

## Analysis

# Contract is king, even in lockdown

Covid-19 public health measures pose significant issues for the management and administration of construction contracts



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There is much commentary in the legal press about interpretation of contract clauses and legal doctrines, but such commentary largely poses further questions.

There are few hard and fast factual answers to questions around the effect the Covid-19 crisis and public health measures are posing for the management and administration of construction contracts.

The bottom line is that the “contract is king”. While it might seem that all contractors will surely have a contractual or other legal entitlement to an extension of time to complete a project at the present time, that simply cannot be assumed. Each contract and set of factual circumstances is different and must be considered on its own terms.

Also, even if an extension of time to complete a project is given in any construction deal, this then leads to the question as to which party will pay for additional costs incurred as a result of that extension and delay. Again, the key question is: “What does the contract say?”

A further issue is that any variations to a construction contract are likely to have a knock-on effect on a myriad of inter-related contracts. This includes facility agreements for development funding or pre-let deals, where a tenant may have set a specific date to occupy a property under construction. The terms of these contracts must be considered too.

## Construction Industry Federation (CIF)

With very limited exceptions, construction cannot proceed while the stay home measures remain in place (at the time of writing, these are due to expire at midnight on May 4, 2020).

Users of construction contracts in Ireland should keep up to date with progress on the report prepared by the

CIF, Construction Sector C-19 Pandemic Standard Operating Procedures, currently being considered by the government. The intention of the plan contained in the CIF report is to provide a standardised approach to commencing construction projects, and which incorporates Covid-19 public health requirements.

## Public works contracts

Public-sector projects in Ireland are procured by public bodies by contracts contained in the Capital Works Management Framework (Public Works Contracts). On April 14, the Office of Government Procurement issued an updated guidance note on Public Works Contracts. It contains useful guidance, for example, as regards Public Works Contracts where sites are now closed as a result of the public health measures. It sets out: “In relation to cost, the Public Works Contracts do not provide an entitlement to the Contractor to recover costs associated with a delay arising from site closure in the current circumstances.”

However, the updated guidance note goes on to outline proposals for employers under Public Works Contracts to make ex-gratia payments to contractors relating to costs associated with delay under certain Public Works Contracts from April 12, 2020 to midnight on May 4, 2020.

## RIAI contracts

The Royal Institute of the Architects of Ireland (RIAI) construction contract is the contract of choice for most privately funded contracts in Ireland (RIAI contract). Even an RIAI contract, amended as it often is in high-value projects, will probably not have been amended to an extent that the effects of Covid-19 will be directly addressed. Parties will now be looking at terms in their contracts dealing in particular with delay – and extensions of time and costs associated with delay.



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Much current discussion revolves around force majeure, which has no standard legal definition. The application of force majeure protocols in each contract will depend on interpretation of the precise wording used (if any).

While it might be expected that the Covid-19 pandemic should be considered of the same level of magnitude as “acts of God” or earthquakes, which should relieve a contractor of certain contractual obligations, it has yet to be seen how the pandemic will be interpreted on a contract-by-contract basis.

Innovative arguments can be expected from both parties, and it may well be that in a worst-case scenario the courts may be called upon to find a way to interpret strict contractual provisions that may seem inequitable. The only express reference to force majeure in the RIAI Contract is at Clause 30, under which the contractor may seek an extension of time (EOT) upon the happening of an

event – giving rise to delay in completing the works due to force majeure. The meaning of force majeure in Clause 30 is open to interpretation as the term is not defined in the RIAI Contract. An EOT under Clause 30 of the RIAI Contract does not necessarily entitle the contractor to an increase in the contract sum.

The public health measures may impact on supply of labour and materials. A contractor under the RIAI Contract may be entitled to seek an EOT where it is unable, for reasons beyond its control, to secure labour and materials essential for the proper execution of the works.

The RIAI Contract also entitles the contractor to seek an EOT where the architect issues instructions for an employer’s variation.

Unlike an EOT request due to force majeure, the contractor may claim for loss and expense associated with an architect’s instruction for a variation.

Whether the RIAI Contract has been

amended or not, it is vital now for parties to construction contracts to comply with notice requirements and to keep comprehensive records of communications and information relevant to an EOT request.

## RIAI contract: changes in law

Clause 4 of the RIAI Contract deals with variations arising from “any legislative enactment, rule or order or the exercise by the Government of powers vested in it...” As most construction sites are now temporarily closed by law, contractors may seek an adjustment to the contract sum pursuant to Clause 4 (unless it is amended).

RIAI contract: price fluctuation Clause 36, dealing with wage and price variations, is often deleted from the RIAI Contract following price buy-out negotiations between the parties where they agree that part of the contract sum will include a figure usually described as a

premium. The contractor takes the risk that the costs of wages and prices that it has to pay to its employees and suppliers will be covered by the premium.

## Health warning

In light of current uncertainties, parties may try to agree, and document, contract amendments to reflect the new circumstances in which they find themselves.

Legislation, guidance and policy affecting construction projects is changing rapidly. The health warning heard so often these days is “wash your hands”.

From the business health perspective for stakeholders in the construction industry, the current advice is “read your contract” before deciding upon the next steps.

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