



## Coronavirus Pandemic

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With the World Health Organization (WHO) having now declared the Coronavirus (COVID-19) outbreak as a pandemic, we are certainly in uncharted waters.

Clearly, everyone's health and wellbeing need to be prioritised and we should all continue to ensure we are aware of the latest guidance from world and local health authorities.

However, I am not saying that Armageddon is upon us... The WHO remain unwavering in their belief that the threat posed by the virus is controllable. The indications in the UK are that the Government is genuinely committed to ensuring the effects of the virus are minimised as far as possible for businesses.

## Impact

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Numerous countries across the globe have increased their attempts to contain, control, delay and reduce the impact of the virus. At the beginning of the week, the Italian Government imposed a lock down across the entire country, restricting movement of its citizens. China had earlier done similar in Wuhan and the Hubei province – the epicentre of the virus.

Clearly, should such sanctions be enforced within the UK, the impact on the economy is likely to be substantial, at least for the short term.

This week has brought the start of disruption in terms of sporting events within the UK. Whilst the Cheltenham festival, despite the threat, did go ahead; the Premier League football match between Manchester City and Arsenal (scheduled for Wednesday 11 March 2020) was postponed as a precautionary measure.

So, what is the impact and rights for those who had bought a ticket for the match the other night?

- **Cost?** Under the terms and conditions, **force majeure** events entitle the ticket holder to attend the rearranged (**suspension**) fixture or obtain a refund (**compensation**); though only if appropriate **notice** is served by the purchaser! Further, for those who had already purchased travel and accommodation, they are unlikely to be able to recover those costs (even via insurances) ...
  - Effectively, they are entitled to compensation for the direct costs, but not indirect!
- **Time?** For those that had pre-booked time off work, they may not be able to cancel holidays. For those who had already travelled to Manchester, they will not be getting that time back.
  - Time is **their risk** and is lost!

Subsequently, the entire Premier League and Football League have suspended play until early April. Large scale running events such as the marathons in London, Manchester and Edinburgh have also been postponed. There is also the threat of future games being suspended or played behind closed doors. The impact of this is unknown – presumably those who have purchased an individual match ticket may be compensated, but what about those who have bought season tickets... Would they be entitled to compensation? Being a Sunderland supporter, at least I wouldn't have to put myself through the pain of watching them continue to struggle every other week (regardless of entitlement

to any compensation)!! I'm not so sure my Liverpool supporting colleague would have quite the same opinion though!!

## **Construction Industry**

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This simple ticketing example puts into perspective how much of a minefield the situation is, the risks and the potential commercial consequences of suspensions and cancellations at a personal level.

But what is the likely impact in terms of the UK construction industry?

It has already been a tough couple of years for the industry, particularly given the insolvency of some major names such as Carillion. Certainly, the financial impact on the supply chain still resonates. Time and cost considerations are therefore critical.

However, in the case of COVID-19, further consideration is required in terms of (but not limited to):

- business resilience / continuity
- mitigation
- security
- cashflow, and
- assurity of supply...

While it is hoped, particularly under long term alliancing and framework agreements, that Clients will take a sympathetic view in terms of the impact on their supply chain partners, clearly Contractor's should be taking a proactive approach in reviewing their respective agreements to understand, and in 'NEC'® contracts particularly, ensure any notification requirements are followed to the letter!

### **Doing nothing cannot be an option.**

As per standard advice, the merits of each situation will need to be determined on a contract-by-contract basis, taking note of any amendments or additional conditions of contract (Z clauses) contained within the respective agreement(s).

## **NEC3 / NEC4 Contracts**

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Many of our contracting clients' agreements are under NEC3® or NEC4® forms such as the Engineering and Construction Contract (ECC) and the Engineering and Construction Subcontract (ECS).

So, how do these contracts (unamended) allocate the risk of the Coronavirus pandemic?

What action needs to be taken, now and in the future?

For clarity, terminology aligned to NEC4 conditions i.e. 'Client', 'Scope', shall be used in the following section though reference to any specific clauses that differ are highlighted. Accordingly, the key players or terminology may be exchanged for the corresponding terms included within NEC3 conditions.

