Te Kāhui Whaihanga New Zealand Institute of Architects

COVID-19 Info

COVID-19 – Administering a construction contract under NZIA Standard Construction Contract 2018

On the 20 March 2020 the Te Kāhui Whaihanga New Zealand Institute of Architects (**NZIA**) published guidance on how to manage the impact of COVID-19 on construction projects in New Zealand. Since then, the Government introduced a lockdown, mandating the closure of all non-essential businesses, including almost all construction sites, for a minimum period of four weeks.[1]

As Architects[2] administering contracts, we should recognise that this is a unique situation. The economic and commercial impacts of COVID-19 Alert Level 4 (**Lockdown**) will become increasingly severe as the Lockdown progresses and its effects begin to impact on the physical and mental wellbeing of those involved in the construction industry. For Architects during this time, they must be proactive with their communication, non-confrontational in their approach and encourage cooperation and facilitate collaboration between the Principal and the Contractor. The Architect has no authority under the Contract to relieve the Contractor from any of the Contractor's obligations stated in the Contract. Until the Principal and Contractor have reached agreement on any renegotiated terms, whether in the form of an amendment or variation, which must be recorded in writing, the Principal and Contractor remain bound by the terms of their existing contract.

Outlined below is an overview of the Government's interpretation of how relief should be provided to the Contractor. Included are some of the contractual provisions that are currently being considered by Architects, whether in the role of agent to the Principal, or as an impartial administrator when administering a contract under the NZIA Standard Construction Contract 2018[3] (**SCC 2018** or **Contract**). One of the contractual challenges of COVID-19, is the lack of provisions available to accommodate an event that is caused by neither the Principal nor the Contractor. This overview will describe the types of relief that may be sought by the Contractor or can be provided by the Architect in its role as administrator to the Contract. It seeks to make a comparison of the types of relief, rather than suggesting a specific approach and advocates for a collaborative solution that uses the relief identified as a possible starting point.

Guidance from Ministry of Business, Innovation & Employment for Public Sector Agencies (NZS 3910:2013 Conditions of Contract for Building and Civil Engineering Construction) (Guidance)

The Ministry of Business, Innovation & Employment (**MBIE**) has produced guidance for public sector agencies to adopt based on NZS 3910:2013 Conditions of Contract for Building and Civil Engineering Construction (**NZS 3910:2013**). The Guidelines were developed by the Construction Sector Accord steering group to provide a consistent approach to support the construction industry during the lockdown. It makes it clear how the Government interprets the effects of the Lockdown on construction projects where active construction work has been forced to close.

1. The lockdown commenced at 11:59pm on Wednesday 25 March 2020 and is due to finish on Wednesday 22 April 2020.

2. The capitalised words are defined terms in SCC 2018.

3. Most construction contracts contain special conditions that amend the general conditions. The Architect should check if any of the clauses referred to in this note have been amended or new clauses added affecting the interpretation of the original clauses.

The following commentary was provided in the ***'Guidance for public sector agencies dealing with the contractual implications for construction projects of the COVID-19 lockdown period'***:

> ***Change in law***
>
> *However, where the Engineer hasn't issued a suspension notice, it is clear that the Principal and the Contractor are obliged to stop any non-essential works in order to comply with the government's Alert Level 4 directive.*
>
> *Clause 5.11.10 of the General Conditions of Contract provides:*
>
> > *If after the date of closing of tenders the making of any statute, regulation, or bylaw, or the imposition by Government or by a local authority of any royalty, fee, or toll increases or decreases the Cost to the Contractor of performing the Contract, such increase or decrease not being otherwise provided for in the Contract, the effect shall be treated as a Variation.*
> >
> > *The Government's interpretation is that the various restrictions put in place by the Government, including moving to COVID-19 Alert Level 4, all emanate from regulations or statutes. These include the Infectious and Notifiable Diseases Order (No 2) 2020 which came into force on 11 March 2020 and added 'Novel coronavirus capable of causing severe respiratory illness' to the list of notifiable diseases, which in turn enabled the establishment of the Alert Level 4 directive. These actions by the New Zealand Government would constitute the making of a statue and/or regulation giving rise to a variation claim under clause 5.11.10.*
> >
> > *On this basis, whether the Engineer has issued a suspension notice under 6.7.1 or not, the Contractor will be entitled to a variation under 5.11.10 as a result of new laws and regulation recently made relating to COVID-19. Any increase in Costs arising from a change in law under 5.11.10 is treated as a variation, much the same way as a suspension instructed by the Engineer under 6.7.1 is treated as a variation.*

Application of MBIE's Guidance on Construction Contracts Administered under SCC 2018

While hard to ignore, MBIE's Guidance is not binding on parties to a construction contract in the private sector. If the Guidance was to be applied to construction contracts in the private sector being administered under SCC 2018, how would the application of the guidance affect the relief the Contractor is entitled to? MBIE has said that the Notifiable Diseases Order (No 2) 2020, is to be treated as *'the making of any statute, regulation, or bylaw'*.[4] This change in law, may entitle the contractor under clause 9.4.5 to treat any increase in Costs arising from the lockdown, as a Variation.

