

CLC COVID-19: CONTRACTUAL DISPUTES & COLLABORATION GUIDANCE

Future Proofing Guidance: JCT/NEC Contract Amendments

1. INTRODUCTION

- 1.1. This Guidance builds upon the [CLC COVID-19 Contractual Best Practice Guidance](#) which emphasised the importance of complying with any obligations in respect of contract administration in respect of the risks of COVID-19 on projects.
- 1.2. The objective of the Guidance and the [Summary Guidance](#) was 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. The purpose of the Guidance was to enable parties to reach a collaborative outcome safeguarding project delivery and business continuity – the Summary encourages an approach which *'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 Guidance transposes [Government advice](#) to drive fair and responsible behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency.
- 1.5. The CLC's Contractual Clauses survey revealed that many in the industry would like further guidance on amendments to new contracts yet to be entered into, that deal with the impact of COVID-19.
- 1.6. Annex 1 provides suggested amendments to the JCT Design & Build Contract 2016 ("JCT D&B 2016") and the NEC 3 & 4 Engineering & Construction Contract ("NEC 3 & 4 ECC").
- 1.7. Particular consideration needs to be given to further changes to other parts of the NEC 3 or 4 ECC – each NEC 3 or 4 ECC Option has a different payment mechanism. For example, under Options C and D of the NEC 3 & 4 ECC a compensation event (as provided in the annex), can lead to the Target Cost changing, rather than a simple additional payment being made to the Contractor.
- 1.8. Please note that the template drafting in annex 1 is based upon the unamended JCT D&B 2016 and NEC4 ECC; these forms are frequently changed and any COVID-19 amendments should be adapted to suit the actual wording in the underlying contract, sub-contract or consultancy agreement. The amendments are therefore a guide and more intricate changes may be required, but it is hoped that this will provide a starting point for all parties involved as to how they will deal with the COVID-19 pandemic going forward.
- 1.9. The amendments are made on the basis of any pandemic, but the parties may wish to consider whether they want to restrict the terms to only the COVID-19 pandemic (or mutations of it).
- 1.10. The amendments in annex 1 may also be used as a basis for amending existing contracts already entered into where (say) they do not provide for an extension of time when dealing with the delays caused by COVID-19 and, more likely, existing contracts which do not allow for the reimbursement of loss and expense incurred by a contractor in dealing with COVID-19 but the parties have now agreed for the contract to do so. Any changes to existing contracts should be made by using a Deed of Variation setting

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out the agreed amendments to avoid arguments in the future – the process for doing so and supporting templates is explained in detail in [CLC COVID-19 Contractual Best Practice Guidance](#) which also refers to [PPN 02/20: Supplier Relief due to COVID-19](#), [PPN 02/20: Additional guidance, FAQs and model terms for construction](#) and [PPN 04/20 Recovery and Transition from COVID–19](#) which contain useful templates for varying existing construction contracts.

2. THE OPTIONS

- 2.1. The JCT D&B 2016 allows for an extension to be granted for “*force majeure*”¹ whilst the NEC 3 & 4 allows money and time where an event has happened which neither party could prevent, an experienced contractor would have judged it to have such a small chance of occurring that it was unreasonable to have allowed for it etc. The amendments seek to avoid any litigious arguments as to whether COVID-19 is a “*force majeure*” event, or foreseeable etc.
- 2.2. These amendments have also been drafted on the basis that the contract programme and contract sum/prices do not already allow for COVID-19 related delays/costs. If the parties have done so then no amendment may be required. In such circumstances the parties may even wish to consider additional or related provisions to reflect any further impact of the consequences of COVID-19, for example to provide for acceleration and the reimbursement of costs if restrictions due to COVID-19 are eased.
- 2.3. Significantly the amendments give 3 options for both the JCT D&B 2016 and the NEC4 ECC:
 - 2.3.1. **Option 1** - allows for just an extension of time to be granted;
 - 2.3.2. **Option 2** - gives rise for an extension of time in addition to the payment of all the Contractor's loss and expense incurred in dealing with COVID-19; and
 - 2.3.3. **Option 3** - allows for the grant of an extension of time, but for the Contractor to be paid a predetermined percentage of the loss and expense incurred. The exact percentage will be the subject of negotiation and should be included where indicated in “[]”s. The intention behind this amendment is for the Contractor and the Employer to share at least some of the costs associated in dealing with COVID-19. The parties could also consider agreeing the Employer paying the Contractor's site-based overheads (preliminaries) at a fixed rate for the period of delay.
- 2.4. The Parties might want to take advice on any amendments, particularly those which lead to sharing financial risk as deciding how this actually operates in practice may be difficult.

