

Principal Covid-19 guidance from Government and Construction Leadership Council



Since the publication '*Coronavirus (Covid-19) and JCT Contracts*' in April much has changed. The emphasis in that article was on existing contracts because there was great concern for those involved with construction projects. That article attempted to set out what the parties to a building contract should do within the context of the Government's response to the virus and the Construction Leadership Council's (CLC) Site Operating Procedures.

As the Covid-19 pandemic has progressed, the Government has made further pronouncements including:

- Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency – issued on the 7th May and updated on the 30th June.
- Guidance Notes for Construction Contracts – Procurement Policy Note 02/20 – issued on the 25th June.
- Procurement Policy Note 04/20: Recovery and Transition from Covid-19 (Action Note PPN 04/20) issued on the 9th June.

The CLC supports the import of those pronouncements in its own publications:

- CLC Covid-19 Contractual Best Practice Guidance – issued on the 7th May and updated on the 28th May
- and more recently with CLC Covid-19 Contractual Disputes and Collaboration Guidance – issued on the 14th July. Additionally, it has continued to review its Site Operating Procedures to reflect the changes arising from the Government's gradual easing of its lockdown restrictions.

Those responsible for building projects that were in progress at the start of the Covid-19 emergency will already have had to make a range of decisions and the published guidance to date should have assisted and it remains relevant. Although much of the documentation is written for the public sector most of it applies equally to the private sector.

Even before the date of those publications referred to above the Government had issued its Procurement Practice Notes PPN 01/20, PPN 02/20, which are applicable to the public sector. PPN 01/20 stated that

‘there will be a range of commercial actions that need to be considered by contracting authorities in responding to the impact of COVID-19. In such exceptional circumstances, authorities may need to procure goods, services and works with extreme urgency.’

This approach is permissible under the current public procurement regulations and has the effect of relaxing the procurement requirements in a way that, subject to proper oversight, enables a contract to be extended or modified during its term. PPN 02/20 goes further by referring to the type and nature of supplier reliefs for which guidance was given in its Guidance Notes for Construction Contracts – Procurement Policy Note 02/20 – issued on the 25th June. That guidance includes a section on frequently asked questions and a template of a deed of variation relating to a JCT Design and Build Contract 2016.

Although PPN 02/20 makes specific reference to force majeure, and frustration, it promotes the continuation of work, wherever possible, by maximising commercial flexibilities within the contract in relation to relief mechanisms.

The Covid-19 emergency inevitably caused great concern for those with extant construction projects. As the CLC put it *‘delays are inevitable and additional costs likely’* and it became essential to establish whether or not the project might continue and if so how. On the 11th May the Government issued *‘Working safely during the COVID-19 in construction and other outdoor work’*, (now referred to in the CLC’s Site Operating Procedures) whose detailed provisions indicate the nature and extent of restrictions: hence the potential for delay and additional cost. That document has undergone many updates, with the latest being issued on the 12th August. One can check for further updates at www.gov.uk/workingsafely

In the Cabinet Office guidance on responsible contractual behaviour, which applies to both the public and private sectors, it strongly encourages

‘all individuals, businesses (including funders) and public authorities to act responsibly and fairly in the national interest in performing and enforcing their contracts, to support the response to Covid-19 and to protect jobs and the economy.’

It sets out guidance and recommendations with regard to contracts and the impact of Covid-19 but makes clear the limits of such guidance by not overriding any support or relief, including any in the relevant contract or at law more generally. Its purpose is to ensure where possible the maintenance of projects and supply chains in the longer term by reaching appropriate agreement and by avoiding the formalisation of disputes. This probably means that strict interpretation of the contract should not always be taken and that contract administrators should look favourably in relation to the operation of terms (the guidance provides a list of situations) and upon providing relief where the project is adversely affected by the pandemic.

CLC's Best Practice Guidance is said to complement that of the public sector guidance, which is set out in the Government's Procurement Practice Notes, and the Cabinet Office's various publications. Those publications encourage public sector employers *'to consider supplier relief as a result of Covid-19 in order to enable projects to progress and encourage cashflow, either under existing contractual mechanisms or through agreed variations to the Contract'*. (Variation here refers to terms of the contract as distinct from the project work.) The CLC guidance then states (as does the Cabinet Office) that it applies to both the public and private sector alike. The aspiration that the approach should apply equally to both sectors is laudable and there is little doubt that the need to act fairly and reasonably when administering the contracts is incumbent upon the parties. However, whether providing liberal interpretations under the contract to provide relief can apply to the same extent in the private sector is a moot point. Government has deep pockets, being able to draw on the taxpayer, whereas companies are generally more constrained. Nevertheless, it is good practice to seek an agreement between supplier and employer in respect of the impact of Covid-19 but, in doing so, to observe CLC's wording

'it is imperative that the contractual mechanisms continue to be followed to preserve each party's rights and remedies under the contract. This includes 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.'

Despite, indeed because of, everything that has arisen regarding the Covid-19 emergency, the contract is and remains an important document and should be administered accordingly.



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