
COVID-19: Impact on Construction Contracts

Since 26 March 2020, New Zealand has been on COVID-19 Alert Level 4. This means all non-essential work must cease for at least 4 weeks. Any construction works that can be carried out at home can continue e.g. non-site works including design, programming, QA, costing, estimating and administration.

"Essential Work" is defined [here](#). In summary, any work required to protect people, property or the environment from imminent risks or to support essential services is deemed "Essential".

The escalation to Alert Level 4 on 26 March, and the associated shutdown, required immediate action to secure construction sites across New Zealand and ensure people returned home safely. Every party in the construction industry is now considering their rights and obligations under their contracts as well as how best to mitigate the cost and time risk.

In the attached Contractual Summary table, we have identified the likely clauses in the NZS 391X, CCCS and Master Builder forms of contract relevant to the current situation. We can also advise on the effect of the current situation on construction work contracted under any other form of contract.

Some practical tips:

Notification

Notification is usually a pre-requisite for any claim for time and money. Even if there are no time bars, prompt notification of delay and cost escalation will generally be required. The Alert Level 4 shutdown may have time and cost consequences which are largely unknown—and it is fine to state that.

Evidence of cost and delays

For claimants, it will be important to keep good records of costs to make it easier to compile a claim later. Most delay claims are assessed against a programme's

critical path: it could be useful to think ahead about how to reschedule and resequence works over the next 4 weeks (or more).

Mitigation

Contracts often require mitigation—with a failure to do so reducing a party's entitlement to relief (e.g. extra time and/or payment). What steps could the parties take to mitigate costs or delays?

In particular, where variations are accepted, we expect that any stated working day rate will be the subject of much scrutiny in the coming weeks, as principals and engineers look to understand how such rates are made up and then move to manage cost and identify any duplicated items within contractor claims.

We also expect that principals and engineers will require far greater transparency and close ongoing involvement in the mitigation and management of any variation claims than would usually be expected. The nature of the lockdown (and the lack of progress on-site) allows the parties time to stop and consider such matters, and to collaborate more effectively than would usually be the case.

Health and safety

COVID-19 presents risks to projects: both for the provision of essential services during Alert Level 4 and potentially beyond. Parties should ensure that their work health and safety policies and procedures are up to date and appropriate.

Seek a fair deal

Regardless of what the contract says, parties are free at all times to negotiate a solution that best fits the situation. In the present case, there may be some goodwill given the unprecedented magnitude of COVID-19.

There is nothing to stop parties talking to each other about a solution that best fits their project and about how both parties can work together to minimise the impacts of COVID-19 to mutual benefit.

Clear the emails, reset relationships and consider the next project

Whilst the lockdown is having severe effects on the Construction industry, it also affords all parties a unique opportunity to reset project relationships and use the time meaningfully to advance or resolve existing issues on a project. The time can also be used to optimise design, programming and pricing; and prepare to recommence and complete the project as efficiently as possible. For example, we expect most contractors will be entitled to an extension of time resulting from COVID-19: parties could be looking to either ask or propose acceleration plans to mitigate delays.

At the front end, for principals with a secure programme of future work, this is a great time to consider the next project: most contractors are at home and many are considering what comes next. It is an opportunity to begin engaging on the next

project wherever possible to make use of any capacity in the system.

We have put together a “quick reference” guide to the relevant clauses in NZ standard construction contracts (covering the NZS3910 and NZS3916, ACENZ Consultancy Agreement the Master Builder Subcontract Agreement). Please click on the link below to access this summary.

[covid-19-impact-on-construction-contracts.pdf](#)
