

white paper conference 2020

Under the main contracts, when can a contractor claim an extension of time and loss and expense for reasons of COVID, given stringent health & safety and site operating requirements?

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“I did not break any law.”

- The answer always depends on the facts of the particular project and the contract terms.
- Every job is different.
- We will look at
 - as a reminder, the common background facts
 - potential grounds in standard public works and RIAI contracts
 - briefly: *force majeure*, frustration, and causation.

DEC

31

WUHAN Municipal Health Commission warns of early signs of a pneumonia outbreak.



South China Morning Post

China / Politics

Hong Kong takes emergency measures as mystery 'pneumonia' infects dozens in China's Wuhan city

- Most patients worked at a seafood market and health workers are still trying to identify virus responsible
- City authorities tell hospitals to report any more cases of the illness, which is described as being 'of unknown origin'

JAN
4

GENEVA WHO reports cluster of pneumonia cases in Wuhan.



World Health Organization (WHO) ✓ @WHO · Jan 4

[#China](#) has reported to WHO a cluster of [#pneumonia](#) cases —with no deaths— in Wuhan, Hubei Province 🇨🇳 . Investigations are underway to identify the cause of this illness.

32

298

322



JAN
30

GENEVA WHO declares the novel coronavirus outbreak a Public Health Emergency of International Concern (PHEIC)

SITUATION IN NUMBERS

Globally
7818 confirmed

China
7736 confirmed
12167 suspected
1370 severe
170 deaths

Outside of China
82 confirmed
18 countries

WHO RISK ASSESSMENT

China	Very High
Regional Level	High
Global Level	High



FEB
20

IRELAND Covid-19 added to the list of legally notifiable diseases.



STATUTORY INSTRUMENTS.

S.I. No. 53 of 2020

INFECTIOUS DISEASES (AMENDMENT) REGULATIONS 2020

MAR
11

GENEVA “WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity. We have therefore made the assessment that covid-19 can be characterised as a pandemic.”

SITUATION IN NUMBERS
total and new cases in last 24 hours

Globally
118 319 confirmed (4620 new)
4292 deaths (280 new)

China
80 955 confirmed (31 new)
3162 deaths (22 new)

Outside of China
37 364 confirmed (4589 new)
1130 deaths (258 new)
113 countries/territories/
areas (4 new)

WHO RISK ASSESSMENT

China	Very High
Regional Level	Very High
Global Level	Very High



MAR

12

WASHINGTON Taoiseach announced closure of schools, creches, college and public buildings until 29 March.





- The Covid-19 response **is likely to have an immediate impact on the resources** available to the Contractor. Both parties shall establish the best approach to ensuring the works can continue, if necessary within redefined delivery parameters.
- Use **co-operation** under clause 4.1
- Work within the contract conditions regarding delay
- At this point it is difficult to say how the Covid-19 response measures may impact on the progress of the works, however it may arise in a number of different ways. For example social distancing may require works to be undertaken differently, there may be a scarcity of key resources or an interruption to the supply of certain Works Items.
- Many aspects may be resolved under **Event 15** by allowing more **time, others may result in an adjustment to the Contract Sum.**
- In these cases it is suggested that the **ER request a proposal for a proposed instruction** under clause 10.4 to address issues identified by a Contractor's noticer under clause 9.3
- **Any decision to close the site will be taken in consultation with the Employer. Should it arise the ER should direct the Contractor to suspend the works.**



Legislation **enabling** lockdown measures becomes law



Number 1 of 2020

Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020

President Higgins signs emergency measures into law

Updated / Friday, 20 Mar 2020 20:06



The new laws were passed without a vote by the Dáil last night and passed by the Seanad this afternoon



By **Aisling Kenny**

MAR
27



Taoiseach Leo Varadkar outlines further Covid-19 measures, says everybody must stay at home from midnight tonight until Easter Sunday, 12 April | Follow live updates: bit.ly/2R6bG5V



Taoiseach outlines measures

MAR

28

Covid-19 – Provision of Essential Services

Guidance for Employees and Employers

28 March 2020

The Government has decided that everybody should stay at home until April 12th 2020, except for the following situations:

- to travel to and from work, or for purposes of work, only where the work is an essential health, social care or other essential service and cannot be done from home
- to shop for essential food, beverage and household goods or collect a meal
- to attend medical appointments and collect medicines and other health products
- for vital family reasons, such as providing care to children, elderly or vulnerable people
- to take brief individual physical exercise within 2km of your home, which may include children from your household, as long as you adhere to strict 2m physical distancing
- for farming purposes, i.e. food production and/or care of animals



~~Non Essential Services~~

If you are not engaged in the provision of essential services, then you are not permitted to travel to and from work until April 12th 2020.

There will be a grace period until 6pm on Monday March 30th for people who need to make necessary arrangements to wind down their activities in an orderly way. This should however be done in a way that minimises travel and personal interaction as much as possible.

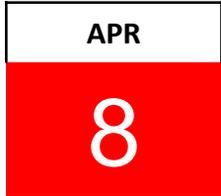
In exceptional circumstances, it is accepted that some extra time will be needed for a wind down of activity, or, it may be necessary for a site to continue to operate at a reduced level of activity e.g. in complex manufacturing processes or very large construction projects.



essential services

Construction ¹	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.

¹ All contractors contracted by Government Departments or Public Bodies will be advised as to whether a project is deemed essential or not.



Lockdown becomes law



STATUTORY INSTRUMENTS.

