

CONSTRUCTION AND ENGINEERING

COVID-19: Next steps in Construction and Engineering

18 May 2020

At the start of May the Irish Government published a [Roadmap to ease COVID-19 restrictions and reopen Ireland's economy and society](#).

As it becomes possible for construction, engineering and maintenance activities to resume, we look at some key legal and contractual considerations. Phase 1 starts on 18 May 2020 and it is planned that subsequent phases will follow at three-week intervals subject to extension, if required, based on disease indicators.

Who can return to work?

As expected, a return to work for construction workers [where it is safe to do so](#) is planned in Phase 1. Social distancing requirements continue to apply.

What does the Roadmap say about transport?

The Roadmap sets out restrictions on travel and imposes conditions on operation of public transport. The key aspect to note for construction is that

there is an *"ongoing requirement that people travelling in private transportation maintain social distancing and hygiene and compliance with other requirements when travelling"*.

What is the multi-sectoral advice on safe return to work?

The Roadmap requires business to take a risk-based approach in bringing employees back to the work place. This requires employers to keep up-to-date with the latest general public health advice and to review and update their risk assessments and safety statements. The [Health and Safety Authority](#), the [Department of Health](#) and the [Health Service Executive](#) have published health and infection prevention advice for employers and employees.

On 9 May 2020 the Government published a [Return to Work Safely](#)

[Protocol](#), a living document applicable to all sectors. As a first step, employers must develop / update a business COVID-19 Response Plan; update their occupational health and safety risk assessments and the safety statements; and address the level(s) of risk identified by putting in place appropriate measures to ensure safe workplaces. The Protocol sets out a number of steps required to prepare employees for returning to work, and to make work practices and places fit for purpose. The Protocol is relevant to the construction sector.

How is the construction industry preparing to return to work?

In the construction sector, industry bodies have also been examining the measures required for a safe resumption of activity. Here are some examples of industry guidance:

<p>Construction Industry Federation ("CIF")</p> <p>New Standard Operating Procedures (SOPs)</p>	<p>Royal Institute of the Architects of Ireland ("RIAI")</p> <p>RIAI Proposals for Reopening of Construction Sites to Promote Suitable Protocols for Working Environments</p>	<p>International Federation of Consulting Engineers ("FIDIC")</p> <p>Guidance Memorandum: FIDIC COVID-19: On-site working and project team organisation</p>
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Here are some examples of the types of sector specific adaptations being recommended.

- Health and safety compliance:** documentation should be reviewed and a specific COVID-19 Plan developed. COVID-19 Compliance Officers should be appointed in the various organisations including the Project Supervisor Construction Stage (“PSCS”) contractor and the sub-contractors. The COVID-19 Compliance Officers should monitor site activities to ensure social distancing, hygiene rules and other COVID-19 adaptations are being followed.
- Return to work protocols:** in advance of returning, workers should complete online training on COVID-19 health and safety. The CIF has reported that over 120,000 construction workers have completed their on-line training. Workers should also complete COVID-19 questionnaires / self-declarations to identify symptoms / potential exposure to the virus.
- Socially distant commuting:** workers should travel separately. Where that is not possible, guidelines on spacing should be followed, windows left at least partially open, personal items kept separate, and hand sanitizer used frequently.
- Safer circulation:** options include increasing the number of entry / exit points at sites; operating open door / non-turnstile access; operating wider or one way systems throughout sites and stop-go systems for stairways, lifts etc; as well as staggering start / finish / break times.
- Socially distant working:** workers should be 2m apart. Examples of how this can be facilitated are reducing the number of persons in any work area; introducing split shifts; maximising off-site prefabrication of components; and modifying construction techniques to allow for single worker operations or use of a ‘buddy system’ where two people form a team. Where a task requires workers to be closer, additional protocols making use of PPE are required. To accommodate split shifts, local authorities may have to modify restrictions relating, for example, to noise.
- Tools, plant and equipment:** they should be used by one individual only or regularly cleaned and disinfected.
- Site inspections:** they are to be taken at a time of pause, avoiding unnecessary site meetings.

What are my statutory health and safety obligations?

