
Contractual and commercial considerations for the return to site

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Construction Industry Coronavirus (CICV) Forum

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INTRODUCTION

Following the lockdown and suspension of work on sites due to the Covid-19 pandemic there are a number of considerations for Contractors to address as the resumption of works occurs. The following matters are addressed by this paper:

- Recording the extent of the period of suspension/site closure and requesting the corresponding Extension of Time.
- Notifying the Main Contractor/Employer of the ongoing effects of restricted working on sites to comply with current Guidance and Main Contractor's amended site operating procedures.
- A system of recording changes or restrictions which affect costs to complete, such as the impact on productivity and progress, further delays due to material deliveries etc., working hours, travel and accommodation, partial access etc.
- The inclusion of a Pandemic clause in new contracts going forward (and qualifications to tenders for new work).

EXTENSION OF TIME (OR CHANGE TO THE DATE FOR COMPLETION)

Upon opening up sites after lockdown, it should be possible to ascertain the delay imposed (to date) as a result of the changed conditions.

It is recommended that Contractors and Sub-Contractors formally write to Employers and Main Contractors as applicable and record the extent of the delay and request an Extension of Time (EoT). **Template Letter T1** is appended on Page 10 to assist in this process.

This is a situation which is very much dependant upon individual terms and conditions of contract, and there is no “one size fits all” solution. However, the template letter ought to assist you to navigate a path to putting in place correspondence which you may have to produce under your contract and which you may subsequently have to rely upon.

If you are unsure of any particular contractual provisions which you are obliged to comply with, then you should consider seeking the appropriate professional advice, which is available through your Trade Body.

The purpose of the T1 Letter is to record and formalise the events which are known to date only. Care must be taken during exchanges that any EoT requested and awarded is not “final” in relation to the Covid-19 events.

We have seen a situation where a Main Contractor produced a draft form of “agreement” to supplement an existing Sub-Contract, where it sought to award EoT for the lockdown period only, and agreement that either party was not entitled to claim or deduct costs from the other as a result of the Covid-19 event.

On the face of it, this seems reasonable, however what about the works to complete? There are likely to be significant delays yet to be calculated, so it is important that the door is left open to claim for time (and compensation, where the contract allows this) for the as yet unknown impact.

Had the Sub-Contractor entered that agreement, he would have had no further entitlement to claim. Be careful!

NOTICE OF DELAY/ FURTHER EXTENSION OF TIME

A further **Template Letter T2** is appended on Page 11. The purpose of this letter is to formally notify of the ongoing delay events following re-commencement.

Again, not all events may apply to your particular scope, and there may be additional circumstances which apply to your works. You can delete or add bullet points as applicable to your own circumstances and contractual requirements.

Under standard forms of contract, there are several Relevant Events and Relevant Matters which may apply. Under many bespoke forms of contract we have reviewed, in particular Main Contractor's own Sub-Contract terms and conditions, you may not have any right to claim – however anecdotally, there are instances where Main Contractors have been proactive in agreeing terms with the Employer, and they may consider Sub-Contractor's costs submissions if there is a route to recovery.

It is always worth asking and offering to work collaboratively to mitigate additional time and costs where possible. Again, seek advice if you are unsure.

Employer/Contractor By email and post (if required)

Address:
Date:
Reference:
For the attention of:
Dear Sirs,

PROJECT NAME
WORKS PACKAGE
EXTENSION OF TIME

Further to our previous correspondence in relation to the site closure and suspension of the works, we write to formally request that the date for completion of the Works/Sub-Contract Works be extended by [A+B] days as a minimum. We have ascertained this as follows:

Date of suspension of works/site closure
XX March 2020
Date advised for site commencement
XX May 2020
Period of delay due to Closure A days
Period required for remediation B days
Total period for extension of time [A+B] days

We look forward to your earliest confirmation of the revised completion date in line with the above.

[Delete one of the following paragraphs depending on your contractual arrangements]

In relation to compensation, we have agreed that we shall not seek prolongation costs for the above noted period, however you shall not be entitled to impose any damages for delay for the same period.

[or]

We confirm that our costs to date associated with the period of extension are £XXXXXX and we shall provide you with full details within our forthcoming applications for payment for certification and payment.

This relates only to the period of suspension and site closure which has now been ascertained. There shall be further consequences of site restrictions which shall inevitably give rise to further delay and additional cost. We shall write to you separately on such matters.

We acknowledge these unprecedented events and confirm our commitment to work collaboratively with you to minimise the effect of the changed circumstances wherever we can. We remain hopeful that these matters are agreed promptly and amicably to allow us all to focus on completion of the works safely and in our mutual best interests.

