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CONSTRUCTION CONTRACTS - COVID 19 IMPACTS AND CONSIDERATIONS

This briefing looks into the potential effect of emergency measures resulting from the Health (Preservation and Protection and Other Measures in the Public Interest Act) 2020 (**Act**) on some forms of construction contract used in Ireland.

Part 3 of the Act gives the Minister for Health wide ranging powers to make regulations to minimise or slow the spread of Covid-19 including the ability to make regulations providing that people stay in their homes. The Minister, having consulted with other Ministers, may exempt people involved in “essential services” from the stay home regulations.

On 28 March 2020 the Department of the Taoiseach issued on gov.ie a guidance document; *“List of essential service providers under new public health guidelines”*. If you are not engaged in the provision of essential services you are not permitted to travel to and from work until 12 April 2020. The services in the following areas of construction are considered to be essential;

- *“essential health and related projects relevant to the COVID-19 crisis, and supplies necessary for such projects”*
- *“repair/construction of critical road and utility infrastructure”*
- *“delivery of emergency services to businesses and homes on an emergency call-out basis in areas such as electrical, plumbing, glazing and roofing”*

Work on all but these three areas of construction will not be able to proceed while the restrictions on movement remain in place. As a result, parties to a construction contract will need to review the terms of their specific contract to see what provisions are relevant to the

For further information on any of the issues discussed in this article please contact:



Fiona O'Neill
DD: + 353 (0)1 673 1709
Fiona.O'Neill@dilloneustace.ie



Kelly O'Hara
DD: + 353 (0)1 673 1827
Kelly.ohara@dilloneustace.ie

unexpected circumstances prevailing during the Covid-19 emergency. Developers, contractors and design team consultants are just some of the stakeholders in the construction industry that will be affected by the commercial implications and risk associated with Covid-19 project delay. Landlords and tenants of pre-let premises will also be adversely affected by uncertainty on the potential to achieve project completion dates. Funders will also be concerned to see the extent to which revenue generation may be delayed.

Public Works Contracts

Public sector projects in Ireland are procured by public bodies, such as local authorities by way of a suite of contracts under the Capital Works Management Framework (**Public Works Contracts**). On 19 March 2020, the Office of Government Procurement issued a guidance document; "Note on procurement and contractual matters associated with the Covid-19 Response Measures." The guidance note is aimed at assisting contracting authorities which may be required to procure emergency professional services or works as a result of the Covid-19 response measures and also where contracting authorities are currently party to a Public Works Contract. As the Covid-19 response measures are updated by Government, the guidance note will be amended.

As an example of how quickly circumstances are currently changing, at the time the guidance note issued on 19 March there were no restrictions on attending work (although where possible people were being encouraged to work from home).

Contractors and construction professionals both operating under and administering Public Works Contracts will no doubt find the guidance note (and any follow up that may issue in light of the recent restrictions on movement) very useful. Also, counterparties to Public Works Contracts may take some comfort from the tone of the note, for example at paragraph 3 which says; "*In these challenging times it is imperative that parties to contracts work together to ensure that the project can be delivered safely. This note sets out measures to assist parties to the contract to take the necessary steps to meet this objective.*"

The strict requirements and timelines for notification within Public Works Contracts will very quickly place an onus for robust administration protocols to be instigated by the parties to Public Works Contracts.

RIAI Contracts

In very many privately funded projects in Ireland, the contract of choice for developers and contractors is the RIAI construction contract (either with or without quantities) (**RIAI Contract**). In most high value projects, the standard form RIAI construction contract is changed by a substantial schedule of amendments including in some instances, amendments to reflect design and build procurement. As a general rule, even an amended RIAI Contact (similar to other contracts) will not have been amended to an extent that the effects of COVID 19 will be directly addressed.

We now set out below some key clauses in the RIAI Contract that parties should consider at this unprecedented time.

RIAI Contract - Delay and Extension of Time

(i) Force Majeure

Most internationally used construction contracts (for example, FIDIC, NEC, JCT) have specific *force majeure* protocols. However, there is no standard legal definition of *force majeure*. As such, the application of *force majeure* protocols in each contract will depend on interpretation of the precise wording used. Typically, the *force majeure* clause will provide for a non-exhaustive list of unforeseen events and circumstances. Obviously, references to disease, epidemics, or pandemics would be useful to invoke the clause, however, terms such as "act of God" or "Acts of Government" or general wording such as "circumstances beyond the parties' control" could potentially be relied on in some instances.

In seeking to rely on a *force majeure* clause as a result of the current crisis, the relevant party will need to be able to demonstrate that the impact of the pandemic is the sole reason for not being able to meet their obligations under the contract. That is, the event in question must be the only cause of an inability to perform. Parties must also consider any contractual obligations to notify the other party to the agreement of the commencement of any *force majeure* event.

The only express reference to *force majeure* in the RIAI Contract is at Clause 30 under which the Contractor is entitled to seek an extension of time upon the happening of an event giving rise to delay in completing the works due to *force majeure*. However, the RIAI Contract does not have a specific *force majeure* definition or clause setting out protocols to apply following the happening of what many would interpret as a *force majeure* event. Accordingly, the meaning of *force majeure* in Clause 30 of the RIAI Contract is somewhat open to interpretation.