### **Step 1 - Early Warning (EW)**

#### **Contractor's (and those acting on their behalf) should notify an EW now.**

The EW mechanism is a proactive risk identification and management tool. Clause 15 (NEC3) and Clause 16 (NEC4) clarify when either Party is expected to issue an EW notice. Essentially, an EW notice must be issued as soon as either Party becomes aware of 'any matter' which could:

- affect the total of the prices,
- delay completion or a key date,
- impair the performance of the works in use, or
- increase the Contractor's total cost (Contractor to notify under NEC3).

Appreciating the risk and impact of Coronavirus are still unknown. However, we are all clearly aware of the matter now. Public health experts tell us that the peak of the virus is anticipated to still be around two months away in the UK, whilst the UK Government is likely to announce further measures in the next few days.

Contractors should be aware that, whilst not strictly a condition precedent to entitlement to additional time and cost (compensation events (CE's)) there are potential consequences in terms of the manner of assessment should they not notify an EW (most notably clauses 61.5 and 63.5 in NEC3, and clauses 61.5 and 63.7 in NEC4).

The EW notice should clearly identify the issue, the potential risks and mitigation measures proposed attributable to the situation.

The following wording, provided for guidance only, may be a suitable starting point:

*“There is a significant risk that the recent increased threat posed by the spread of Coronavirus (COVID-19) – now a pandemic - could severely impact project delivery.*

*Whilst we shall continue to follow mitigation measures as advised by Government, NHS, PHE, WHO etc., it is now apparent that COVID-19 may lead to the unavailability of resources (including People, Plant and Materials, & Equipment) whether through illness, isolation, and, or transport bans.*

*In order to mitigate against the impact, we would like to request a meeting (TBA) to discuss further.*

*We would also like to request consideration of a relaxation of the rules around Working Areas. By doing so, it will enable continued collaboration (via virtual meetings / conference calls) between the Parties, Project Manager, Supervisor, Supply Chain Partners and Others. This will be crucial in attempting to mitigate against delays and increased costs and shall facilitate:*

- *Review of resource availability*
- *Review of security and potential storage solutions for Plant and materials*
  - *Regular programme reviews*
- *Review of progress recovery and potential acceleration measures (if necessary)*
- *Agree the best approaches to realign halted projects and get them back on course as swiftly as possible once any stoppages are lifted / delays overcome*
- *Review of cashflow and payment processes (potential contract amendments)*
  - *Review of procurement issues*
- *Continued commercial forecasting (including profiling of budget impacts)*
  - *Collation of RAMS, O&M's / as-built data (as appropriate)."*

## **Step 2 – Notification of Compensation Events (CE's)**

Should any additional constraints be imposed, or worse still works be delayed or suspended as a result of COVID-19, then the Parties will have to deal with the impact accordingly.

The CE mechanism under NEC contracts deals with events that, should they eventuate and do not arise from the fault of the Contractor, entitle the Contractor to additional time and cost (though costs can be reduced too). Essentially, they are events for which the financial and time risk sits with the Client.

CE's (relevant events) are identified in clause 60.1 of the contract conditions, whilst further events are stated in secondary option clauses (X2 for example). The process consists of four clear stages:

1. Notification (clause 61)
2. Quotation (clause 62)
3. Assessment (clause 63 and 64)
4. Implementation (clause 65)

**CE notification, in line with the prescribed timescale (8 or 6 weeks) is necessary to preserve entitlement to additional time and cost** (see clause 61.3). As per the advice above in relation to EW

notices, any CE notification should clearly identify the issue, reference the relevant event (clause 60.1) that it is being raised against, the likely consequences as well as any mitigation measures proposed. For clarity, the following events are likely to be referenced in relation to the impact of COVID-19...

Clause 60.1 (1) – Change to the Works Information / Scope

The Client is entitled to vary the works to be delivered or impose additional constraints on how they are to be delivered. Such variations are to be captured under this event. This may include an obligation to comply with special working arrangements i.e. ‘social distancing’, which in turn necessitates additional site accommodation, or to supply increased numbers of hand wash / sanitiser stations for project teams.

