

## **RPA Briefing Note on COVID-19 and Construction Sites**

**DATE: 25/03/2020**

The below briefing note is aimed at trying to give our Clients the most up to date information as received by the date of issue. We feel that during these challenging times trying to keep you up to speed with what we are experiencing across the Industry and Regions will assist with your current and future planning.

### **State of Play with Sites**

As I am sure most of you are aware there has been a fair amount of confusion regarding whether construction sites are open or shut for business. Further to discussing this today with numerous sources it would seem that a number of Contractors are gearing up for a closure in the coming days / end of week due to a number of factors, these being;

- by their own decision due to H&S concerns on site;
- lack of resources from the supply chain meaning work on site is no longer feasible;
- Government enforced site closure.

We would advise that you look to contact the Contractors that you are working with to understand whether they are planning on closing site under their own decision or continuing to work until the Government guidelines change to confirm that they must close. It is important to note which option is taken, as this may affect the contractor's entitlement to any EOT that may be applied for later on.

### **What this may mean for you**

Whilst the closure of any sites is obviously going to lead to delay it should be noted that we believe the most pressing matter will be Contractors looking to request valuations to be undertaken up to the point of the site closure to aid with cashflow.

Taking the example of the JCT D&B 2016, there are some stringent clauses over when valuations can be made by Contractors, when payment certs have to be issued and when payments are due to the contractors. However as noted above we envisage that contractors will be asking for 'interim' valuations even if they are outside of the Contractual payment timescales to enable them to claim any and all work undertaken up until the date of the site closing.

Given this likelihood, it is probably worth discussing with your EA whether an 'interim' payment will be required by the Contractor as and when sites are forced to close. Here at RPA we are trying to ensure that as many of our sites are visited by staff by the end of this month so that photo records can be taken in readiness for any potential 'interim' valuations.

## **Contractual Position regarding COVID-19**

I am sure that most of you have either sought advice or have received some from your EA or Legal Advisor, however the below link will take you to an article published by Blake Morgan and a more recent one included in today's Building Magazine. We would advise talking through with your EA and / or legal representative on a job by job basis, given the likelihood that Contract Amendments are likely to have been incorporated in your various projects.

[Blake Morgan Article](#)

[Building Magazine Article](#)

Another thing to expect from Contractors (in addition to the request for valuations) will be letters notifying you of a potential delay due to the COVID-19 Pandemic. This is to be expected and in line with what is required under the Build Contract. Again, if you receive one of these letters (or your EA does) then please liaise with your EA to understand your next steps.

Some current advice is that contrary to previous advice that any delay would be covered by the 'Force Majeure' Clause it is looking more and more likely that the clause covering 'Government Action' may well be the applicable Clause to reference for any delay. (in JCT 2016 Clause 2.26.12)

## **Current Tenders / Pre-Contract Award**

No doubt many of you currently have projects out for tender or have recently just entered in to Contracts, maybe following the WG deadline of March 2020. With the current situation we now find ourselves in, this could now cause issues as to whether tender periods should be extended or cancelled, and the potential delay to recently entered in to contracts that may not yet have started on site.

Hugh James have recently released a blog post on this that may help initially, but again each case will need to be looked at carefully and decisions taken on a project by project basis.

[Hugh James Blog](#)

We would suggest that with all the current uncertainty and likely stress placed on Contractors' Cashflows at present, it is likely that any Tenders currently out will need to have their periods extended and may receive a lower than usual response. That said, should sites be closed in the near future, Contractors will no doubt be keen to price new works to try and shore up cashflow for the future due to the uncertainty of the market place. The main thing to bear in mind is that you need to ensure that any Tender currently being priced are realistically going to go ahead. Tendering costs contractors so it will be a double hit to their already stretched cashflows if they are asked to tender the works, win the tender and then have the job cancelled or delayed.

