

BRIEFING NOTE

The COVID-19 Virus and Delays to Project Completion – Applying for Extensions of Time and Additional Costs for Construction Projects

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Introduction

As we continue our battle with COVID-19, most of the world is in some form of lockdown. Many construction projects have come to a halt as workers are barred from entering sites and material and equipment are unable to be delivered as quickly as desired. With the lockdowns stretching on, it may be increasingly difficult to deliver projects according to the original schedules and extensions of time and additional costs may need to be sought.

To assist Contractors with such time and cost claims, we have prepared this briefing note to provide an outline of how Contractors may seek relief from their Employers.

Overview of Extensions of Time and Additional Costs Claims

When construction projects are delayed, it is common for Contractors to seek extensions of time and additional costs from their Employers.

To do so, Contractors should first determine the grounds of their claim (typically, this can be a force majeure or non-force majeure event). Having determined these grounds, Contractors should provide adequate and timely notification of their claims in accordance with the contractual provisions.

Establishing the Basis of the Claim

Typically, the basis for any time and cost claim may be a force majeure or non-force majeure event.

Force majeure events have been widely discussed. These events excuse non-performance of contractual obligations. However, it is important to remember that force majeure is not a free-standing legal principle under common law jurisdictions. This means that the ability to rely on so-called force majeure events depends on the existence and the precise wording of a force majeure clause.

It is common for force majeure clauses to comprise two parts: (a) the first part describes the characteristics of a force majeure event; and (b) the second part provides examples of force majeure events. When dealing with these clauses, Contractors should review the contract wording carefully to determine whether force majeure events are limited to events *ejusdem generis* to those listed in the examples.

Non-force majeure events are less widely discussed. However, they are equally effective as a basis for time and cost claims. Some examples are illustrated below:

- ‘Change in laws’ clauses are often present in most construction contracts. They usually provide that should any change in the legislation (i.e., change in laws restricting the number of, or even prohibiting, workers allowed on site) affect the time and/or cost for completion of the project, the Contractor is entitled to apply for an extension of time or additional costs to complete the project.
- ‘Delays by public authorities’ clauses are often sighted too. They usually provide that if Contractors are delayed by virtue of procedures laid down by the relevant public authorities (i.e., mandatory temperature reporting or additional protective equipment), Contractors are entitled to apply for an extension of time or additional costs to complete the project.
- ‘Unforeseeable shortages’ clauses can be found as well. They usually provide that if there are unforeseeable shortages in manpower or material and equipment due to certain specified reasons (i.e., contagious diseases such as COVID-19), which lead to the delay in project completion, Contractors are entitled to apply for an extension of time or additional costs to complete the project.

Notification of the Claim

Having established a basis for claiming extensions of time and additional costs to complete the project, Contractors are encouraged to ‘lock in’ these claims by providing adequate and timely notification to the Employer (and/or the Engineer).

The construction contract will stipulate the information necessary to substantiate the claim. For this reason, Contractors are advised to maintain contemporary records of documentation essential for its claim.

The construction contract will also stipulate the time for notification of the claim. There is usually a deadline for the initial notification (whereby a Contractor need only notify, without any supporting documentation, of the event causing the delays). This is typically followed by a deadline for subsequent substantiation (whereby a Contractor submits a fully detailed claim, comprising of the basis of the claim, the supporting documentation and the extension of time and/or additional cost claimed).

Contractors should adhere to these contractual stipulations on the adequate and timely notification of claims. Otherwise, the right to make such claims may be lost such that no extensions of time or additional costs may be granted.

How We Can Help

COVID-19 restrictions are likely to remain with us for quite some time. Until we find a solution to cope with COVID-19, there may be further delays to the completion of construction projects. During this time, Contractors are encouraged to maintain relevant records of project progress and where required, engage external assistance to help with the claims process.

Our construction team is well equipped and experienced to assist Contractors with extensions of time and additional costs claims. We work with construction support consultancy firms to assist our clients with assessing the quantum of their claims whilst ensuring that our rates remain reasonable and aligned with the commercial interests of our clients.

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