

● Post Lock-Down

COVID-19 and Construction Contracts
Challenges

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Introduction

- Impact of COVID-19 lock down on Construction Contracts
- Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020
- Health Act 1947 (Section 31A -Temporary Restrictions) (COVID-19) Regulations 2020
- Health Act 1947 (Section 31 A-Temporary Restrictions) (COVID-19) (Amendment) Regulations 2020
- Legislation on COVID-19 lockdown expired on Monday, 18 May 2020
- Legislation on COVID-19 opening up is awaited
- Recommence works on the basis that health and safety guidance is adhered



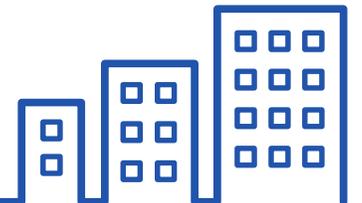
CIF COVID-19 (SOPs) Guidance – 11 May 2020

- As part of the preparation for re-opening, Irish Construction Industry Federation (CIF) Construction Sector C-19 Standard Operating Procedure (SOPs) – <https://cif.ie/2020/05/11/new-operating-procedures/>
- It is an industry written document and is in line with HSE and WHO current advice
- Services as a guide for the management of COVID-19 on a construction site for the duration of the pandemic
- Section 3 referring to the “Role of the Client”. *“Contractors work for clients under a construction contract. In most instances, compliance with these Standard Operating Procedures (SOP) involves changes to the schedule or delivery programme for construction projects”*
- Whilst the CIF Guidance represents good practice, it is not a statutory document



Responsibilities for the Employer

- COVID-19 considered a previously unknown Particular Risk in respect of the Works and within the ambit of the Safety, Health and Welfare at Work (Construction) Regulations 2013 as amended
- PSDP to instruct both the PSCS and Contractor for the Works update their "Construction Management Plan" to outline how they will manage to work safely on site
- The Contractor has a statutory obligation to comply with Section 8 (1) of the Safety, Health and Welfare at Work Act 2005 which obliges that "*Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees*"
- The contractor has a contractual obligation under Clause 2 of the RIAI and Clause [] to carry out works in accordance with all laws

