Getting Back on Site

Key Considerations under the Public Works Contracts

22 May, 2020
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Agenda

• Status Overview
• Key Aspects of the OGP Guidance
• Contract Claims for Additional Time and / or Costs
• ‘Return to Work’ Checklist
Status Overview
World Health Organisation announced its assessment that COVID-19 can be characterized as a pandemic.

Irish government introduced first social distancing measures to delay the spread of the virus including closure of schools, colleges, childcare facilities and state-run cultural institutions. Hospital visits restricted, and pubs advised to close.

Irish government announced further public health measures directing people not leave their homes except for essential journeys. The public health measures were published on 28 March.

Government released its Roadmap for re-opening society and business. Phase 1 commenced on 18 May which permitted a phased return of outdoor workers, including construction workers. Social distancing requirements continue to apply.

11 Mar.
World Health Organisation announced its assessment that COVID-19 can be characterized as a pandemic.

12 Mar.
Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020 was signed into law giving the Minister for Health power to restrict movement and gatherings of people, as well as social welfare protections.

20 Mar.
The Health Act 1947 (Section 31a - Temporary Restrictions) (Covid-19) Regulations 2020 (the “Regulations”) were enacted giving legal effect to the restrictions announced by the Government on 27 March. The Regulations are effective from 8 April to 5 May & further extended to 18 May (SI 153 of 2020).

27 Mar.

8 April

18 May
How has this impacted the construction sector?

Programme Delays and Additional Costs:

Pre 27 March
- Slower rate of working
  - Social distancing;
  - reduced work force;
  - Shortage of materials / goods.

Post 27 March
- Complete shutdown for non-essential sites
- Slower rate of working for essential sites

From 18 May
- Phased return of construction sites is permitted
- Social distancing requirements continue to apply
- Impact on productivity
- Delays in supplies
Key Aspects of the OGP Guidance
OGP Guidance
PWC contracts

• Guidance issued 14 April and updated 8 May
• Recognises “exceptional circumstances currently facing contractors”
• Confirms no entitlement to the Contractor to recover costs associated with a delay arising from site closure
• Measures to alleviate financial impact

➢ Extension of time runs from 28 March rather than from 8 April
➢ payments up to the date of site closure should be made
➢ Consider adjusting period between interim payments
➢ Ex gratia
Ex gratia payment

• Contribution to cost of preliminaries based on open book information
• Applicable period is 12 April to 17 May
• Formula excludes profits and overheads
• Supplemental agreement
• Claw back if breach of the agreement
• No waiver of claims but set off
Contract Claims for Additional Time and/or Costs
Public Works Contracts
Potential Claims for Covid-19

Contractors may still claim for additional time and costs as a result of the impact of Covid-19

- Extension of time will provide some relief
- Impact on site productivity
- Increased site running costs
- Unknown duration
What approach are the CIF recommending to its members?

The CIF are recommending that ‘before construction resumes on any site, a revised risk assessment is conducted by the client and contractor to ensure the project can recommence, revised delivery schedules are agreed, revised work programmes are agreed and/or any necessary contractual instructions are issued by the client which make it possible to comply with these SOP’s’.
What response is appropriate for an Employer following such a request?

- Sub-clause 4.5.4 refers to the ‘Employers Representatives opinion’
- The ER must assess if it is ‘physically impossible or contrary to Legal Requirements to complete the Works in accordance with the Works Requirements’
- If completion of the Works is ‘physically impossible or contrary to Legal Requirements’, the ER ‘shall give an instruction’ per sub-clause 4.5.4
- Otherwise, a direction may be issued to the Contractor to proceed per sub-clause 9.1.3

What provisions in the Public Works Contracts may be used by Contractors to seek such an instruction?

- Contractors may request an instruction be given under sub-clause 4.5.4
What are the Legal Requirements imposed on the Contractor once works resume on site on 18 May 2020?

- Minister Humphries confirmed compliance is enforceable by the HSA.
- Sub-clause 2.5.1 states that the ‘Contractor shall [without limiting other obligations] ensure, so far as is reasonably practicable, that the Works are constructed to be safe and without risk to health…’
- Clause 2.2 which obliges the Contractor to ‘comply with all Legal Requirements’
What grounds may be used by a Contractor to seek an Extension of Time?

Clause 9.3 Delay and Extension of Time

• Contractor may issue a clause 9.3 notice
• Schedule Part 1 K15 – ‘delay to the Works caused by the order or other act of a court or other public authority exercising authority under law, that did not arise as a result of or in connection with an act, omission or breach of Legal Requirements of the Contractor or the Contractor’s personnel’
What grounds may be used by a Contractor to seek financial compensation?

- Contractor may issue a notice under sub-clause 10.3
- Schedule Part 1 K1 – if an instruction is issued under sub-clause 4.5.4
- Schedule Part 1 K7 – the Employer’s Representative did ‘not give the Contractor an instruction required under sub-clause 4.5.4 within the time required under sub-clause 4.11.2 when the Contractor has asked for the instruction in accordance with sub-clause 4.11.1’
What grounds may be used by a Contractor to seek financial compensation?