Whilst instructions in this respect will be issued on behalf of the Client, from experience, it is not always followed up with the associated CE notification and request for a quotation as the contract requires (see clause 61.1). The good news though is that Contractor’s cannot be time barred in this instance since the obligation rests with the instructing party to notify. Should you find yourself in this situation however, then our advice is to notify the CE regardless in order to capture the impact and establish the timeframes in progressing toward implementation.

Clause 60.1 (2) – Access to and use of part of the site

Clause 33 obliges that the Client provide access to and use of a part of the Site by certain dates. Should access restrictions be imposed (instigated by the Client), or certain part of the Site be isolated, then entitlement to compensation may be triggered under this event (so long as it can be demonstrated by reference to an update to the latest accepted programme).

As above, whilst time barring in such instances cannot be enforced since the obligation will rest with the instructing Party, it is prudent to raise a CE notification if one is not forthcoming.

Clause 60.1 (3) – Client provision

The Scope should give details of anything, usually plant (in NEC lingo, plant means items to be incorporated into the works) and materials, which the Client is to provide to the Contractor. The Scope will usually include an indication as to when such items are to be made available (based on a procurement schedule for example). The same information is to be included in the programme (as per clause 31.2) by the Contractor. If the Client then fails to provide anything in accordance with the latest accepted programme, then a compensation event will be triggered.

Examples of Client provision being impeded due to COVID-19 may include closure of manufacturing facilities (in the UK or further afield), closure of borders, transportation restrictions, delivery restrictions and quarantine (outside the UK i.e. China or Italy).

Consequently, it is imperative that the Contractor includes this information within the programme, otherwise entitlement will be lost (remember, it is only an admissible event if shown on the accepted programme). Further, the Contractor must notify of any such failure in accordance within the timescales to protect entitlement.

Clause 60.1 (4) – Stopping work or changing a Key Date &

Clause 60.1 (5) – Work of the Client or Others

The Contractor may be instructed to stop, or to not start any works (as per clause 34). There may be several reasons for instructing this, but in this instance perhaps the most likely is that the Client (having considered relevant advice) chooses to postpone the project, or non-essential works.

Alternatively, they may choose to stop work briefly, or for a prolonged period, or instigate a deep clean of the site whilst the works continue. In this situation, it may trigger a CE under either of these clauses (i.e. the Client carries out work on the Site not identified in the Scope).

Again, whilst time barring cannot be enforced in respect of events under clause 60.1 (4), it would be prudent to raise a CE notification if one is not forthcoming. For any events triggered by clause 60.1 (5), the Contractor must notify within the timescales to protect entitlement.

Clause 60.1 (8) – Changing a decision

An example of a changed decision may reflect receipt of an instruction to re-start works for which the Contractor is in receipt of a prior stop / not start instruction.

Again, whilst time barring cannot be enforced in respect of events under clause 60.1 (4), it would be prudent to raise a CE notification if one is not forthcoming.

Clause 60.1 (16) – Client provision for tests and inspections

Like clause 60.1 (3) above, the salient difference being that the Contractor does not have to justify this failure by reference to the latest accepted programme. Under clause 41.2 (NEC4), or clause 40.2 (NEC3), the Client is required to provide materials, facilities and samples for tests and inspections as identified within the Scope. This may not be feasible, or it may be delayed given the impact of COVID-19.

Failure to do so will entitle the Contractor to be compensated accordingly, so long as they notify within the timescales to protect entitlement.

Clause 60.1 (18) – Client breach of contract

A Client breach may also trigger a CE. This particular event can only be relied upon if the instance does not relate to any of the other CE's in the agreement and notification procedures are adhered to by the Contractor.

An example could be that the works are delayed because the Client allows staff to work flexible hours (say to accommodate childcare if schools are closed), yet the same resource is required on Site to witness or manage the works (overlap with other CE events may be likely in this instance however)...