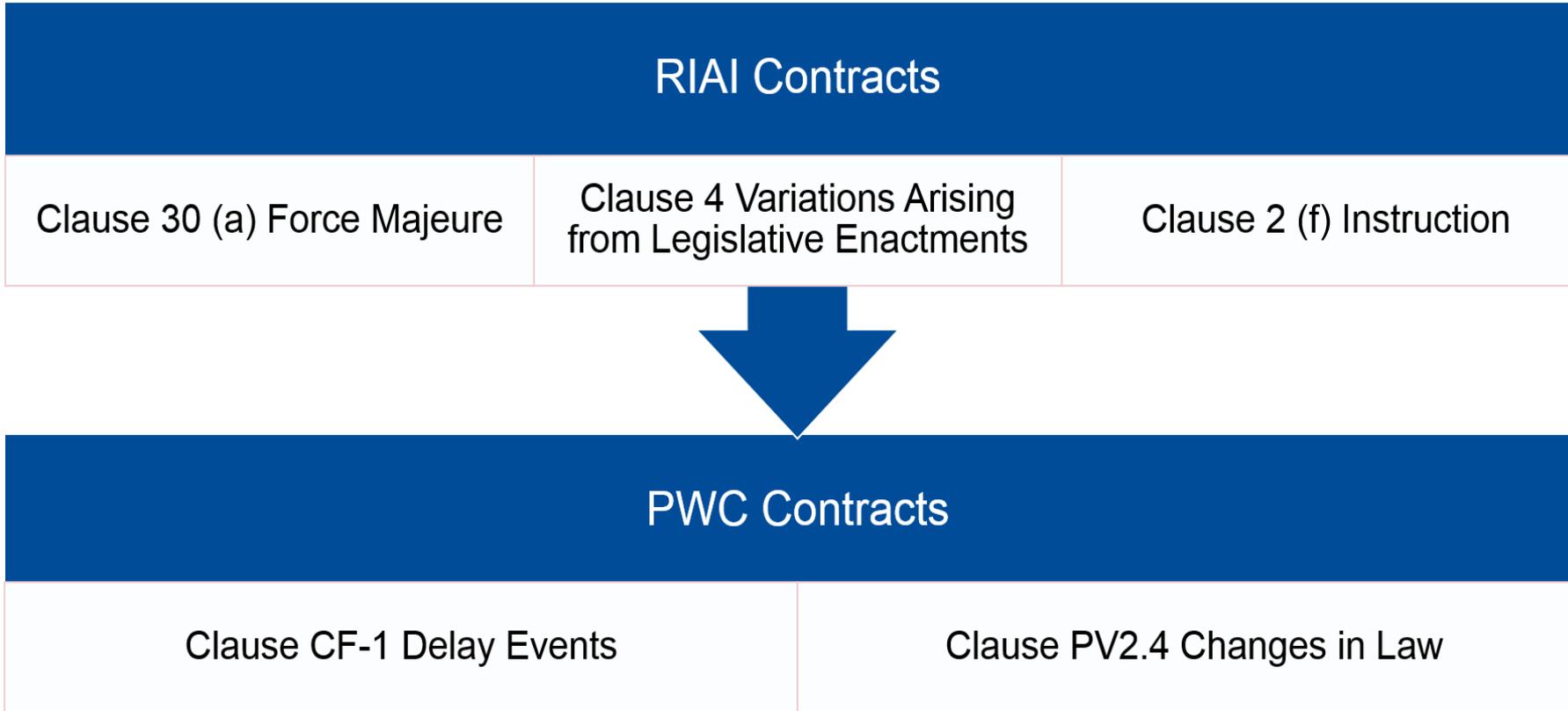


Responsibilities for the Contractor

- It is for the Contractor to develop the Covid-19 Plan as part of the Construction Management Plan
- The Contractor is obliged to enforce this plan in carrying out its construction activities and those of its sub-contractors on site
- The Contractor to identify a Covid-19 compliance officer to ensure compliance of the plan in line with issued guidance including the CIF C-19 SOPs
- The Employer is expected to co-operate with the Contractor



Construction Contract Overview



Force Majeure



Although not defined in most standard form construction contracts, force majeure clauses are now under scrutiny where they do exist in construction contracts

Parties who are either seeking to **assert a claim** of force majeure, or are **in receipt** of one, should carefully review the requirements of their contract

Demonstrate able and willingness to perform contractual obligations BUT FOR the force majeure event – *Tennants (Lanschire) Ltd v G.S. Wilson 7 Co. Ltd [1917]AC 495*

Provide evidence of steps taken to mitigate the impact of the event



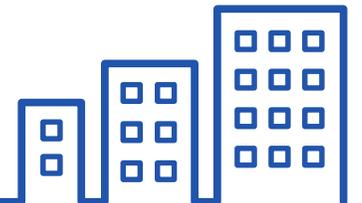
Impact on Cost – Change in Law

- RIAI Contracts
 - Clause 4 – where cost of performance of contract changes as a result of any legislative enactment etc the amount of the contract sum shall change as certified by the architect/contract administrator
 - Clause 36 –fluctuations in respect of wage and price variation
- PW-CF1 Contract
 - Optional Clause PV2.4 –provides for change in law after the designated date and before the date for substantial completion
 - Law is defined as enactments and statutory instruments as defined by the Interpretation Act 2005. It appears that this measure may give rise to an entitlement of cost adjustment to the contract sum where:-
 - changes to VAT, customs or excise duties requirements for a licence to import or export or **Pay Related Social Insurance**;
 - is not identified in the Works Requirements; and
 - not resulted in an adjustment to the Contract Sum under another part of PV2.4/contract.
 - Clause 10.8 – price variation, Clause PV1 or Clause PV2 and Schedule Part 1M of the Contract



Impact on Cost – Site Closures

- Office of Government Procurement (OGP) has published guidance on how parties to standard PWC Contracts can agree ex-gratia payments
- Payment is to cover Contractor's preliminaries unavoidably incurred and reasonably vouched for the duration of the site closure
- Contractor must provide all supporting evidence from 12 April for the period of the site closure
- OGP has also published the model terms of a Supplemental Agreement to be entered into between the parties