Clause 10 Claims and Adjustments - Schedule Part 1 K1 and Part 1 K7 events

- If ‘physically’ possible to complete the Works no liability arises if an instruction is not issued.
- Any such decision should be communicated to the Contractor.
What grounds may be used by a Contractor to seek financial compensation?

Clause 10 Claims and Adjustments - Schedule Part 1 K16 event

- Schedule Part 1K16 event if there is ‘A breach by the Employer of the Contract delaying the Works that is not listed elsewhere in this table.’
- If the Contractor refuses to return to site in the absence of an ER’s instruction under 4.5.4
- Sub-clause 4.1.1 requires ‘reciprocal co-operation’
‘Return to Work’ Checklist
Is the Site Compliant with Health and Safety Requirements?


- Return to Work Safely Protocol
  - Published by the Government on 9 May
  - The HSA will oversee compliance with the Protocol in the workplace – the Protocol is mandatory
  - Inspectors may issue Improvement Notices, Prohibition Notices or close sites

- CIF’s Standard Operating Procedure
  - Version 2 (published on 11 May) takes account of the Return to Work Safely Protocol
## Is the Site Compliant with Health and Safety Requirements?

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<thead>
<tr>
<th>cat</th>
<th>National Protocol</th>
<th>Standard Operating Procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Worker representative</td>
<td>Each workplace must appoint at least one lead worker representative</td>
<td>COVID-19 Compliance Officer(s) and workers Safety Representative. C-19 Compliance Officer’s duties should be shared among all contracting companies on a project.</td>
</tr>
<tr>
<td>COVID-19 Response Plan</td>
<td>Employers must develop or update their Response Plan for dealing with COVID-19 in their workplace.</td>
<td>Develop a specific COVID-19 Plan and update the existing (i) Safety Statement; (ii) Risk Assessments / Method Statement; and (iii) Daily Briefings Documents</td>
</tr>
<tr>
<td>Physical distancing</td>
<td>The Protocol identifies a number of ways in which physical distancing may be achieved in the workplace. Alternative measures are also suggested where 2m distancing is not physically possible.</td>
<td>Number of solutions in the SOP but particular attention should be paid to the requirements for personnel working within 2m of each other.</td>
</tr>
<tr>
<td>Staff training</td>
<td>Employers to provide COVID-19 induction training for all workers.</td>
<td>All site personnel must complete the ‘CIF Online C-19 Induction’.</td>
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</table>
Have You **Read Your Contract?**

What is the role of the Employer?
- Reciprocal co-operation
- Compliance with the Contractor’s reasonable safety rules (clause 7.5.3)
- OGP Checklist for Re-opening Sites (issued 14 May)

What is the role of the Contractor?
- Comply with all Legal Requirements and ensure that its personnel comply with all Legal Requirements (clause 2.2)

Are there any other documents relevant to the Project?
Are You Maintaining Adequate Records?

- Records can be kept as photographs, minutes (including minutes of all virtual meetings), emails, notes, letters etc.

- **Record the condition of the works** before the site re-opens. Maintain those records as the works progress.

- Records will be **critical when assessing a contractor’s claim** for an extension of time or costs or should any claim be referred to dispute resolution.
Are there any concerns regarding Insurance / Performance Security?

**Insurance**
- Consult with insurers
- Request updated evidence of professional indemnity insurance to be maintained by Contractors and Specialists

**Performance Bonds**
- The Model Form of Performance Bond requires the bond to remain in place post Substantial Completion of the Project
- No action required by an employer

**Parent Company Guarantee**
- Consider confirming there have been no changes to the financial status of the parent company
Additional Covid-19 related services for Consultants Engaged under the CoE
Construction Stage

What additional services may be required as a result of Covid-19 in relation to projects on site?

- Re-start inspections and associated reports
- Ex-Gratia payment negotiations
- Assessing Contractor Claims
- Formal Dispute resolution processes
Design Development / Pre-Tender Stage

What additional services may be required as a result of Covid-19 in relation to projects in Design Development/Pre-tender Stage?

• Updating documents including Risk Assessments
• Updating planned programme of works to take re-sequencing/social distancing into account
• Updating the Preliminary Health & Safety Plan
Covid-19 Tasks – Are there grounds for additional fees?

What do the Conditions of Contract say?

- Suspension – entitlement under sub-clause 4.16 to 4.23
- Prolongation – Neither party liable to the other for Special circumstances
- Client Liability – ‘no liability to the Consultant [whether for breach of contract, duty of care or other duty] for the Consultant’s costs or losses’
- Cooperation – support reciprocal cooperation
- Communicate without prejudice
- Incentives – the client may make concessions as an incentive to continue cooperation
What services are within the Contract?

Scope of Services

- How prescriptive is it?
- Examine the words/phrases used
- E.g. are the services ‘reasonably to be expected’?
- Grounds to seek an instruction?
Conditions of Engagement – **Clause 11 Client’s Changes**

**Determining additional fees following Clients instruction**

- Clause 11 instruction for change to services
- Clients discretion to choose proportionate increase or apply Time Charges
- Success dependent on Scope and quality of case presented!
Questions?