

MEDIA ARTICLE

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COVID-19 LOCKDOWN – THE IMPACT ON CONSTRUCTION CONTRACT CLAIMS

The Coronavirus (Covid-19) pandemic has already had extreme impacts across the globe including South Africa. The impending lockdown we all face will result in construction sites being shut down.

This will have a significant impact on Projects and result in substantial delay claims. Richard Hoal, Partner at Cox Yeats, looks at how to possibly address these claims and the effects on construction contracts.

National State of Disaster

The South African Government has declared a National State of Disaster in terms of Section 27 of the Disaster Management Act 2002.

Following on from the President's address to the nation yesterday evening, further regulations will be published in terms of Section 27(2), which will have the effect of a nationwide lockdown for 21 days. This lockdown will inevitably result in construction sites in South Africa being shut down for a period of at least three weeks.

Possible Effects of Covid-19 on Construction Projects

In addition to the lockdown, the consequences of the global pandemic for ongoing construction projects may be felt for some time, for example:

- transport and availability of materials will be reduced or compromised;
- procurement of materials internationally may be problematic;
- non-availability of specialist/international resources or subcontractors;
- the potential compromise to the health of the workforce and resulting reduction in available labour;

- slow down in production rates and business interruption;
- potential site closures where the number of infections are high.

What should Contractors do to protect themselves in terms of their Construction Contracts?

Timeous Notification of Delay

The first and most important step for contractors is to give notice of the delay to the Project occasioned by the site shutdown.

Almost all construction contracts have a time limit for such notification to be delivered. Contractors must pay careful attention to the contract specific requirements for notice of the delay.

There may also be contract specific inclusions, of a force majeure style, which might be relevant given the South African Government's intervention in declaring a National State of Disaster and effectively enforcing site closure.

In addition to the site closure as an identifiable cause of delay, there may be other specific underlying events giving rise to a claim and these should be identified by the contractors. Where the origin of the particular event or delay or impediment arises as a consequence of Covid-19 and the attendant lockdown, a contractor would have to make a claim in accordance with the claims provisions in each specific contract.

Typical Construction Contracts

We have briefly analysed the standard form contracts used in South Africa below.

GCC 2015

Clause 5.12.2.4 entitles a contractor to an extension of time for any disruption caused which is entirely beyond the contractor's control.

Covid-19 may also fall within the definition of "excepted risk" and in particular the reference to "epidemic plague" set out in clause 8.3.1.7.

The contractor would be entitled to payment of any increased cost attributable to Covid-19 as an excepted risk or for the disruption of site closure.

Although it is unlikely that contractors would wish to terminate the construction contracts, be aware that if the excepted risk or disruption has a material impact on the project for more than 20 consecutive days either parties may be entitled to terminate the agreement.

JBCC

In the JBCC agreements from edition 6 onwards the concept of force majeure is recognised.

It is defined as:

“An exceptional event or circumstance that:

(a) could not have been reasonably foreseen;

(b) is beyond the control of the parties; and

*(c) could not reasonably have been avoided or overcome.”*Covid-19 as a global pandemic, would fall within that definition and accordingly delays which are caused, in the origin by Covid-19 would entitle a contractor to make a claim for revision of the date of practical completion in terms of clause 23.1.6.

Clause 23.1.5 also allows for a revision to the date of practical completion where “an exercise of a statutory power by a body of State directly affects the execution of the works”. No doubt the State’s declaration of the National State of Disaster and the consequential lock down would fall within that provision.

A contractor would however not be entitled to an adjustment of the contract value for any such delay.

Also be aware that either party may terminate the agreement where progress of the works has ceased for a continuous period of 90 calendar days.

NEC 4

A compensation event is defined in clause 60.1 as:

“An event which stops the contractor completing the whole of the works and which neither party could prevent and that an experienced contractor would have judged at the contract date to have had such a small chance of occurring that it would have been unreasonable to allow for it.”

Covid-19 ought to fall within that definition.

A contractor must notify the project manager of a compensation event in accordance with clause 61.3.

The project manager must determine if the contractor’s notification is accepted as a compensation event and instruct the contractor to submit quotations which could impact the contract price and/or completion date.

In clause 91.7 the employer would have the option to terminate if the works are prevented from completion or would result in a delay in completion of more than 13 weeks.

Covid-19 ought to by now form part of the Risk Register and have to be pro-actively managed to reduce its impact on the project.

FIDIC 2010

Clause 19.1: Definition of Force Majeure

In this clause "Force Majeure" means an exceptional event or circumstance:

- (a) which is beyond a Party's control;*
- (b) which such party could not reasonably have provided against before entering into the contract;*
- (c) which, having arisen, such Party could not reasonably have avoided or overcome; and*
- (d) which is not substantially attributable to the other Party.*

The contractor would have to give notice of the circumstances and underlying origin of the claim in terms of clause 19.2.

Once notice has been given the contractor would be entitled to an extension of time for the delay but the contractor would not be entitled to additional payment.

Again, either party may cancel the contract if a substantial portion of the work is prevented for a continuous period of 84 days.

Conclusion

Contractors must give notice of the delays arising from Covid-19 and the attendant site closures as soon as possible. The delays and impacts on the project should be set out clearly in the delay notice. Contractors must comply strictly with the contract notification requirements of each contract.

Contractors will have to consider whether the identified delay claim will entitle them to simply claim further time for completion, without penalty, or whether they will be entitled to claim their additional costs arising from the delay. As this brief analysis shows, this will be dependent on each contract form and a careful consideration of any special conditions.

Our teams will be working through the lockdown period.

Please feel free to contact me or any of the construction team members for further advice that you may require during this period of uncertainty.

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