



Building Credit Management (Pty) Ltd

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THE CORONAVIRUS - A SHORT GUIDE FOR CONTRACTORS

This guide is limited to the provisions the JBCC Principal Building Agreement Ed.6 (the PBA).

Although the JBCC Nominated/Selected Subcontract Agreement contains similar terms to the PBA concerning claims for extensions of time, subcontractors are advised to refer to the agreement instead of placing reliance on this guide.

Contractors will be concerned about the effect the CoronaVirus pandemic will have on their building contracts. Of concern are delays caused by the shortage of labour and materials that usually follow disruption to economic activity.

Clause 23 of the PBA caters for 2 kinds of delays – those for which the contractor is entitled to an adjustment to the contract value and those for which he is not so entitled.

A contractor is entitled to extensions of time with no monetary adjustment to the contract value where delays are caused by Force Majeure.

Clause 1 defines Force Majeure as:

"FORCE MAJEURE: An exceptional event or circumstance that:

- a. could not have been reasonably foreseen
- b. is beyond the control of the parties, and
- c. could not reasonably have been avoided or overcome

Such an event may include but is not limited to:

1. Acts of war (declared or not), invasion, and hostile acts of foreign enemies
2. Insurrection, rebellion, revolution, military or usurped power, war (whether declared or not), terrorism
3. Civil commotion, disorder, riots, strike, lockout by persons other than the contractor's employees or his subcontractors
4. Sonic shock waves caused by aircraft or other aerial devices, and ionising or radioactive contamination
5. Explosive materials, except where attributable to the contractor's use of such technology
6. Natural catastrophes including earthquakes, floods, hurricanes, or volcanic activity"

An epidemic can therefore be regarded as "an exceptional event" entitling a contractor to an adjustment to the date for practical completion but with no adjustment to the contract value.

REASONABLE PRECAUTIONS

The contractor is required to take reasonable precautions to avoid or overcome the delays.

Here are some practical suggestions:

1. Take care of your employee's health as you don't want to provide them with an excuse to be absent from work. Implement procedures for screening for infection and hygiene maintenance (face masks, hand washing etc).

2. If you rely on foreign made goods or materials then bear in mind that foreign governments' efforts to contain the spread of the virus have caused a slow down or stoppage of the supply of the goods and materials and you will need to source your materials from other suppliers.
3. Have a careful look at your financial situation as delays will surely have an adverse impact upon it. You should consider approaching creditors to make suitable arrangements before a crisis occurs.

PRICE ESCALATIONS

To avoid incurring losses due to price escalations, particularly where long-term contracts are being considered, make sure that the contract includes the standard Contract Price Adjustment Provisions.

Where the progress of the works has stopped as a result of Force Majeure for a period of 90 calendar days or an intermittent period of 120 calendar days then either party may terminate the agreement.

Contractors finding themselves trapped in a situation where they are obliged to bear the cost implications of delays can use this clause to either terminate the contract or negotiate a new one better suited to them.

CONTRACTS NOT YET IN FORCE

Now that the world is aware of the CoronaVirus pandemic, it is no longer an event that could not be "reasonably foreseen".

Contractors should therefore ensure that any contract they are considering entering into contains appropriate clauses to cater for the risk.

PROCEDURE

NB – The agreement contains strict time limits within which to send notices. Failure to comply with these provisions will result in claims for extensions of time being lost.

1. Give notice of intention to submit a claim for an extension of time within 20 working days of becoming aware or from when you ought reasonably to have been aware of the delay.

"To the principal agent

Dear Sir,

NOTICE IN TERMS OF CLAUSE 32.4.2

We hereby give notice in terms of clause 32.4.2 of the agreement that the circumstances as described in the annexed schedule have occurred which have/will cause a delay to practical completion.

This serves to notify you that it is our intention to submit a claim for a revision of the date for practical completion."

2. Submit your claim within 40 working days from when you are able to quantify the delay in terms of the programme. See clause 23.6 for the prescribed content of the notice.

"To the principal agent

Dear Sir,

SUBMISSION OF CLAIM IN ACCORDANCE WITH CLAUSE 23.5

We refer to our previous notice in terms of 23.4.2 sent to you on _____.

Relying on the provision of clause _____ (see agreement for the clause numbers) we hereby request a revision of the date for practical completion amounting to _____ working days.

We annex hereto a schedule containing the particulars of:

- the cause of the delay
- the effect of the delay on the critical progress towards practical completion (consider submitting a revised programme illustrating the change to the critical path)
and
- our calculations indicating how our claim for the number of working days is arrived at

We respectfully draw your attention to clause 23.7 in terms of which you must respond to our claim within 20 working days."

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