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Issued on behalf of SNIPEF

2 April 2020



# Contractual Guidance

INFORMATION RELEVANT TO THE COVID-19 CRISIS

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## Introduction

The implications of Covid-19 are clearly widespread and profound. All sectors and industries are affected. It is particularly acute in the construction sector. In a very fast-moving situation, this is an update which reflects the position as at **2 April 2020**.

On 24 March 2020, the First Minister for Scotland, Nicola Sturgeon, said “her advice was that non-essential building sites should close”. There has been much discussion on this matter since then with the Construction Employers Federation advising all their members to close construction sites, and the FMB, we understand are following this advice for their members.

We welcome the recent statement by **Connor Murphy, Finance Minister** <https://www.finance-ni.gov.uk/news/construction-companies-supporting-essential-works-must-comply-pha-guidelines-murphy> that provides some clarity on the position in Northern Ireland. SEC Group (NI) has agreed to issue the following guidance to businesses operating in Northern Ireland

1. We recommend that businesses follow advice from the Finance Minister for Northern Ireland; in accordance to these, our guidance is that work should only be undertaken on Construction sites in the case of Essential Services i.e. hospitals, transport, water and sewage infrastructure.
2. We recommend that only emergency repair and maintenance work essential to safety\* is undertaken until notified otherwise by the Northern Ireland Executive.
3. We recommend that any other construction work should be suspended in the meantime.

*\* Your own trade association will provide further examples and guidance, but businesses should use their own judgement over what constitutes an” emergency”.*

***We understand that the situation is subject to constant review and this guidance will be updated accordingly. We are also asking the Executive to give us a more specific definition of ‘essential’ works.***

Note that there is no specific legislation in force, yet which requires all non-essential construction activities to cease. That position may change today or in the days ahead particularly following upon the enactment of the Coronavirus Act 2020.

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## What do you need to do if your construction sites close?

The advice differs depending on the terms of the contract, the reason for the closure, and where you sit in the supply chain. However, the first thing to establish is the reason for the closure. Have you been told that the works are suspended? Have you not been given any reason, other than the site is closed due to Covid-19? The reason given has consequences.

Whatever the reason (if any), the practical advice is this:

- Issue notices as soon as possible to protect yourself. In the context of a JCT/SBCC contract, the notice should be given to preserve your right to claim an extension of time AND a claim for loss and expense. The notice should cover all conceivable relevant events, and, if appropriate, relevant matters (for loss and expense). This is why the reason for the closure is potentially important. If you are told that the work is “postponed” by the contract administrator for example, this is a ground for an EOT and loss and expense. Furthermore, if you consider that you are able to provide the work, the closure of the site may be an “impediment or prevention” – which is a time and money event.

If NEC conditions apply, then the appropriate contractual notices should be given where EOT and/or money are to be claimed including Early Warning Notices and notices of any Compensation Event.

Care should be taken to check the requirements of your specific contract (including any bespoke changes to Standard Forms) in order to cite the relevant contractual provisions and the relevant circumstances founded upon.

- If this affects sub-contractors, please give careful consideration to the notices you send to them and communicate clearly and as soon as possible whether works are to be suspended. Again, the advice is dependent on the terms of the contract. In general terms, it will be in your interest to act fairly and in accordance with the terms of the sub-contract and afford them the same delay/loss and expense events as you are granted under your contract. It is a time for the supply chain to come together and work out how to act in the best interests of health and safety of employees and not an opportunity to beat up those lower down the supply chain, however worried you may be feeling about your own business.
- Consider whether the closure of the site amounts to suspension only or termination of the contract. The particular contract may contain specific notice and other provisions dealing with suspension or termination. Consider also whether there has been “frustration” of the contract. The doctrine of frustration arises where there is a change of circumstances after the contract has been entered into, which is not the fault of either party which renders the contract either impossible to perform or fundamentally deprives the contract of its commercial purpose. Frustration is difficult to establish and essentially brings the contract to an end.
- Accurately record the state of your works at the point of closure, as described below.

