



Coronavirus – Building contracts

Updated as of 7 May 2020

The effects of the current pandemic on construction projects put us in an unprecedented situation, so whilst we summarise below the general principles that are likely to apply under a standard JCT contract, it is unfamiliar territory and will likely lead to some novel situations.

It is also worth noting that claims for extensions of time or additional money will be dependent on the facts of each particular circumstance that occurs on site and each circumstance will need to be assessed individually within the general guidance given below.

Claims for additional time

A contractor will be entitled to an extension of time if one of the 'Relevant Events' listed in the JCT contract occurs. Having reviewed the terms of the JCT Design & Build 2016 edition (by way of example), the provisions which are most likely to be operative in these circumstances are:

1. the exercise of a statutory power by the UK Government under clause 2.26.12; and
2. force majeure under clause 2.26.14.

Statutory powers

If the UK Government exercises statutory powers to contain COVID-19 and the exercise of these powers delays the project, this would more than likely fall under clause 2.26.12 and enable the contractor to claim an extension of time. Such statutory powers could include a mandatory requirement for the populace to remain at home, curfews being imposed, borders being closed, certain areas being quarantined or prevention of supplies being delivered to site.

Force majeure

A 'force majeure' event is generally understood to be an 'act of God', however, there is no definition in the JCT. It is generally thought that the spread of an infectious disease, such as COVID-19, would qualify as a force majeure event as it is outside the will and control of both contracting parties. The spread of the disease would

need to have a definable impact on the works – e.g. labour shortages, an outbreak on site closing the works down or lack of material availability.

The circumstances above focus on the impact of COVID-19 across the country as whole. It is of course possible that a localised incident of COVID-19 results in the commencement or progress of work being delayed. In this case there are three further Relevant Events to consider:

1. The deferment of giving possession under clause 2.26.3;
2. An instruction for the postponement of work under clause 2.26.2.2;
3. An instruction that limits site working hours or otherwise restricts the contractor's ability to undertake the work in a timely manner under clause 2.26.1.

In the case of each of these clauses we are concerned with an instruction issued by or on behalf of the Employer which is based on site specific factors.

Mitigation

Each of the Relevant Events explained above are subject to the mitigation proviso in clause 2.25.6 whereby the contractor must constantly use his best endeavours to prevent delay to the progress of the works.

Therefore, for example, if one or two of the contractor's workforce are in self-isolation and unable to work, the contractor should use its best endeavours to find other workers to carry out their jobs. However, if it is genuinely impossible to source other workers as the epidemic has had a major effect on the labour market generally, an extension of time should be granted.

In the case of delays caused by an Employer's decision to defer the giving of possession, to postpone work or alter working practices there may be little that a contractor can do to mitigate the effect of delay.

Claims for additional money

A contractor will be entitled to claim for additional money if one of the 'Relevant Matters' listed in the JCT contract occurs. These are more limited than the 'Relevant Events' set out above, as neither the exercise of a statutory power nor force majeure are Relevant Matters.

The additional money is for direct losses and expenses incurred as a result of the Relevant Matter.

There is nothing obvious in the JCT Design and Build contract list that could trigger more money for the current situation except if something was deemed to be a change in the Employer's Requirements. Postponing the delivery of giving site possession or postponing works during the currency of a project would fall into this category. Another example would be if the client chooses to restrict working hours / access on COVID-19 fears.

The result of the exercise of a statutory power could also constitute a change in the ERs if it necessitated an alteration or modification in the works. By way of example, if a change in statutory requirements meant that materials from a particular country would be impossible to procure and a supplier from that country had been specified in the Employer's Requirements, alternative materials from another country would have to be

sourced and the works would have to be changed to take account of this.

Overall though, the potential to claim additional money seems more limited than the potential to claim extensions of time.

Acceleration

Separate to claims for additional money for a Relevant Matter which are direct losses flowing from the Relevant Matter relied upon, once works on site resume the employer may wish to make up for lost time. Alternatively an employer may wish to accelerate work now for fear of losing time later. If the employer wishes to accelerate the works, this will trigger the acceleration provisions in the contract and will entitle the contractor to additional money.

If, having floated the possibility of acceleration the employer chooses not to proceed (because for example the additional costs quoted by the contractor are too high) the costs incurred by the contractor in making proposals will be recoverable by the contractor.

Termination right

It is also worth noting that if the works are suspended for longer than a period stated in the Contract Particulars (the JCT defaults to 2 months) as a result of a force majeure event, UK Government edict or client instruction, the contractor will have the right to terminate the contract and walk away.

For more guidance, and further information, visit our [Coronavirus hub](#).