3. TERMINATION

- 3.1. In the event of a further wave or further delays caused by COVID-19 then the amendments allow for termination in certain circumstances:
 - 3.1.1. Under JCT D&B 2016, whether whole or substantially whole of the Works is suspended for a specified continuous period, then upon giving notice either the Employer or the Contractor may give notice terminating the Contractor's employment; and
 - 3.1.2. Under the NEC 3 & 4 ECC the contract may be terminated if the works have been suspended for a specified period.

¹ Clause 2.26.14

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- 3.2. The specified periods for which the suspension must continue for the right to terminate to arise should be agreed for each contract and included where indicated in “[]”s.
- 3.3. Termination as a result of a Pandemic Event has the same effect as termination for “*force majeure*” under the JCT D&B 2016 and under the NEC 3 & 4 ECC it has the same effect as termination due to a prevention event under clause 91.7. The effect of termination (including the Contractor’s entitlement to payment) due to a Pandemic Event should be agreed on a contract by contract basis and the attached drafting amended as appropriate.
- 3.4. If the parties decide to allow loss and expense to the Contractor for COVID-19 then the Employer should consider whether the right to terminate in such circumstances should be for either party or both parties, given that the paying party (Employer) is bearing the risk of the additional cost and delay.

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ANNEX 1 - COVID-19 Template Clauses/Amendments

JCT Design & Build Contract 2016 (JCT D&B 2016)

1. Option 1: Time (but not money)

Add a new definition to clause 1.1 as follows:

"A Pandemic Event means:

- i) any pandemic (including, but not limited to, the COVID-19 coronavirus outbreak and/or any mutation thereof and any other outbreak of an infectious human disease),*
- ii) any measures, recommendations, regulations and legislation issued by the government and/or public authorities in relation to any pandemic from time to time, and/or*
- iii) any consequences of any pandemic which are outside the reasonable control of the Contractor, which affects the Works including without limitation the Contractor being unable to reasonably access the Site, delay in or non-delivery of any materials required for the Works, the Contractor being unable to reasonably adequately resource the Works."*

Add a new clause 2.26.15:

"a Pandemic Event."

2. Option 2: Time and money

Add a new definition to clause 1.1 as follows:

"A Pandemic Event means:

- i) any pandemic (including, but not limited to, the COVID-19 coronavirus outbreak and/or any mutation thereof and any other outbreak of an infectious human disease),*
- ii) any measures, recommendations, regulations and legislation issued by the government and/or public authorities in relation to any pandemic from time to time, and/or*
- iii) any consequences of any pandemic which are outside the reasonable control of the Contractor, which affects the Works including without limitation the Contractor being unable to reasonably access the Site, delay in or non-delivery of any materials required for the Works or the Contractor being unable to reasonably adequately resource the Works."*

Add new clause 2.26.15:

"a Pandemic Event."

Add new clause 4.21.6:

"a Pandemic Event."

3. Option 3: Time and % of money

Add a new definition to clause 1.1 as follows:

"A Pandemic Event means:

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- i) *any pandemic (including, but not limited to, the COVID-19 coronavirus outbreak and/or any mutation thereof and any other outbreak of an infectious human disease),*
- ii) *any measures, recommendations, regulations and legislation issued by the government and/or public authorities in relation to any pandemic from time to time, and/or;*
- iii) *any consequences of any pandemic which are outside the reasonable control of the Contractor, which affects the Works including without limitation the Contractor being unable to reasonably access the Site, delay in or non-delivery of any materials required for the Works or the Contractor being unable to reasonably adequately resource the Works."*

Add new clause 2.26.15:

"a Pandemic Event."