Yours faithfully,

T1 Letter template

Employer/Contractor By email and post (if required)

Address:
Date:
Reference:
For the attention of:
Dear Sirs,

PROJECT NAME
WORKS PACKAGE
NOTICE OF DELAY

Following the re-commencement of works on site, please be assured of our continued cooperation and intention to work collaboratively with you to mitigate the effects of the present constraints on working conditions imposed. As you will however appreciate, we remain obliged to you to give notice under the terms of the Contract of those matters which continue to delay our works, which we do herewith. We have considered the continued restrictions and changes to working methods. The relevant event(s) causing delay and preventing regular progress of the Works are as follows:

- A Variation to the order of the Works, and/or
- Late or restricted access to areas of the site and/or
- Delays by others wholly beyond our control and/or
- Suspension of the Works and/or
- Any other event or impediment over which we have no control and/or
- Changes to legislation or other statutory requirements (if emergency legislation) and/or
- Force Majeure and/or
- Any other relevant event within the contract upon which we (or yourselves) may consider applicable in relation to the present circumstances

Notwithstanding any other conditions of the contract, we are presently unable to ascertain the full effect in terms of duration and compensation. We shall, of course, update you and advise of any changes as such become known to us. For the purposes of satisfying any notice requirements we estimate the time effect to be X weeks at an estimated cost of £xxx,xxx per week. There are continuing unprecedented impediments over which we have no control and which impact our ability to carry out and complete the works, including and not limited to:

- Delay to the supply of materials
- Travel restrictions
- Accommodation requirements (where employees are required to stay away from home)
- Staffing restrictions where personnel are in a home conducting isolation of vulnerable persons
- Updating risk assessments and revised, safe working practices
- Delay due to preceding activities
- Restricted access within the site
- Changes to government guidance

We would be grateful if you could take all due cognizance of the foregoing in reviewing progress and completion and grant us the appropriate extension of time at such time, as this can be ascertained.

Yours faithfully,

T2 Letter template

RECORDING THE ONGOING EFFECTS ON THE REMAINING WORKS

This is the tricky bit. Disruption and loss of productivity are historically difficult to prove, usually for the want of accurate records of the activities on site, and how they have been impacted by specific constraints imposed.

It is recommended that each operative on site maintains a Daily Record Sheet, showing what they were able to achieve in a given day, or equally importantly, what they could not achieve and the reasons why. A **template Daily Record Sheet** is provided on Page 12.

Such record keeping is never warmly welcomed by the site operatives, however it is absolutely critical that employers emphasise the importance of keeping such records at this time.

Consider implementing these protocols where they are handed to the appropriate supervisors and managers at the next day's toolbox talk as a means of ensuring adequate record keeping is maintained. It is a process which will require managing.

Obviously during this period, if these protocols can be completed electronically to minimise contact, the better for all concerned. It is also important to keep general records of the site conditions by photographs and video where possible.

Show progress. Show restrictions. Delays by preceding activities. If you see unsafe working practices on site, record such in writing to the Main Contractor/Employer – do not stand idly by. Site Supervisors/Managers to keep a daily site diary noting the matters which are affecting the progress. The better the standard of record keeping, the more likely your prospects of recovering additional costs expended. This can be implemented immediately on re-commencement.

What next, with all these records?

Submit them to the Main Contractor/Employer "for information and record purposes" at least weekly. That way, you are keeping them aware of the conditions on site which are affecting the works.

Importantly, if the Main Contractor/Employer can see something they think should change to reduce the impact, they can instruct accordingly. If they are not informed, you potentially deny them opportunity to do so, and you may have no right to claim as a consequence.

When it comes to calculating and applying for additional costs expended, the likely starting point is demonstrating from your tender, that your "norms" were adequate and achievable under those halcyon days of normal working conditions. Where you can, break down aspects of the works and show that you were able to achieve X (m² or linear metres or numbers of widgets) per hour/per

day. From your records following restart, that is likely to reduce to Y. In broad terms, Y-X will show the unrecovered time due to the changed circumstances. What took two hours now takes four, and so forth. When you have the time, it can be multiplied by the rate for the operatives affected, thereby arriving at the cost of the additional hours expended due to disruption.

You are unlikely to succeed in this claim unless you have the records to back up your assertions, with a narrative explaining why restrictions required more time (tie the records to the sums). It is simply not good enough to say we tendered X hours, the job ended up taking Y hours, so we are entitled to recover the difference. This is termed a “global claim” which is only viable under very strict conditions. So records, records, records to authenticate the mathematics to back up your losses. Submit to the Main Contractor/Employer periodically, and ensure these details are included within any Application for Payment.

