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Construction with COVID 19: could you need a contractual reset?

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The new normal for construction looks quite different.

The Standard for New Zealand Construction Operations outlines how to operate at COVID-19 Alert Levels 2 and 3. It refers to the provision by the industry and associated trades of protocols and processes down to site level that will achieve the Standard's principles and minimum requirements (but with a condition that businesses should set their level of control higher than Standard where specific conditions present higher levels of risk). The protocols are to be applied and adapted to each site. It is accepted that industry participants will have to social distance while working, some builders and related trades will require specific shift work, and all sites will require clear records of daily attendance on site.

The main industry protocol was prepared by CHASNZ but other guidance includes materials prepared by the Master Builders Association, The Plumbers Gasfitters and Drainlayers Board, and the MBIE, which can all be found online.

There was no and is still no relief from employers' obligations under the Health and Safety at Work Act 2015 to continue to take all reasonably practicable steps to keep people safe.

The general effect of the Level Orders, the Standard, and the Health and Safety at Work Act 2015 is that in order for construction work to resume, operations must be carried out in a compliant COVID-19 Alert Level 2 and above manner. Whilst the methods of complying with the law will vary between the construction type, the site size, and the nature of activity, it seems likely that productivity will decrease from the pre COVID-19 levels. As such, delay and additional cost in completing current projects may become a pressing issue for parties.

Much of the focus has been on claims arising out of the Level 4 lockdown. But the bigger concern for owners, contractors and subcontractors may be the longer term costs of operating in this new environment.

There are potential contractual terms and basis for claims that could provide for compensation to contractors and subcontractors for the cost impacts of operating with COVID-19 Alert Level 2 and 3 restrictions, in particular prolongation and disruption claims. However, there is also a bigger question of whether owners and their contractors and the broader supply chain need to do a global 'contractual reset' to reflect the new normal.

If the approach is to deal with claims on a case by case basis, a party claiming prolongation costs (delay) and/or disruption costs must show as a minimum:

- an event has occurred in respect of which it is entitled to recover loss and expense;
- that the event caused a delay or disruption which reduced productivity in the nature and extent alleged; and
- that the delay or disruption caused loss, expense, or damage to be incurred.

While this is the legal framework, it is important to note too that in these challenging COVID-19 times courts, arbitrators and adjudicators are likely to seek to find justice for those parties who have sought to act as reasonably as possible. Comments by the judiciary have already laid out that expectation.

Parties that are difficult and adopt extreme positions may find they get little sympathy if a third party has to resolve the issue.

An obvious answer to productivity based claims will be to point to restrictions imposed by law and established as industry protocols.

If, for example, a particular contractor is delayed or disrupted by the number of people it can commit to work due to the social distancing requirements then that contractor may be able to rely upon an appropriately worded change of law provision within the contract that allocates risk to its counterparty.

By way of example, Clause 5.11.10 of NZS3910:2013 could assist such a claimant contractor under an agreement formed prior to COVID-19 Alert Level 4, given it provides for increases to costs caused by a change in law to be treated as a variation. It would then fall to the contractor to establish its loss. This may be relatively straightforward where the impact is simply that the project takes longer. In this situation, the additional time required is assessed and a claim made for the time related costs and relief sought from any liquidated damages for delayed completion.

However, the disruption may not be felt in this way. Also, delay may not be the only impact. For example: additional costs may be incurred from implementing extra shifts to overcome or compensate for the loss of productivity across the site; shift patterns may need to be changed and extra costs incurred to compensate workers or subcontractors for that change.

Disruption claims can be difficult to establish and value, but one recognised and commonly accepted method both to establish that a particular event has caused disruption and to quantify that disruption is the 'Measured Mile' analysis. This analysis is effectively a comparison exercise between the cost of the unaffected and affected work. In our example, then, the costs of days spent to progress particular work or reasonably similar work pre and post COVID-19 Alert Levels 2 and 3 would be compared. The contractor would then seek compensation for the additional costs incurred during and as a result of the impacted time period.

A contractor or subcontractor making such claims needs to make sure they give any required notices under the contract. Whatever the type of delay, the variation provisions of the contract should be considered in relation to effecting the variation itself and how it may be quantified. Excellent site records are also important (e.g. when tasks were started and completed and progressed along the way) and who was on site and when (which would also assist with the contact tracing requirement).

The new environment could have other impacts as well. For example, the supply chain to the contractor may have been compromised from either of the COVID-19 Alert Level 3 or 4 restrictions; additional overheads from compliance with the Order may have increased the cost to achieve productivity; inputs of the principal (e.g. drawings, principal supplied materials etc) may be delayed.

The question becomes whether it is in the best interests of parties to deal with these issues on a piecemeal basis, relying on the allocation of risk under the contract pre COVID-19, or whether a 'contractual reset' is required to reflect the new environment. Such a reset may raise some difficult issues, and require some compromise but it may be better in the long run, creating more certainty around the cost consequences. That should allow all parties to make necessary decisions to put the project on a sound footing and/or recognise that it is no longer viable.

It is clear that the current and future reality of construction will be markedly changed.

In order for contract participants to be best prepared, underlying contracts and cost baselines should be reviewed, good site and costs records should be kept, and communications with the counterparty should be maintained. If and when productivity claims arise then, the parties will all be in a better position to either pursue or respond on a case by case basis or use the information already gathered to inform an upfront discussion about a reset for the project.

For more information, or if you would like any assistance in asserting your contractual rights, please contact us to discuss.

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