

Keeping you up to date

Coronavirus and its potential impact on construction and engineering projects

Although each construction or engineering contract will deal with risk allocation between the parties in its own way, this briefing provides pointers on what the parties need to consider – focussing on the commonly used JCT and NEC ECC contracts.

	Contract Administration	Suspension	Termination
Key processes	<p>Parties will need to continue to share information – co-operation is critical to minimise avoidable disputes.</p> <p>Under NEC, both parties should continue to notify early warnings ie events which may increase costs, delay completion or a key date or impair the performance of the works when completed. Similarly for anything which is (or becomes) illegal or impossible, and acts of prevention.</p> <p>Under JCT, the contractor should proactively notify relevant events and relevant matters.</p> <p>Understanding the impact of Covid-19 on your project requires sharing information with and discussions with all project partners to manage, mitigate and review risks – both those currently happening and those which are foreseeable. Even if your contract does not require this approach, it is commercially critical.</p>	<p>If the works have not yet started, the employer could postpone the start of the works up to the maximum permitted period. Under JCT this is 6 weeks (or a longer if stated in the Contract Particulars). Under NEC there is a right to delay access until the later of the access date or the date in the Accepted Programme.</p> <p>If the works have started, the employer must rely on an express contractual right to suspend the works. JCT allows 'postponement'. NEC allows the contract administrator to instruct the contractor to stop/not to start work at any time.</p> <p>Prolonged suspension may entitle both parties to end or terminate further work on the project.</p> <p>Suspension without a contractual right is a breach of contract, and the other party can then terminate the contract.</p>	<p>Termination outside the contractual provisions is tricky and relies on force majeure or suspension without cause.</p> <p>Termination based on contractual provisions will depend on the terms of the contract. Typical events entitling termination include:</p> <ul style="list-style-type: none"> – prolonged suspension (beyond the period stated in the JCT Contract Particulars, or 13 weeks under NEC) – force majeure or an act of prevention – government-imposed restrictions on travel, movement of people or movement of goods 'which directly affects the execution of the works' (JCT) or release of either party from further performance by the law (NEC) <p>The termination clause will set out the rights of both parties, the notices required and the consequences.</p>
Impact on time	<p>Events which may extend the completion date typically include:</p> <ul style="list-style-type: none"> – employer-imposed changes – employer delay – government-imposed restrictions 'which directly affects the execution of the works' – statutory changes – impossibility, acts of prevention or force majeure¹ <p>Under NEC the contractor must also update the programme to reflect challenges arising from Covid-19.</p>	<p>Any suspension of the works would, subject to relevant process requirements, extend the completion date.</p> <p>Where the project proceeds to completion, changes to the completion date are essential to provide relief for the contractor from delay or liquidated damages.</p> <p>The role of the contract administrator will be critical in determining the impact of any contractual risk events</p>	<p>Typically on termination, the contractor will stop carrying out the works and any further obligation to complete the works will end.</p> <p>The employer may be able to recover accrued delay damages (depending on the wording of the contract), particularly if they do not relate to the cause of the termination.</p>

¹ Force majeure is not defined in most standard form contracts. Under English law, force majeure is generally understood to mean acts, events or circumstances that are beyond the reasonable control of the parties and the only effective cause of the delay or default. It does not cover occasions when the project becomes commercially unattractive. It is for the party seeking relief from its obligations to establish that the acts, events or circumstances were sufficient to constitute force majeure and there were no alternative means for performing its obligations.

	Contract Administration	Suspension	Termination
Impact on cost	<p>Foreseeable price increases can be dealt with under the NEC early warning process.</p> <p>Contracts may include a clause entitling the contractor to increased prices e.g. fluctuations under JCT or inflation under NEC secondary option X1.</p> <p>Force majeure does not entitle the contractor to loss/expense under JCT. Under NEC extra costs can be claimed for any compensation event, which includes acts of prevention (as noted above).</p>	<p>Under both JCT and NEC, suspension entitles the contractor to recover its additional costs.</p> <p>Under NEC, the contract administrator can give a decision on compensation events based on stated assumptions. This entitles them to review the extra time and cost awarded if those assumptions prove to be wrong.</p>	<p>Generally no further interim payments are due to the contractor, and an accounting will be carried out.</p> <p>For termination relating to force majeure the JCT clause entitles the contractor to be paid for work properly executed, cost of leaving the site, materials ordered and which cannot be returned, and additional costs (or compensation) accrued before/arising from the termination.</p> <p>Under NEC, the payment depends on the main option but is essentially costs incurred and the costs of removal.</p>
Impact on quality	<p>Foreseeable future performance or quality difficulties are dealt with under the NEC early warning process.</p> <p>Any reactive qualitative changes to the works required to meet supply and labour issues arising should be issued by the contract administrator – the contractor has a right under NEC to propose changes.</p>	<p>Contracts may contain guidance on the contractor's obligations to protect and secure the site and part-completed work or delivered goods and materials during the suspension.</p> <p>Generally, loss of plant or materials, and damages to the works would be covered by the insurance provisions under the contract.</p>	<p>Once the contractor's employment on the project has been terminated, the defects period will not/no longer apply.</p> <p>Any defects in the works will entitle the employer to a reduction in the amount payable on the termination account or (if found too late) to bring a claim for breach of contract.</p>

This note does not discuss the common law position including the complex remedy of frustration as the vast majority of construction and engineering projects in the UK will be governed by a contract with express terms dealing with this situation. For more on force majeure and frustration, please read our note on **Fighting the Corona Virus – Key Legal Challenges and Solutions**.



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