Businesses must review existing legal obligations with the COVID-19 pandemic in mind. They should be updating occupational health and safety risk assessments and their Safety Statements as well as site specific method statements for undertaking activities. Some relevant points are summarised below.

<p>The Safety, Health and Welfare at Work Act 2005 (the “2005 Act”)</p>	<ul style="list-style-type: none"> • Section 8 sets out obligations for businesses who must ensure, so far as reasonably practicable, the safety, health and welfare at work of their employees. This duty extends to persons who are not your employees but who work under your direction or control. • Businesses also have obligations to a broad category of third parties at workplaces who are not their employees. Sections 12 and 15 in particular are relevant. • Section 13 of the Act places duties on employees including in relation to the safety, health and welfare of any other person who may be affected by their acts or omissions. Similarly, Section 14 imposes a broad obligation on all persons, individuals and companies to not intentionally, recklessly or without reasonable cause, place others at risk. • Sections 19 and 20 provide for hazard identification and risk assessment and require preparation of a written safety statement, to include the measures put in place to avoid or mitigate risks. • Section 21 imposes on contractors and sub-contractors a duty to co-operate and co-ordinate actions where they share a place of work.
<p>Safety, Health and Welfare at Work (Construction) Regulations 2013</p>	<ul style="list-style-type: none"> • The practicalities of complying with health and safety law as sites become active again will be the responsibility of all parties involved, all of whom will be subject to the duties set out in the 2005 Act, as well as additional duties under these Regulations. In practice, the contractor/project supervisor construction stage (“PSCS”) will have the heaviest burden for the site and will be required to ensure there are additional site rules, reflecting the COVID-19 measures and ensuring that revised working methodologies are followed. • ‘Clients’ under the regulations will also have obligations, in particular, to ensure they remain satisfied that the PSCS, contractor and design team are all competent to discharge their roles and have the resources required to meet COVID-19 adaptations. Clients should remain satisfied the PSCS and the contractor (likely the same entity) can carry out the works safely and in compliance with COVID-19 adaptations.

What do I need to consider in my building contract?

In March and April 2020, the focus was on contractual mechanisms designed to manage issues arising from site shut downs. We looked at this in a previous [briefing](#). Since then, several organisations have published COVID-19 guidance with a view to assisting parties in finding workable solutions. Some of them are shown here:

Public Works Contracts	RIAI
FIDIC	NEC
Construction Leadership Council (UK)	

The industry is encouraging collaboration and cooperation to get projects restarted and to prevent disputes down the line. Work cannot resume without significant health and safety adaptations; contractors need to communicate to employers the site-specific adaptations required; employers need visibility of time and cost implications; and the parties need to agree responsibility for costs and revised delivery programmes.

The current situation is unprecedented, but fair and proper management of contracts is still vital. It will help parties to engage constructively, wherever possible, to preserve their existing rights and entitlements, to avoid breaches of contract, and to reduce the potential for issues to escalate to costly disputes. Here are some examples of points to bear in mind.

Does my contract assist in facilitating a collaborative approach?

Contracts may contain clauses that require or facilitate co-operation or avoidance of disputes.

Example. Clause 4.1 of PW-CF1 requires the parties to support reciprocal co-operation for the Contract purposes. The OGP has encouraged parties to avail of this and to consult or communicate, without prejudice. Offering or giving co-operation does not imply any admission of responsibility or alter the parties' rights or duties unless agreed in writing. In its [Note on procurement and contractual matters associated with the COVID-19 Response Measures](#), OGP recommends that this clause be used as a vehicle to assess the likely impact of the COVID-19 measures on progress of the works, issues arising and mitigating measures that can be taken.

Some contracts may set out a detailed

process for cooperating to resolve issues early.

Example. Clause 15 of NEC4 requires parties to notify each other to give an early warning of issues that could increase price or delay Key Dates / Completion. It sets out requirements for meetings and how those in attendance should cooperate by making proposals to reduce the effect of each matter, seeking solutions to advantage those who will be affected, and deciding on the actions to be taken and who (in accordance with the contract) will take them. Subcontractors attend meetings if that would assist. (Note however that parties will need to adapt their meeting arrangements to be safe and in compliance with public health guidance.)