Clause 60.1 (19) – Other events

This is likely to be the salient event referred to in the case of COVID-19. Essentially, this clause is the NEC's 'force majeure', or prevention event i.e. something outwith the control of the Parties. Should the Contractor be prevented from completing the works, or from completing by the time shown on the accepted programme (again, it is vital that Contractors update their programmes ASAP if they are not up to date already) it will trigger a CE.

That said, Contractor's entering into an agreement next week (the Contract Date) may find themselves unable to rely on this event since the clause includes reference to an event which "...an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it...". Clearly, if you are in the process of tendering or negotiating a contract award at the moment, it would be justified to flag this as a risk and agree with the Client how they would like you to accommodate the risk (as the impact of the ongoing spread of COVID-19 remain unknown). It may be practical for the Client to identify any agreed constraints as assumptions (see clause 60.1 (17)) within the Scope, the actual impact of which can then be dealt with during delivery based on reality; thus, protecting both Parties. Alternatively, under NEC4, an express reference to COVID-19 may be included as an additional CE event (clause 60.1 (21)) within the Contract Data (Part One).

I can recall a similar issue in relation to foot and mouth almost 20yrs ago! Notified CE's (under clause 60.1 (19)) were deemed admissible in this context as installation works in farmers' fields could not be progressed (the Contractor was prevented from completing the works in line with the accepted programme).

In the context of COVID-19, 'force majeure' is likely to be claimed by the Contractor due to delayed delivery of plant and materials (stone or floor tiles from Italy, or electrical items China for example), or (less likely) equipment.

#### Additional Conditions of Contract: Clause X2.1 – Changes in Law

If incorporated into the agreement, secondary option X2.1 relating to change in law may also trigger a CE. Should the UK Government introduce a new law relating to COVID-19, then the Contractor would be entitled to be compensated accordingly.

#### **Records, Records, Records**

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As the situation develops and CE's are notified, it is **imperative that appropriate record keeping is maintained** to support the quotation and assessment stages. These records should be to sufficient depth, perhaps in more detail than ordinarily required. If project works are suspended, then photos, logs, plant standing idle, potential abortive works, etc should be recorded to ensure entitlement to additional time and costs is supported and substantiated... in fact, we would advocate keeping such records now (to be proactive and avoid potential disputes later down the line as to what resource(s) are / were on site).

Further, it would be prudent to keep records to prove any delays incurred outwith the working areas i.e. transportation delays or cancellations, customs declarations, supplier factory closures etc.

Consideration should also be given in terms of which personnel shall be responsible for keeping these records.

#### **Collaboration and pragmatism**

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As remarked upon earlier, the COVID-19 pandemic sees us all in uncharted waters.

NEC contracts require the Parties to act in a spirit of mutual trust and co-operation. This approach is going to be needed now, more than ever, as we move through the next weeks. The Parties must find a way to work together and maintain regular dialogue. Perhaps a relaxation of some of the contractual mechanisms (such as the Working Areas as suggested in the EW section above) should be considered to facilitate increased collaboration via virtual meetings and conference calls, and afford personnel options (where appropriate) such as home working, flexible working etc.

Consideration of the potential impact on Contractors and the supply chain needs to be in the forefront of our minds. Agreement to amend (clause 12.3) some of the contractual terms or ensure that payment charters and prompt payment are strictly adhered to.

Some potential amendments may include consideration to delete, or at the very least reduce the value of any retention clauses included in the agreement. Consideration could be given to incorporate advance payment terms, or at the very least pay for any properly 'vested plant and materials' stored off site.

Finally, it should always be remembered that each of the Parties and the supporting cast are businesses. Not only do Client's need Contractor's, but Contractor's need supply chain partners (whether that be subcontract or supply) and vice versa. **Let's all look out for one another and treat each other with due respect and consideration.**

Written by Ian Hedley - North East Director  
Email: [ian.hedley@solomoneurope.co.uk](mailto:ian.hedley@solomoneurope.co.uk)  
Phone: 07584 966 786

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