

Coronavirus (Covid-19) and SBCC Contracts- October 2020

This guidance note is restricted to construction projects **in Scotland** which are using SBCC contracts where there are provisions for extension of time, loss and expense, and termination.

The guidance in relation to contracts entered into **prior** to the reasonable foreseeability of the effect of the coronavirus and those contracts entered into **subsequently** need to be considered separately.

The Scottish Government took a different approach to dealing with Covid-19 from the position adopted by the UK Government. This has necessitated the issue of this guidance note, as the primary role of the SBCC is to “kilt” the JCT forms of contract, and this requires the SBCC to reflect any differences in custom and practice in Scotland.

The Scottish Government published guidance in the early days of the pandemic. This guidance has stated that construction sites should close unless and until it became clear how operations could be undertaken safely.

This guidance has now been updated so as to reflect the Scottish Government’s gradual easing of its lockdown restrictions. Current guidance including Construction Policy Notes (CPN’s) at the date of this guidance note can be found in <https://www.gov.scot/publications/coronavirus-covid-19-construction-sector-guidance/>

In addition, the statutory responses to COVID-19 in Scotland which impact on the construction industry are primarily contained in: (a) the Coronavirus Act 2020 (“the Act”); (b) the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (“the Regulations”); (c) the Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment Regulations 2020 (“the Amendment Regulations”); and (d) the Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No 2) Regulations 2020 (“the Amendment (No 2) Regulations”).

JCT have provided extremely useful guidance notes. That advice can be found at <https://corporate.jctltd.co.uk/Coronavirus>, but it should be highlighted that the advice is restricted to projects in England and Wales.

The JCT refer to the CLC (Construction Leadership Council’s) guidance. The CLC have published a very helpful set of guidance notes which contain suggested drafting options to make to the JCT versions to cover 3 distinct scenarios around Extensions of Time and expense, and the issue of termination. SBCC endorses JCT’s position on the value of the CLC Best Practice Guidance. You will see the wording here: <https://www.constructionleadershipcouncil.co.uk/news/future-proofing-guide-for-contracts-launched/>

In its article entitled “**Future Projects: the impact of Covid-19 and Brexit**” (see <http://corporate.jctltd.co.uk/wp-content/uploads/2020/09/Future-Projects-the-impact-of-Covid-19-and-Brexit-v1.pdf>), the JCT considers the impact of both these issues in respect of contracts that have yet to be entered into. The SBCC encourage you to consider the points raised as they are equally as important in SBCC contracts. Relying on “Force majeure” to claim an extension of time in respect of delay caused by Covid-19 will be much more problematic, as it will now be considered “foreseeable”, albeit that the consequences of an upsurge of Covid-19 may not be.

In that article the JCT highlight the importance of identifying the Base Date in contracts. The SBCC principal contracts provide for an extension of time for delay that arises from:

“the exercise after the Base Date by the Scottish Government, in respect of its devolved powers or the United Kingdom Government in respect of matters reserved to it, or any Local or Public Authority of any statutory powerwhich directly affects the execution of the Works”

What this means is that all interventions by the Scottish or UK Governments prior to the Base Date which delay a project would not give rise to an extension of time. It is therefore essential that the Contract Particulars (and in particular in relation to reference to the Base Date) are fully completed so as to avoid any unnecessary dubiety in interpretation.

The situation around Covid-19 continues to evolve, and as such, legal advice should be obtained before entering into any new contracts.