The first issue is, if the Lockdown entitles the Contractor to claim for a Variation for the additional Costs incurred in performing the contract, would the Contractor be entitled to claim for an extension of time (**EOT**) like it would for other variation types?[5] Clause 11.5.1(e) entitles the Contractor to apply to the Architect for an EOT when a delay arises due to a Variation and clause 11.6.1(d) entitles the Contractor to claim for actual time related Costs. In deciding whether to extend the time for Practical Completion, the Architect must assess the Contractor's claim (Variation (change in law)) and determine if the Variation has caused a delay and affected the critical path. If the Architect considers the Contractor's EOT claim to be justified, the time for Practical Completion must be extended.[6]

A Variation claimed under clause 9.4.5 caused by a change in law that increases the Contractors Costs, may give rise to an EOT. Strictly speaking, the Variation (change in law) does not stem from a change to the scope of the contract works that would likely affect the critical path and delay the date for Practical Completion. Alternatively, the Contractor may be entitled to claim relief for time, by making a claim for an EOT under clause 11.5.1(k) *'something else of significance beyond the Contractors control'*.

The second issue is, if the variation did give rise to an EOT and the time for Practical Completion was extended, would the Contractor be entitled to claim actual time related Costs. A Variation is considered a Principal delay, that may entitle the Contractor to claim actual time related Costs. A Variation caused by a change in law is not a Principal led delay and if clause 11.6.1 is interpreted strictly, the Contractor may not be entitled to claim actual time related costs.

Extension of Time Request by the Contractor

The Contractor must determine whether to apply for an extension of time (EOT), and the basis on which delay event occurred.[7] SCC 2018 does not contain provisions relating specifically to the Lockdown caused by COVID-19 (pandemic), but the clause that is potentially most relevant to a Contractor's claim for an EOT is clause 11.5.1(k), by reason of *'something else of significance beyond the Contractors control'*. The effects of the Lockdown may trigger two other delay events that may be relevant to a Contractor. The first is when *'the Architect does not give a Direction within a reasonably time'*,[8] and the second is when *'the Principal does not supply materials, work or services on time'*.[9] If the Architect[10] considers the Contractors EOT claim to be justified,[11] the time for Practical Completion can be extended.[12]

If the Architect grants (i) an EOT for *'something else of*

4. NZS 3910:2013 clause 5.11.10. The corresponding clause is SCC 2018 is 9.4.5.

5. For a list of deemed variations, refer to SCC 2018 clause 9.1.1.

6. SCC 2018 clause 11.5.5.

7. Refer to clause 11.5 of SCC 2018 for a list of qualifying delay events.

8. SCC 2018 clause 11.5.1(h).

9. SCC 2018 clause 11.5.1(i).

10. SCC 2018 requires the Architect to determine whether the qualifying delay event will impact on the critical path of the project and whether the Contractor has taken reasonably steps to avoid delays and minimise the effects of the delay (clause 11.7.1).

11. It is likely, that a Contractor would argue COVID-19 is beyond the Contractors control if its tender was accepted before the 30th January 2020 when the New Zealand Ministry of Health described the likelihood that the spread of COVID-19 within New Zealand was low (28 January 2020) and the World Health Organisation declared the COVID-19 outbreak to be a public health emergency (30 January 2020).

12. SCC 2018 clause 11.5.5.

significance beyond the Contractors control', clause 11.6.2 does not entitle the Contractor to compensation for time related Costs, and (ii) an EOT because *'the Architect does not give a Direction within a reasonably time'* or because *'the Principal does not supply materials, work or services on time'*, clause 11.6.1 entitles the Contractor to compensation for time related Costs.

The Architect should be aware that the Contractor has to apply for an EOT in writing, and the claim is to be received within 5 Working Days, or as soon as practicable, after the delay begins.[13] The Architect must then respond to the Contractor's claim within 10 Working Days after either receiving the Contractors claim or receiving sufficient detail to assess the claim.[14]

Suspension by the Architect

Under clause 16.4, the Architect may direct the Contractor to suspend the progress of the whole Works and the Contractor must comply with the direction. The following observation was made by the Association of Consulting and Engineer and CEAS in '***COVID-19 dealing with NZS 3910 issues as engineer to contract'***[15] and has parallels with SCC 2018:

> *It is far from clear that the Lockdown necessitating site shutdowns falls within the scope of clause 6.7.1* [corresponding clause in SCC 2018 is cl 16.4]. *This is because:*
>
> - *Work has ceased as a consequence of the operation of a Health Act Order dated 25 March 2020 which included requiring non-essential premises to be closed until further notice. In effect, the suspension has been imposed by law irrespective of any instruction by the Engineer.*
> - *The clause provides that the suspension continues "for such time as the Engineer [Architect] may think fit" whereas that discretionary power cannot apply to the situation of a Government-ordered lockdown.*
> - *If the clause was intended to extend to a suspension resulting from the exercise of Government or other legal authority, arguably it could have been expected to expressly state this.*