As in most construction contracts the RIAI Contract sets out time limits within which the Contractor must give notice of the event giving rise to the delay to the Architect. It also deals with the Architect's obligations regarding the granting of a "fair and reasonable" extension of time.

The Architect is the contract administrator in the RIAI Contract, albeit that the role of employer's agent or employer's representative can sometimes be introduced through amendments to the RIAI Contract. The Architect is normally appointed by the party engaging the Contractor (namely, the **Employer**), and will determine if a *force majeure* event has occurred for the purposes of deciding if the Contractor is entitled to an extension of time under clause 30.

An extension of time under Clause 30 of the RIAI Contract does not necessarily entitle the Contractor to an increase in the Contract Sum. On the happening of a delay event, Clause 30 obliges the Contractor to use best endeavours to prevent delay and to proceed with the works.

(ii) Inability to secure essential labour and materials

The Contractor is also entitled to seek an extension of time where it or any nominated subcontractor or supplier is unable for reasons beyond their control, to secure labour and materials essential for the proper execution of the works. This provision in the RIAI Contract may become relevant when the stay home restrictions are lifted if problems with supply of materials and labour

ensue.

(iii) Compliance with Architect's instructions for an Employer variation

Clause 30(f) of the RIAI Contract also entitles the Contractor to seek an extension of time by reason of any Architect's instructions issued for an Employer's variation pursuant to Clause 2 of the RIAI Contract. Unlike an extension of time request due to *force majeure*, the Contractor may claim for loss and expense associated with an Architect's instruction for a variation.

(iv) Standard Amendments to extension of time under Clause 30

Where the RIAI Contract is amended by a schedule of amendments, they will usually make timely notification of delay a precondition to the Contractor's entitlement to the extension of time.

(v) Key Tip

Whether the RIAI Contract is amended or not, it is vital, particularly at this time, for the parties to comply with notice requirements and to keep comprehensive records of communications and information relevant to an extension of time request.

RIAI Contract - Changes in Law

Clause 4 of the RIAI Contract deals with variations arising from legislative enactments. In summary, it provides that where the cost of performance of the contract is increased or decreased as the result of any legislative enactment, rule or order or the exercise by the Government of powers vested in it, whether by way of imposition of new duties or tariffs or by way of affecting the cost of labour or otherwise, the Architect will certify the increase or decrease that will be added to the contract sum.

Following the Act, construction is not an essential service. This will mean that most construction sites will be temporarily closed on foot of a "legislative enactment". Contractors may therefore seek an adjustment to the contract sum pursuant to the change in law clause. The parties to the contract may have differing interpretations of the application of Clause 4. The administration by the Architect of claims pursuant to Clause 4 could potentially lead to disputes which, if not resolved by negotiation, could result in the parties invoking the dispute avoidance and resolution provisions of Clause 38 of the RIAI Contract.

Where on any particular project, the RIAI Contract is changed under a schedule of amendments, the change in law risk profile may also have been amended. Again, parties need to check the provisions of their own contract.

RIAI Contract - Price Fluctuation

It is also important to review clause 36 of the RIAI Contract in the context of the effects of the Covid-19 emergency. Clause 36 deals with wage and price variations. It is fair to say that in the majority of cases, Clause 36 is deleted from the RIAI Contract following price buy out negotiations between the parties. However, bearing in mind the potential for supply chain issues, where Clause 36 is not

deleted, the Contractor may be able to claim an increase in the contract sum due to the operation of Clause 36.

Construction Contracts Act 2013

The provisions of the Construction Contracts Act 2013 apply to all construction contracts in Ireland regardless of whether or not it is referred to in the contract. While the Construction Contracts Act deals mainly with payment obligations of parties to construction contracts it also provides that any dispute relating to payment may be referred to an adjudicator at any time.

Both parties to a construction contract (including design team appointments) need to give some thought to practical implications of the potential of a submission to adjudication in the event of a payment dispute which may happen as a result of the effect of the Covid-19 emergency.

Conclusion - Health warning and the law of unintended consequences

In light of current uncertainties and rapidly changing landscape, it is possible that parties to construction contracts, particularly where they have a history of working together on successful projects, may not be satisfied that their contract reflects the circumstances in which they now find themselves. As a result, there is merit in the parties considering the negotiation of some contract amendments. A collaborative approach could potentially result in a more mutually commercially acceptable and less strictly contractual and possibly adversarial response to problems arising out of a Covid-19 delay.

In adopting a collaborative approach, both parties to the contract would need to consider very carefully, the short and long term effects of any agreed change. They will need to formally and carefully document any change and consider the knock on effect of any agreed change on, for example, an associated agreement for lease, development agreement or funding arrangement. In addition, the prior agreement of a funder would probably be a prerequisite to any construction contract amendment.

Legislation and policy affecting construction projects is changing on an almost daily basis. Changes in legislation being implemented now have clear public health consequences. What remains to be seen is the extent of the unintended consequences. 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 next steps.

**Dillon Eustace
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DILLON □ EUSTACE**Dublin**

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

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