In clause 4.19.1, after *"subject to clause 4.19.2"*, add:

"and 4.19.3".

Add new clause 4.19.3:

"Notwithstanding clause 4.19.1, in the event of the regular progress of the Works or any part of them being materially affected by the Relevant Matter referred to at clause 4.21.6, the Contractor shall only be entitled to the reimbursement of []% of the direct loss and expense which it would otherwise be entitled to as a result of such circumstances under these clauses 4.19 – 4.23."

Add new clause 4.21.6:

"a Pandemic Event."

4. Suspension/termination

In clause 8.11.1, after *"Contract Particulars"*, add:

"(or in the case of clause 8.11.1.7, for [] days)".

Add new clause 8.11.1.7:

"a Pandemic Event,"

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NEC4 Engineering & Construction Contract (NEC4 ECC)

1. Option 1: Time (but not money)

Add a new clause 11.2 (12A):

"A Pandemic Event means:

- i) any pandemic (including, but not limited to, the COVID-19 coronavirus outbreak and/or any mutation thereof and any other outbreak of an infectious human disease),*
- ii) any measures, recommendations, regulations and legislation issued by the government and/or public authorities in relation to any pandemic from time to time, and/or*
- iii) any consequences of any pandemic which are outside the reasonable control of the Contractor, which affects the works including without limitation the Contractor being unable to reasonably access the Site, delay in or non-delivery of any materials required for the works or the Contractor being unable to reasonably adequately resource the works."*

Add new clause 60.1 (22):

"A Pandemic Event."

Add new clause 61.8:

"Notwithstanding any other provision in this contract, there shall be no change to the Prices where and to the extent that a compensation event is an event of the type referred to in clause 60.1(22)."

2. Option 2: Time and money

Add new clause 11.2 (12A):

"A Pandemic Event means:

- i) any pandemic (including, but not limited to, the COVID-19 coronavirus outbreak and/or any mutation thereof and any other outbreak of an infectious human disease),*
- ii) any measures, recommendations, regulations and legislation issued by the government and/or public authorities in relation to any pandemic from time to time, and/or*
- iii) any consequences of any pandemic which are outside the reasonable control of the Contractor, which affects the works including without limitation the Contractor being unable to reasonably access the Site, delay in or non-delivery of any materials required for the works or the Contractor being unable to reasonably adequately resource the works."*

Add new clause 60.1 (22):

"A Pandemic Event."

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3. Option 3: Time and % of money

Add a new clause 11.2 (12A):

"A Pandemic Event means:

- i) any pandemic (including, but not limited to, the COVID-19 coronavirus outbreak and/or any mutation thereof and any other outbreak of an infectious human disease),*
- ii) any measures, recommendations, regulations and legislation issued by the government and/or public authorities in relation to any pandemic from time to time, and/or*
- iii) any consequences of any pandemic which are outside the reasonable control of the Contractor, which affects the works including without limitation the Contractor being unable to reasonably access the Site, delay in or non-delivery of any materials required for the works or the Contractor being unable to reasonably adequately resource the works."*

Add a new clause 60.1 (22):

"A Pandemic Event."

Add a new clause 63.12:

"Notwithstanding any other provision in this contract, any increase to the Prices as a result of a compensation event of the type referred to in clause 60.1(22) shall be reduced by []%."

4. Suspension/termination

In the termination table in clause 90.2, insert R17A i) after R21 in the row regarding termination by the *Client* and ii) after R17 in the row regarding termination by the *Contractor*.

Add a new clause 91.5A:

"Either Party may terminate if the works have been suspended for at least [] days due to a Pandemic Event (R17A).