Impact on Time Line

- RIAI Contracts
 - Clause 30(a) where in the opinion of the architect, progress of the Works is delayed due to a force majeure event, the contractor is entitled to an extension of time to the Date for Completion of the Works. Force majeure is not expressly defined – common law interruption. Covid-19 disruption would appear to support to fulfil this criteria
 - Clause 2/30(f) where the delays occurs by reason of an Architect’s Instruction given pursuant to Clause 2 of the Contract
 - Clause 30(h) where the delay occurs due to an inability to secure such labour and materials which are essential to the Works
- PW-CF1Contracts
 - Delay Events to the Works caused by an order or other act of a court (or another public authority exercising authority under Law), provided that this did not arise as a result of an act, omission or breach by the Contractor. Reference to force majeure is not included in the Schedule
 - What is, or is not, a force majeure event and/or impact? In the absence of agreement the dispute resolution clauses in the contract may become applicable



Impact on Quality

Any COVID-19 related logistical changes needs to be issued by the architect or contract administrator under the terms of the relevant contract

It is therefore essential that the employer, the contractor and their respective teams work in a proactive and co-operative manner to maintain the quality requirements as set out in the contract



Termination of Works

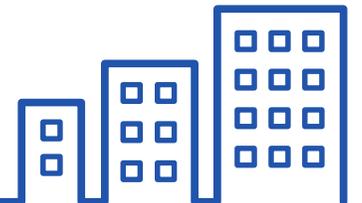
Termination rights based on the terms of the particular contract. Typical events include:

- prolonged suspension – 3 months under PWC1 Contract Form
- failure to proceed with the Works/suspend the Works – Clause 33 (a) RIAI or Clause 12.1.1 of PWC1 Contract Forms
- physically impossible or contrary to law for the Contractor to fulfil its obligations under the contract for a period of at least 6 months - Clause 12.4 PWC1 Contract Form
- employer right to terminate - Clause 12.5 PWC1 Contract Form. Termination clause will also set out the notices required and the consequences of termination on adjustment of the Contract Sum



Frustration

- Frustration occurs when contractual obligations can no longer be either physically or commercially performed as a result of unforeseen circumstances beyond the parties control
- In effect it transform the obligations to perform the Contract into a different obligation from that what was agreed
- High threshold to be met to rely on frustration – Ringsend Property Ltd v Donatex Ltd [2009] IEHC 568 – Obligation is “impossible” to perform
- Preference of Irish Courts is to enforce contracts where possible
- Contract is discharged and parties excluded from their obligations
- Therefore one of the parties suffers extreme hardship before being able to rely on the doctrine
- Operates in an “all or nothing” fashion – no such thing as selective frustration



Advice for Construction Professionals

In managing the Covid-19 crisis implications and as part of a proactive advisory position, advice should include:

- advise which activities and contractual obligations are affected by COVID-19
- push back on broad force majeure notices and suspension of works
- observe all obligations especially notification and notification particulars
- advise clients to mitigate COVID-19 impacts
- review clients potential exposure to liability for failure to mitigate damages
- review applicability of insurance policies
- work with clients to prepare contingency plans
- remind clients to keep good/accurate records



Conclusion: A Collaborative Approach

Review of the Construction Contract obligations affected by events arising from Covid-19 and how they are affected.

Availability of remedies subject the mitigation of loss/impact

Despite difficulties which may arise regarding the performance of a construction contract the preferred approach is that the parties work in a proactive and collaborative manner in managing projects in these challenging times



Future Contracts – Way Forward

- Issues concerning drafting of clauses for future Contracts
 - foreseeability of delay or financial impact
 - is Covid-19 foreseeable in the future?
 - whilst now a foreseeable risk but how it will manifest itself is unknown (labour, material supply issues, currency devaluation , inflation) ? – Employer/Contractor risk!
 - are “agreement to agree clauses” the way to go?; or
 - specific Covid-19 delay events and Loss & Expense entitlement



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