Given the present circumstances, most entities will be satisfied if they are able to recover the additional costs to restore them to a position where they are no worse off. Compensation, in other words.

There will be rare opportunities where the valuation of variations rules may apply, and you may actually be entitled to recover a reasonable profit on your additional costs – though do not get your hopes up in benefitting from the present circumstances.

DAILY RECORD SHEET	
<small>THIS FORM MUST BE COMPLETED BY ALL SITE OPERATIVES</small>	
DATE:	OPERATIVE NAME:
TIME IN:	COMPANY:
TIME OUT:	DESIGNATION:
HOURS:	SUPERVISOR'S NAME:
Detail and quantity of work undertaken this day (Level/Area/System/Panel/etc.)	
What did you plan to achieve today? What did you achieve? Why?	
Details of any delay to your work caused by others	
Reference to other trades, unsafe areas you could not enter. Were you instructed not to do something? Etc.	
Instructions received from third parties etc.	
Signature:	
<small>This sheet must be returned to your supervisor before leaving site for the day</small>	

Daily Record Sheet

FUTURE WORKS

We all know the risks and restrictions a pandemic imposes. It would be insanity to enter into contracts on normal terms at normal prices knowing what lies ahead for at least the short and likely medium term.

We strongly recommend that any new contracts account for the circumstances in relation to pandemic restrictions. We have drafted a sample Clause, below, which we suggest be offered as part of a response for inclusion in any new contracts which are put in front of you for signing or negotiation.

Where there is a government initiative by which employers can recover staff costs (furlough arrangement) we consider that prolongation of staff costs ought to be recovered under such a mechanism rather than under the contract. This ought to make the Pandemic clause more palatable to a Main Contractor/ Employer. There ought to be a means of recovering additional costs for changed methods of working and other restrictions imposed. In relation to tenders for new works, we suggest that the tenderer advises the recipient that:



This tender has been prepared on the basis of “normal” site working conditions. If we are to progress to an acceptance and formal contract, we shall require the inclusion of the following clause (or similar) to recognise and accommodate the unprecedented recent events in relation to Covid-19.

Pandemic: Proposed new clause

In the event of any delay, disruption or suspension of the works due to any published government guidance, updated risk assessments or operating restrictions or changes in legislation in relation to a pandemic, the [Contractor/ Sub-Contractor] shall be awarded such reasonable extension of time as is necessary to complete the works in consideration of all such matters. There shall also be relief from delay damages for the period of extension. We may also request compensation for inflationary increases in labour and materials. Where additional productivity costs arise as a consequence of imposed restrictions, or noncompliance by others of site operating procedures, which directly impact on our works, compensation shall be payable upon provision of details by the [Contractor/Sub-Contractor] and records required to properly demonstrate the extent of such additional costs.

If you are able to reasonably estimate the additional costs in advance, then it may be preferable to negotiate a lump sum payment (over stages, perhaps) to cover such and put the matter to rest.

PROGRAMME IMPLICATIONS AND RECORD KEEPING

A review of the Master Construction Programme should be carried out and updated to reflect the status of the programmed works as at the point of the Lockdown (even if this shows that the job was behind programme as of that date).

An updated Programme should be produced showing the impact on programme of the Lockdown Period and mapping the programme to complete based on the same logic and contract labour outputs etc, as used on the Original Master Programme. This amended programme should then be used to map the required changes to individual work activities created by the implementation of the New Construction Phase Plan and create a Post-Lockdown Programme base on anticipated impact on work activities and their impact on the Critical Path.

By producing this Post-Lockdown Programme, it will give an early indication of the potential impact on contract duration and allow an initial assessment of any EOT that would need to be applied for.

Obviously, this will only be an initial guide to the potential impact on timeframes and it will have to be monitored closely and updated as information becomes available and activities are undertaken.

The Daily Record Sheet [**see template on Page 12**] would be a useful tool to implement going forward and it would be helpful if the Details of Work Undertaken were linked in some way to the Post-Lockdown Programme Activities and used to confirm allowances in the Post-Lockdown Programme and thereby justify the validity of adjustment to the original Master Programme. This will involve a lot of collation of information, probably by the surveyors but will be necessary to support any application for payment of additional costs incurred.

T1: Letter to record extent of extension of time to date

Employer/Contractor

By email and post (if required)

Address

Date:

Reference:

For the attention of:

Dear Sirs,

PROJECT NAME
WORKS PACKAGE
EXTENSION OF TIME

Further to our previous correspondence in relation to the site closure and suspension of the works, we write to formally request that the date for completion of the Works/Sub-Contract Works be extended by [A+B] days as a minimum. We have ascertained this as follows;

Date of suspension of works/site closure	XX March 2020
Date advised for site commencement	XX May 2020
Period of Delay due to Closure	A days
Period required for remobilisation	B days
Total period for extension of time	[A+B] days

We look forward to your earliest confirmation of the revised completion date in line with the above.