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## **What is “force majeure”?**

This has become a fashionable expression in the last few weeks, having been very seldom discussed for decades. Force majeure, strictly, has no fixed definition in law but is thought to cover an “act of God” or something outside the control of the parties, for example a natural disaster or the outbreak of war or other hostilities which prevents one party from meeting its contractual obligations. In such an eventuality the doctrine of force majeure means that the party who can't perform obligations is not held liable for the consequences of the inability to perform.

Given the uncertainty as to what is covered by force majeure at common law many written contracts set out specific circumstances which are to be regarded as a force majeure, for example, an epidemic. All we can say right now is that the circumstances created by the virus might be a force majeure but that is not clear. If your contract has a force majeure clause, the wording should be checked to see if it might cover the virus. Force majeure clauses are usually more complex than just bringing the contract to an end as would be the case due to frustration. They might give entitlement to claim EOT and money.

Here again, notice of a force majeure may strictly be required by the particular contract and notice should be given in such circumstances.

## **What if the law changes, requiring building sites to close?**

This will at least put matters beyond doubt. It means that, in a JCT contract, there will be entitlement to claim an extension of time, but not loss and expense. It may also, depending on the length of the closure, effectively bring about the right to terminate the contract.

## **What if this is a local authority contract?**

The Cabinet Office has published Procurement Policy Note 02/20 (PPN 02/20) – Supplier Relief due to COVID-19 which applies to all public contracting authorities. It covers goods, services and works contracts being delivered in the UK.

PPN 02/20 sets out information and guidance on payment of suppliers, to ensure service continuity during and after the current COVID-19 outbreak and sets out a list of immediate actions.

It includes a section on “accelerating payment of invoices”. It also confirms that contracting authorities and suppliers should work collaboratively to ensure there is transparency during this period. To qualify for continued payment for the purposes of maintaining business continuity, suppliers should agree to act on an open book basis and make cost data available to the contracting authority. This concept is explained, and examples provided. Suppliers should also continue to pay employees and flow down funding to their subcontractors.

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## What are my health and safety obligations?

If you are being told to continue to work on a site, you need to be very careful about your health and safety responsibilities and duties. An assessment must be made as to whether it is safe to do so. Appropriate risk assessments should be made under the CDM Regulations.

Duty holders are the ones that control and coordinate the site and where it is obvious that the social distancing is not or cannot work then they have to seriously consider continuing the work.

Conceivably, directors could face the prospect of prosecution, if a worker contracts and dies of the virus in circumstances where no safe system of work was implemented.

It goes without saying that, irrespective of the contractual position, health and safety must be a priority for every contractor / employer. If you are being told to go to work on a construction site and you consider that it is not safe to do so, we strongly recommend that you note your position in writing, stating why (in detail) the risks are too great.

## What do I do about payment?

It is imperative that you pursue any debtor for any outstanding payments.

If your contract is a Construction Contract under the 1996 Act you are due to be paid by the final date for payment. If you are not paid by the final date for payment then you can thereafter issue a notice of your intention to suspend and after at least 7 days, you can then suspend the performance of any or all of your obligations under the contract or subcontract. You will then be entitled to an extension of time for the period of the suspension, and for the recovery of any costs you have incurred as a result of the suspension. Be sure to keep accurate records to enable you to calculate such when the suspension ends. Suspension for non-payment ends following payment being discharged. If payment is not made it may be necessary to issue a Notice of Adjudication to recover what you are due.

If a site closes or you elect to close the site, you should submit an application for payment up to the date of closure or departure. If at all possible, you should take photographic records of your progress on site and of any materials on site. You must leave your works in a safe condition, so it is best to co-operate with the employer or the contractor in this connection.

***Please note, this guidance contains general information only and is not to be treated as legal advice. Your legal position will depend largely upon the particular terms of your contract (express or implied) and the surrounding circumstances and accordingly you should seek appropriate legal advice which reflects those terms and circumstances.***

**For Further Information and Guidance Contact your Member Organisation or legal advisor.**