Where parties wish to agree a new mechanism or relief not contemplated in their contract, it is usual to enter into a variation or supplemental agreement. It should be clear between parties whether they are in discussion or whether they have reached an agreement by which they intend to be bound. If discussing/negotiating, careful use of language in correspondence is important (for example "without prejudice", "subject to agreement", or stating that rights and entitlements under the contract are reserved, as appropriate to the situation).

What obligations does the contract contain in relation to health and safety?

In addition to the statutory obligations referred to above (which apply regardless of what the contract says), contracts will likely contain obligations relating to health and safety and compliance with law generally. Failure to comply may lead to a breach of contract in respect of which the non-defaulting party may seek damages for loss sustained (for example, if a site is shut down because of the contractor's failure to implement COVID-19 adaptations).

Example. Clause 2.2 of PW-CF1 requires the Contractor in performing the Contract to comply with all Legal Requirements. Under Clause 2.4.2, if the Contractor (or another person) is appointed as PSCS, the Contractor represents and warrants that the Contractor (or the other person) is competent and will allocate adequate resources to enable itself to perform its duties under the Regulations discussed above. Under Clause 2.5.3, the Contractor makes similar representation and warranties in respect of its own duties.

Relevant contractual obligations will not necessarily be confined to the Contractor.

Example. Clause 4.8 of FIDIC (Red) requires the Contractor to comply with all health and safety regulations and Laws; comply with all directives of the Contractor's health and safety officer; and take care of the health and safety of all persons entitled to be on the Site. It requires the Contractor to provide a site specific health and safety manual which must include requirements necessary to maintain a healthy and safe working environment for everyone on the Site. Under Clause 6.4, the Contractor must comply with health and safety laws applicable to its Personnel, and must require its Personnel to obey laws on health and safety at work. Under Clause 6.7, the Contractor must ensure that suitable arrangements are made for all necessary welfare and hygiene requirements and for the prevention of epidemics, and must appoint a health and safety officer at the Site. Under Clause 6.9, the Engineer may require the Contractor to remove any person who persists in conduct which is prejudicial to health or safety. Note, however, that under Clause 2.3, the Employer is responsible for ensuring that the Employer's Personnel and other contractors on the Site co-operate with the Contractor's efforts and comply with the health and safety obligations outlined in Clause 4.8.

What about the key issue of extension of time ("EoT") to complete the works?

The Contractor's entitlement to more time will depend on the terms of the contract. In our previous [briefing](#) we looked at key clauses entitling the Contractor to more time where performance of obligations is impacted by force majeure events, legal requirements, or changes in law. There are likely to be a range of circumstances, set out in various clauses, that may entitle the Contractor to an EoT. COVID-19 is an evolving situation and a number of issues may cause delay over the coming weeks. Parties should be clear about the precise cause(s) of delay and any related notice requirements.

Example. Clause 30 RIAI provides that, if in the opinion of the Architect, Works are delayed by a number of events, the Architect shall make a fair and reasonable extension of time for completion of the Works. The Contractor must give notice of the happening of any of these events and use best endeavours to prevent delay. The 'events' include force majeure; instructions issued under the Contract; inability of the Contractor to secure labour and materials; and delay on the part of other contractors engaged by the Employer.

Parties may wish to consider whether a degree of flexibility is appropriate.

Example. The OGP [Note on procurement and contractual matters associated with the COVID-19 Response Measures](#) refers to the definition of Delay Event in the Public Works Contracts, which includes delays caused by the order of a public authority exercising authority under Law (though not force majeure). OGP has clarified that (public sector) employers should treat delay as starting on the date of site closure following the publication of public health measures on 28 March 2020, rather than the date the [Regulations](#) came into operation (8 April 2020).

While there may be a policy reason for public sector employers to take this approach, private sector employers may wish to consider on a case by case basis whether there are commercial reasons for exercising a degree of flexibility in light of COVID-19.

What about the key issue of who pays the costs of shutdown, re-starting work, additional costs by reason of the new working procedures, revised schedules and supply chain disruption?

How the impact of COVID-19 is dealt with will depend on the terms of the contract and any compromises the parties now make. In our previous [briefing](#), we highlighted some relevant clauses allowing for cost adjustment.

