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Practice Information Note

FI208
Implications of Coronavirus on Contract Administration

This Practice Note has been written by Colin Templeton.

Outline

The construction industry faces various challenges, but Coronavirus presents one of the most unusual ones in recent years.

This note will consider the potential effect of coronavirus, and some of the contractual options available. Although reference is made to SBCC, the underlying principles are relevant. It is important to emphasise that it assumes and considers a worst case. The Note will thus be reviewed and reissued as required depending on circumstances.

Possible Outcomes

In the event of a widespread outbreak there are two possible options open to the Contract Administrator.

1 Shutting sites.

This option may be actively promoted or sought by clients, particular those in the public sector, where there are sites or works in large public buildings (e.g. schools), and there is a very real risk of transmission of infection if these buildings are kept open. The public health argument for this is compelling, but a wise CA should be aware that there may be consequences for the Employer, and it certainly puts the CA on the horns of a dilemma.

The key consideration here would be why is the site being shut?

If the site is being shut solely at the request of the Employer without a good reason, many contractors would argue this is a default by the Employer in that the contractor wished to work, but was being prevented from doing so. SBCC, for example, makes reference to this and considers 'prevention' by the Employer as a Relevant Event, and allows the contractor to reap the benefits thereby. A contractor's claim in these circumstances would almost certainly be weighted in favour of loss of profit, costs associated with discontinuous work and so on. Closure on the basis of a nervous Employer would not be good enough.

However, if the site is being shut because of a move to close schools or assembly buildings, restrict gatherings or movements by a recognised authority (as has happened in other countries, and public statements by the UK government indicate it is being considered here) then the CA and his Employer are probably on better ground. In this case, there is no default by the Employer or the contractor, so *Force Majeure* would most likely apply – it is a circumstance no one could anticipate or avoid. It is worth noting that *Force Majeure* is not a Scots legal term, but it does make an appearance in the SBCC standard building contract 2016 edition as a Relevant Event under clause 2.29.15. In this case, it is easier to argue that there is no default on either side, so there is limited liability for the Employer. The project may be late

but there should be a lot less debate about a default by the Employer, and his consequential monetary liability

2 Termination of a contract

Termination of a contract (any contract) is not to be done lightly or easily, and can only usually be done in very clearly defined specific circumstances, and in a prescribed manner. Anything else is a default. SBCC for example has a clearly laid out process of how one party or the other can terminate a contract and the circumstances for doing so. As they mostly revolve around one side or another failing to meet its obligations under the contract it may be hard to argue a default if an outside set of circumstances prevented them from meeting their obligations. .

However, it is possible to terminate a contract if the outcomes cannot be realised. This process – known as frustration – allows for a contract to be determined if it cannot be performed. For example, if you bought a car, but it was written off prior to delivery, the contract could clearly not be performed (you don't have your car) and you would be entitled to withdraw at no consequence.

This sounds simple, but termination is not easy and the test for non-performance is high. If a contract cannot be performed then it has to be very clear that it cannot be performed in any way. It could, for example, be argued that the current situation is temporary and work could resume after the virus has passed.
If agreement to terminate is mutual, then there are no issues, but in all other cases, Architects should only consider this route as a last ditch, and should consider very carefully seeking legal advice on the effects of the decision to terminate. Get it wrong and you will be in court

Summary

The likely outcome of coronavirus is unknown, but it is clear that the various authorities are adopting a "plan-for-the-worst-hope-for-the-best" approach.

If the worst happens, then there will be pressure on Architects to consider how to respond. It may be there is an element of choice, but it may also be that there is no choice, and sites will be required to close.

In the event of closing sites, architects must consider the circumstances they find themselves in, the contracts they are using, and the consequences of the decisions they make.

Circumstances that prevent or delay architects in fulfilling commitments under their appointment should also be reported to their clients.

There will necessarily be grey areas. Where either the contractor or the Employer find it difficult or impossible to fulfil their duties (in the absence of specific instructions from an authority), the CA might suggest to parties to confirm they will temporarily waive certain rights in view of the special circumstances.

If in doubt, legal advice should be sought.

Also read:

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https://www.macroberts.com/insights/employment/coronavirus-and-your-employees/