

7 changes to construction contracts due to Covid-19

Prior to Covid-19 becoming a global reality, few existing contracts had appropriate provisions for its impact, specifically in the construction sector. However, the disruptions to business and operations are no longer unanticipated and new contracts negotiations need to take these possibilities into account.



Barry Herholdt, senior associate at MDA Attorneys

Says Barry Herholdt, senior associate at MDA Attorneys, “Initially, force majeure notices were being issued in line with the broad definition of force majeure as an unanticipated event. However, we now know that even with regulated levels of lockdown, a sudden announcement can impose stricter measures and regulations which could limit or halt access to sites across the country. We, therefore, need to reinvent our thinking when negotiating new contracts to create the right balance of risks in contracts with the understanding that Covid-19 and its effects will be with us for the foreseeable future.”

Using the most common occurrences, Herholdt has identified seven possible provisions that should be amended for better protection in the context of Covid-19.

1. Time extensions – with or without related costs

Identifying and stipulating likely delays entitle parties to claim extensions of time (with or without costs). Instructions for additional works (including variations) or to suspend or halt works completely, for instance, need to be anticipated and specified.

2. Access, mobilisation, demobilisation to and from site

Changes in lockdown levels may necessitate site alterations, including shutting down and reopening sites. Transport costs may rise on account of vehicle capacity restrictions for transporting workers to and from site and the location of the site is a key consideration as it could give rise to time implications. Cross-border and inter-provincial travel may be restricted, and regulated isolation or quarantine periods should be considered in addition to possible exemptions and permit requirements.

3. Health and safety considerations

Additional safety measures are required to protect workers and prevent the spread of the virus. A detailed stipulation of health and safety specifications needs to form part of every new contract, including guidelines and protocols, as well as agreement on related costs which become part of the contract value. Examples are hand-washing stations, sanitisers, screening equipment, personal protection equipment, restrictions on the sharing of tools, equipment and machinery and medical testing. The required period of isolation in quarantine should a worker test positive should also be anticipated.

4. Price adjustment, escalation in supplier costs

Given the delays caused by supply chain interruptions, contracts should better define the circumstances which will establish a price escalation entitlement. The ability to utilise alternative and back-up suppliers to source required materials should be discussed. Shipping and delivery routes from the respective suppliers must be established to deal with possible border restrictions.

5. Force majeure

Given that the presence and impacts of Covid-19 are no longer unforeseen, it is important to carefully review and expressly

define what would constitute a force majeure event. The detail in the wording is crucial as some standard form contracts do not expressly stipulate “virus”, “epidemic” or “pandemic”. Also important to bear in mind is that claims under this clause generally allow for time extensions, but no additional related costs.

6. Insurance to be considered for proper cover relating to certain unforeseen events

Parties need to consider insurance cover for loss of income or revenue, worker protection or worker salary protection and measures to accommodate alternative working environments, such as working from home. Other cover to be considered includes costs to provide access facilities to remote workers, security costs during periods with no access to site and cover for possible loss or delays incurred in the supply chain.

7. Termination of the contract

The only certainty that has come with Covid-19 is that there will continue to be uncertainty, which makes it likely that parties may need to terminate the contract. The conditions for termination should be clearly set out, including notice requirements and the responsibilities and procedures each party should undertake.

"To achieve efficient and cost-effective operations, parties must consider possible risk areas, carefully review the provisions of the contract and agree to clear, balanced duties and responsibilities. “This is what makes projects successful, rather than iron-clad contracts”, says Herholdt. “A collaborative approach and team mentality is crucial to achieving this.”

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