S.I. No. 128 of 2020

- people in the Republic must not leave their residence without reasonable excuse
- reasonable excuse includes providing essential service
- essential services includes
 - constructing and developing essential health and related projects relating to the spread of Covid-19
 - repairing, maintaining, constructing critical road, rail and utility infrastructure
 - essential emergency call-out maintenance and repair service to business and homes

HEALTH ACT 1947 (SECTION 31A – TEMPORARY RESTRICTIONS)
(COVID-19) (AMENDMENT) REGULATIONS 2020

APR

14



Oifig um Sholáthar Rialtais
Office of Government Procurement



- If the Employer deems the project ‘essential’ work may continue.
- Shut-down is ground for time extension: event 15 (Delay to the Works caused by the order or other act of a court or other public authority exercising authority under Law ...)
- *‘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.’*
- *Ex gratia* payment towards certain preliminaries during shut-down

MAY
1

MAY
18

road map to reopening

4. Economic Activity (Work)					
Phases	1	2	3	4	5
<p>Economic Activity (Work)</p> <p>(applying over and above currently permitted work arrangements)</p>	<p>Applying a risk-based approach:</p> <ul style="list-style-type: none"> Permit phased return of outdoor workers (e.g. construction workers, gardeners, including people working on allotments). Social distancing requirements continue to apply. Continue to maintain remote working for all workers / businesses that can do so. 	<p>Applying a risk-based approach:</p> <ul style="list-style-type: none"> Permit phased return of workers, such as solitary and other workers that, due to nature of work, can maintain 2m distance constantly. Social distancing requirements continue to apply. Continue to maintain remote working for all workers / businesses that can do so. <p>Organisations to develop plans for return to onsite working by employees in</p>	<p>Applying a risk-based approach:</p> <ul style="list-style-type: none"> Organisations where employees have low levels of daily interaction with people and where social distancing can be maintained. Continue to maintain remote working for all workers / businesses that can do so. 	<p>Applying a risk-based return to onsite working:</p> <ul style="list-style-type: none"> Organisations where employees cannot remote work to be considered first for return to onsite working arrangements. Depending on business, shift work, staggered hours etc should be operated to increase % of workforce available for work in any 24-hour period, as long as they can limit the number of workers interacting with each other. 	<p>Applying a risk-based return to onsite working applicable fairly across all sectors:</p> <ul style="list-style-type: none"> Phased “return to onsite working” arrangement ‘Higher risk’ organisations which by their nature cannot easily maintain social distancing implement plans for how they can eventually progress towards onsite return of full staff complement.



Rialtas na hÉireann
Government of Ireland

Return to Work Safely Protocol

COVID-19 Specific National Protocol for Employers and Workers



The law allows construction reopen

- essential services now also includes
 - construction and development work
 - support services relating to construction and development work



STATUTORY INSTRUMENTS.

S.I. No. 174 of 2020

HEALTH ACT 1947 (SECTION 31A – TEMPORARY RESTRICTIONS)
(COVID-19) (AMENDMENT) (NO. 3) REGULATIONS 2020

JUN

24



Oifig um Sholáthar Rialtais
Office of Government Procurement



Covid Co-operation Framework

- The OGP considers that the standard public works contracts do not give rise to an entitlement for Contractors to an extension of time or to recover costs incurred as a result of the implementation of the Protocol Measures.
- Proposes burden sharing: Employer makes a contribution to any unavoidable cost and delay impacts. *Ex gratia*, without prejudice to parties' rights, and not mandatory. Proactive and collaborative approach encouraged.

public works contracts (PW-CF 1-5)

	Potential time	Potential €
Instruction (ER or Employer)	change order (#1) suspension (#3)	
Resource constraints pre-27 Mar		
Shutdown from 27 Mar (or 8 Apr) to 18 May	act of public authority (#15)	access (#8) (Employer shut site?)
No instruction for shutdown	Impossible to comply with Works Requirements? Necessary? (Govt guidance; unauthorised suspension) (#7, cl 4.5.4 – Employer design forms)	
Ongoing extra measures and resource constraints		

RIAI agreement and schedule of conditions of building contract

	Potential time	Potential €
Instruction (Architect or Employer)	clause 30(f)	clause 2
Resource constraints pre-27 Mar	30(h) usually deleted 30(a) <i>force majeure</i>	clause 4?
Shutdown from 27 Mar (or 8 Apr) to 18 May	30(a) <i>force majeure</i>	clause 4
No instruction for shutdown	30((g) – necessary instruction?	necessary?
Ongoing extra measures and resource constraints	30(a) <i>force majeure</i>	clause 4?

contracts entered before, say, 31 January 2020

RIAI clause 4

Variations Arising from Legislative Enactments

4. Where after the Designated Date the cost of the performance of this 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 the imposition of new duties or tariffs or the alteration of existing duties or tariffs or the restriction of licences for the importation of any commodity, or by way of affecting the costs of labour or otherwise, the amount of such increase or decrease as certified by the Architect shall be added to or deducted from the Contract Sum as the case may be.

- ***force majeure***

a creature of the contract

- **frustration**

an unavoidable event outside what the parties bargained-for, that makes performance impossible or radically different

- **causation**

proof that covid-19 caused the delay, the cost, the problem?

Questions?

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the greatest benefit is to be derived from conversation,
because it creeps by degrees into the soul.

Lectures prepared beforehand
and spouted in the presence of a throng
have in them more noise but less intimacy.

Lucius Annæus Seneca (died 65 AD),
On quiet conversation (Moral Letters to Lucilius, 38)

This presentation doesn't include any legal advice.

What I say might not apply to your situation.

Don't rely on it. Get legal advice.

I accept no liability at all for any use to which any contents of this presentation are put.