Under the terms of SCC 2018, the Architect must be aware, that if the suspension clause does not apply to the Lockdown but the suspension occurred with instruction and the suspension remains in effect for more than 60 Working Days, the Contractor may request the Architect to allow the suspended Work to continue. If the Architect does not grant permission for the suspended Work to continue within 20 Working Days of the Contractors request, then the Contractor is likely to be entitled to treat the suspension as an abandonment of the Contract by the Principal.[16]

During any such suspension, the Contractor is entitled to claim any additional Costs which the Contractor reasonably incurs, and this is why Contractors are demanding suspension notices be issued by the Architect. If the suspension ends in abandonment of the Contract, the Contract, the Contractor is entitled to recover from the Principal any Costs incurred and any loss suffered.[17]

As suspension appears to be more favourable to the Contractor, if the Architect is considering suspension as an option, to mitigate any liability for the Architect's decision being retrospectively considered as not authorised by the Principal, the Architect should seek written confirmation of authority from the Principal to suspend the Works. If the Architect's view, as impartial administrator, is contradictory to the Principal's view and Principal was unwilling to authorise the suspension, the Architect may consider issuing a suspension notice clearly recording the Government's decision to lift the alert level to Level 4 and identifying effects of the lockdown on all non-essential business and the time frames (refer to footnote 1). However the Architect would be advised to take legal advice before issuing a suspension, where the Principal is not in written agreement.

Summary

In summary, an unintended effect of COVID-19 on standard form construction contracts, is that no existing construction contract provisions exist that provide equitable relief to both the Principal and the Contractor when neither the Principal nor the Contractor was responsible for the Lockdown. A change in law may entitle the Contractor to claim a Variation for the increase in costs of performing the Contract, but the Variation is unlikely to give rise to an EOT. Depending on the delay event claimed, the Contractor may be entitled to an EOT and relief in the form of time, or time and time related compensation. If the Architect suspends the works, the Contractor may be entitled to an EOT and time related compensation.

As the construction industry navigates the Lockdown and the fallout, the Architect, in collaboration with the Principal and the Contractor, would be advised to choose a course of action that attempts to mitigate the effects of the Lockdown and where possible, provide a bespoke amendment or variation that seeks to relieve but minimise the negative effects of the Lockdown on the parties for the period of disruption. Attention should be given to ensure the notice and timing requirements are complied with and it is strongly advised that any agreements or variations entered into, are clearly documented and cover all matters including costs.

Regardless of the provisions of the Contract, the Principal and Contractor would be advised to focus on the ongoing viability of the project after the Lockdown. The insolvency of one party will not benefit the other party, and is unlikely to lead to a satisfactory completion of the Contract. Further collaboration in mitigation of costs by both parties may lead to a more viable resolution during and after the Lockdown.

Architects should not be providing legal advice to either Principal or Contractor, who should, where they feel such advice necessary, be independently seeking legal advice from their own advisors as to their position and the consequences of any decisions. Because of the

13. SCC 2018 clause 11.5.2.

14. SCC 2018 clause 11.5.3.

15. For a copy of 'COVID-19 dealing with NZS 3910 issues as engineer to contract' refer to https://www.nzia.co.nz/explore/covid-19-information/contract-resources

16. SCC 2018 clause 16.4.4.

17. SCC 2018 clause 16.3.1.

challenging contractual environment arising from the Lockdown, the Principal and Contractor may be unable to reach agreement on the type of relief. Particularly if the Contractor has requested the Architect suspends the Works and the Architects decision, not to, is challenged by the Contractor. The Architect should take comfort, that the Architect's decision is not final. Either the Principal or the Contractor can dispute an Architects decision via the dispute resolution provisions outlined under clause 17.1 and via the Construction Contracts Act.

Where Architects are uncertain of their role in this, whether as a representative of the Principal, or as impartial administrator, and the Principal and Contractor cannot agree on the course of action, Architects should seek legal advice on their role and liabilities to avoid any later legal challenges.

The below table is a brief summary of the mechanisms available to the parties and the types of relief available:

	Type of Relief for Contractor		
Mechanism	Time	Time Related Costs	Costs
Variation (change in law) Clause 9.4.5			✔
Extension of Time (something else of significance beyond the Contractors control) Clause 11.5.1(k)	✔		
Extension of Time (Architect does not give a Direction within a reasonably time) Clause 11.5.1(h)	✔	✔	
Extension of Time (the Principal does not supply materials, work or services on time) Clause 11.5.1 (i)	✔	✔	
Suspension Clause 16.4	✔	✔	