Cost implications of re-starting and progressing works will be more complex than those arising from site shut down. Re-starting will require training at all staff levels; allocation of new responsibilities; new working methods; increased supervision, monitoring and reporting; site adaptations; potential supply chain disruption; and new delivery schedules. It will be important to identify and keep under review the mechanisms in your contract that contemplate price adjustment.

Example. Under Clause 4 of the RIAI construction contract, where the cost of performance of the Contract increases or decreases as a result of any legislative enactment, rule or order or the exercise by the Government of powers vested in it, the amount of such increase or decrease as certified by the Architect shall be added to or deducted from the Contract Sum. (Clause 36 may also provide for the Contract Sum to be adjusted to reflect wage and price variations, although this clause tends to be amended / deleted to minimise the potential for inflationary increases to the Contract Sum.)

Standard form contracts are often amended and, if such amendments limit the entitlement under a contract such that the contractor is not fairly paid for the steps required to resume work safely, parties may wish to agree a sum that more accurately reflects the scale of change required in light of COVID-19.

Example. There is an optional clause in the PW-CF1 which allows for an adjustment to the Contract Sum. The OGP [Note on procurement and contractual matters associated with the COVID-19 Response Measures](#) acknowledges, however, that the Public Works Contracts do not provide an entitlement to the Contractor to recover costs associated with a delay arising from site closure in the current circumstances and so has developed guidance for 'an ex gratia payment' to relieve financial pressure on contractors. To be eligible for the payment, the contractor must demonstrate a number of things, including that it has provided a full breakdown of all costs under the contract on an 'open book' basis, that it has made all relevant records available to the employer, and that it has not claimed any cost for which it has received assistance through the Temporary COVID-19 Wage Subsidy Scheme operated by the Office of the Revenue Commissioners.

While there may be public policy reasons for public sector employers adopting this approach, it is an example of how an arrangement not contemplated in the contract may be taken to safeguard viability of projects. Other employers will wish to consider the most suitable approach for their project.

Force majeure events tend to trigger entitlement to time, but some contracts also allow cost adjustment for force majeure type events.

Be mindful of formalities and reporting requirements

As intense work progresses, in order to assess risk and implement all the required adaptations, it is important to be cognisant of contractual formalities. If parties fail to do so, they risk being deemed to have agreed to a variation with cost/time implications, or to losing an entitlement for more time and/or cost adjustment, or from being excused from liability for failure to carry out obligations. Employers can expect contractors to be submitting claims to make sure they do not lose potential entitlements.

What if I am negotiating a new building contract?

Parties negotiating new contracts may

wish to agree how they intend to deal with the impact of COVID-19 on their project and reflect this in their contract. COVID-19 is a continuing pandemic and therefore certain provisions (depending how they are worded), notably force majeure, are unlikely to be triggered in new contracts solely as a result of COVID-19.

It may be possible for contractors to build into their tendered price the cost of complying with COVID-19 adaptations, including the cost of additional personnel requirements (such as COVID-19 Compliance Officers). Social distancing is likely to impact the number of workers who can be on site at any given time and this may impact delivery schedules: a longer than usual construction period and different target and long stop dates may be required. There is some indication that local authority restrictions on working hours may also be adjusted, but this will likely be on a case by case basis.

It is difficult for parties to forecast at this stage what the time and cost implications will be of meeting the new COVID-19 adaptations that will be necessary. It will likely take a number of weeks, even months, to understand their true impact. As such, parties will need to be satisfied that the contract mechanisms can manage and allocate risk associated with the type of disruption that may occur (such as illness, future shut downs, or supply chain disruptions) and the additional costs of carrying out works safely.

What are we seeing in practice?

What we have seen in practice is many employers and contractors actively engaging and cooperating with each other as the situation develops to reach agreement where possible, particularly since health and financial risks have to be managed on a day-to-day basis. The full impact of the pandemic is not yet capable of being understood and will likely vary, depending upon the nature and stage of each project. Practically speaking, both parties will generally be incentivised to reach an agreement on the way forward for the sake of completing the project, as costs and losses will be far greater if the project or any of its participants fail. The overriding consideration for parties will be ensuring that the project can proceed with appropriate health and safety adaptations in place.

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