parties can be penalised by the courts if they unreasonably refuse to do so. Good mediators try to ensure that the parties are engaged by emphasising that it is in their interests to do so. Also mediators do not give a binding decision – settlement is normally achieved by making sure the parties realise what the effect of a failure to achieve a compromise would be, rather than the parties simply relying on their strict legal rights.

7. CONCLUSION

7.1. The aim of this guidance is to generate collaborative and constructive approaches to the resolution of contractual issues on construction projects during these uncertain times.

7.2. This document provides general guidance and does not constitute legal advice. A party's contractual rights will depend on the wording of its particular contract and the factual circumstances on its project. If in doubt, advice should be sought.

7.3. If you have any comments or feedback please email: construction.enquiries@beis.gov.uk

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Construction Leadership Council
C/o Department for Business, Energy and Industrial Strategy
1 Victoria Street, London, SW1H 0ET
Tel. 020 7215 6476
construction.enquiries@beis.gov.uk
www.constructionleadershipcouncil.co.uk