

LAW MATTERS

CONSTRUCTION CONTRACTS: STEPS FOR RECOVERY



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PRESENT indications are that the lockdown may end at the end of April 2020, with a staggered re-integration of construction.

There will be a protracted impact on contractors' productivity because of required site controls and other social distancing measures that will have to be implemented.

All of this will have a significant impact on project completion programmes and the originally anticipated timeframes will be unlikely to be achieved.

What steps should contractors take to mitigate their contractual risk?

Contractors must make claims for extension of time arising from the lockdown and other Covid-19 related delays. These may include claims for the late supply of goods and materials or unavailability of skilled international subcontractors.

Contractors should request that professional teams continue to certify interim payments during the lockdown period. Where contractors are entitled to claim costs in terms of their contract, these can be included in interim payment certificates.

How should contractors ensure vital cash flow through the lockdown period?

Contractors should endeavour to obtain payment for materials and goods already procured and if the materials are not yet delivered to site, propose a cession and/or transfer of ownership to the employer from the suppliers directly, in order to allow for payments to be made.

Contractors would also be claiming UIF payments as part of Government's Disaster Management Package in respect of the workforce which would be on short time and/or unpaid leave.

The lockdown period presents contractors with an opportunity to analyse the quantities in interim payment certificates and whether they have correctly and completely claimed for the value of work completed. Contractors should also use this time to resolve any measurement-related disputes in terms of work completed and any outstanding claims for extension of time. Any disputes on these claims can be pursued during lockdown.

What should contractors do after lockdown?

When work is able to resume contractors will need to re-program the completion of the works. After delivery of the initial intention to claim notices, they will need to ensure that the detailed claims for the consequence of the lockdown are made in terms of the contract.

In claiming a revision of the contract completion dates, contractors are not exclusively limited to the lockdown period. The effect of the lockdown may have a more extensive impact on the completion of the works than the period of work suspension.

After lockdown it is likely that production rates on construction sites will fall because of site and/or health and safety restrictions to minimise the risk of transmission of the Coronavirus.

When these work restrictions are determined contractors should provide the details of this as part of their claim for additional time and, where possible, cost for the extended contract period.

What can be done to put projects back on track?

Where the employer requires a critical completion date to be achieved, acceleration measures may need to be implemented, where possible. As a result of the lockdown, employers will not be able to hold contractors to the original completion dates without accepting responsibility for payment of acceleration costs. Every construction contract will be confronted by claims arising from delays and cost from the lockdown. All of the contracting parties will find themselves in uncharted territory and will have to approach each contract circumstance with a strong sense of logic, fairness and compromise.

Employers will need to recognise that cash flow is the lifeblood of operations for contractors and that regular payments are the key to successful performance.

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