[Delete one of the following paragraphs depending on your contractual arrangements]

In relation to compensation, we have agreed that we shall not seek prolongation costs for the above noted period, however you shall not be entitled to impose any damages for delay for the same period.

[or]

We confirm that our costs to date associated with the period of extension are £XXXXXX and we shall provide you with full details within our forthcoming applications for payment for certification and payment.

This relates only to the period of suspension and site closure which has now been ascertained. There shall be further consequences of site restrictions which shall inevitably give rise to further delay and additional cost. We shall write to you separately on such matters.

We acknowledge these unprecedented events and confirm our commitment to work collaboratively with you to minimise the effect of the changed circumstances wherever we can. We remain hopeful that these matters are agreed promptly and amicably to allow us all to focus on completion of the works safely and in our mutual best interests.

Yours faithfully,

T2: Notification of Delay (following re-commencement)

Employer/Contractor
Address

By email and post (if required)

Date:
Reference:

For the attention of:

Dear Sirs,

PROJECT NAME
WORKS PACKAGE
NOTICE OF DELAY

Following the re-commencement of works on site, please be assured of our continued cooperation and intention to work collaboratively with you to mitigate the effects of the present constraints on working conditions imposed. As you will however appreciate, we remain obliged to you to give notice under the terms of the Contract of those matters which continue to delay our works, which we do herein. We have considered the continued restrictions and changes to working methods. The relevant event(s) causing delay and preventing regular progress of the Works are as follows;

- A Variation to the order of the Works and/or
- Late or restricted access to areas of the site and/or
- Delays by others wholly beyond our control and/or
- Suspension of the Works and/or
- Any other event or impediment over which we have no control and/or
- Changes to legislation or other statutory requirements (if emergency legislation) and/or
- Force Majeure and/or
- Any other relevant event within the contract upon which we (or yourselves) may consider applicable in relation to the present circumstances

Notwithstanding any other conditions of the contract, we are presently unable to ascertain the full effect in terms of duration and compensation. We shall, of course, update you and advise of any changes as such become known to us. For the purposes of satisfying any notice requirements we estimate the time effect to be X weeks at an estimated cost of £xxxx per week. There are continuing unprecedented impediments over which we have no control and which impact our ability to carry out and complete the works, including and not limited to;

- Delay to the supply of materials
- Travel restrictions
- Accommodation requirements (where employees are required to stay away from home)
- Staffing restrictions where personnel are in a home conducting isolation of vulnerable persons
- Updating risk assessments and revised, safe working practices
- Delay due to preceding activities
- Restricted access within the site
- Changes to government guidance

We would be grateful if you could take all due cognisance of the foregoing in reviewing progress and completion and grant us the appropriate extension of time at such time, as this can be ascertained.

Yours faithfully,

DAILY RECORD SHEET

THIS FORM MUST BE COMPLETED BY ALL SITE OPERATIVES

DATE:..... OPERATIVE NAME:
TIME IN:..... COMPANY:
TIME OUT:..... DESIGNATION:.....
HOURS:..... SUPERVISOR'S NAME:.....

Detail and quantity of work undertaken this day (Level/Area/System/Panel/etc.)

What did you plan to achieve today? What did you achieve? Why?

Details of any delay to your work caused by others

Reference to other trades, unsafe areas you could not enter. Were you instructed not to do something? Etc.

Instructions received from third parties etc.

Signature:.....

This sheet must be returned to your supervisor before leaving site for the day

Current members of the Construction Industry Coronavirus (CICV) Forum:

- Association for Consultancy and Engineering (ACE)
- British Constructional Steelwork Association (BCSA)
- Builders Merchants Federation (BMF)
- Building Engineering Services Association (BESA)
- Chartered Institute of Architectural Technologists (CIAT)
- Chartered Institute of Building (CIOB)
- Civil Engineering Contractors Association (CECA Scotland)
- Construction Plant-hire Association (CPA)
- Electrical Distributors' Association (EDA)
- Federation of Master Builders (FMB)
- Finishes and Interiors Sector (FIS)
- Lift and Escalator Industry Association (LEIA)
- National Federation of Roofing Contractors (NFRC)
- Royal Incorporation of Architects in Scotland (RIAS)
- Royal Institution of Chartered Surveyors (RICS)
- Scaffolding Association
- Scottish Building Federation (SBF)
- Scottish Contractors Group
- Scottish Plant Owners Association (SPOA)
- SNIPEF
- SELECT
- Stone Federation (GB)

Further information



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