## What happens should sites close?

In the now seemingly likely event that all construction sites are forced to close for the foreseeable future (possibly 2-3 months) then it's important that communication/correspondence continues between the relevant parties to ensure the following:

- The site is left in as secure and safe state as possible;
- The site continues to be secure and safe during the duration of the closure;
- The relevant Insurances are maintained for the site;
- If possible, a photo record of the site from the date the site closes is completed;
- Contractual obligations are adhered to throughout the period of closure. This may mean a monthly valuation certifying a zero payment is still issued by the EA or an agreement reached between all the parties that payment provisions are suspended until the site resumes activity (we are looking into this as we speak); However Contractors will still likely incur security costs and site set up costs throughout this period that they may not have previously costed for;
- The potential issue of any materials on site that may become damaged / stolen or obsolete due to weathering during the period of closure and consideration should be given to whether these should be removed/stored somewhere;
- Discussion with Building Control and the Structural Insurance Provider that any potential delay on site will not affect any policies in place (regards half built structures and the like);
- Remobilisation costs will also be likely be incurred by Contractors further adding to the unforeseen financial costs;

## Some Thoughts

While there is no doubt that we are entering un-precedented times, now more than ever the need for clear communication and collaboration between all parties is vital to ensure the continued survival of the Construction Industry.

With this in mind, over the last couple of days there have been some interesting thoughts and ideas discussed that could aid the industry during this period, these being:

- The UK Government has, as of the 20<sup>th</sup> March issued a Procurement Policy note for Public Sector Clients. Key points include;
  - Public clients should act to support suppliers at risk so they are better able to cope with the current crisis
  - Public clients should pay all suppliers as quickly as possible to maintain cash flow and protect jobs
  - Payments can be made in advance of need (up to 25% of value of contract)
  - Suppliers should identify in their invoices which elements of the invoiced amount relates to services they are continuing to supply (i.e. business as usual) and which amounts are attributable to the impact of covid-19
  - Suppliers in receipt of public funds on this basis during this period must agree to operate on an 'open book' basis. This means they must make available to the contracting authority any data, including from ledgers, cash-flow forecasts, balance sheets, and profit and loss accounts, as required and requested to demonstrate the payments made to the supplier under contract have been used in the manner intended.

- Suppliers should not expect to make profits on elements of a contract that are undelivered during this period and all suppliers are expected to operate with integrity. Suppliers should be made aware that in cases where they are found to be taking undue advantage or failing in their duty to act transparently and with integrity, contracting authorities will take action to recover payments made.
- If a supplier seeks to invoke a clause relating to a form of contractual relief that would allow them to suspend performance, such as force majeure, contracting authorities should first work with the supplier to amend or vary contracts instead. These variations could include changes to contract requirements, delivery locations, frequency and timing of delivery, targets and performance indicators etc.
- Other reliefs sought by a supplier could relate to any contractual obligation but usually takes the form of one, or both, of the following:
  - an extension of time for contract performance (e.g. revised milestones dates or delivery dates, etc);
  - a waiver or delay in the ability of the contracting authority to exercise a right and/or remedy (e.g. to claim liquidated and ascertained damages, service credits or terminate the contract)

The full note is available at: <https://www.gov.uk/government/publications/procurement-policy-note-0220-supplier-relief-due-to-covid-19>

- We have also recently been made aware of Contractors looking for either an early release, or part release of retention monies being held for projects in the defects period. This may be something that Clients are willing to look at especially if you are holding retentions for a number of scheme's against the same contractor. It should be stressed that while this could be considered each case would need to be reviewed carefully and on its own merits.
- As noted previously the ability for Valuations and Interim Valuations to be undertaken to keep the cashflow moving where possible, and prompt payment of these valuations.

Hopefully the above gives a brief but useful insight to how things are developing, we would stipulate that at present everything is very much a moving feat and may well need updating by the end of the week.

As always should you have any questions / queries regarding the above please do not hesitate to contact anyone here at RPA.

Above all, stay safe.

The RPA Team

*\*Please note that the above is the collated thoughts from the team here at RPA, based on what we have experienced to date. The information is un-solicited and should not be taken as legal advice. Should you want to discuss any of the above in more detail please feel free to contact anyone here at RPA.*