

Member Advisory

COVID-19 Contractual Effects: Guidance Notes

Issued 14 April 2020

Table of Contents

<i>Disclaimer</i>	3
Introduction	3
General Conditions of Contract (GCC) 2010 and 2105 Editions	3
GCC 2010.....	3
GCC 2015.....	4
General Conditions of Contract - JBCC.....	4
General Conditions of Contract - NEC	6
Conditions of Contract for Construction – FIDIC 1999	7
The COVID-19 pandemic requires contractual interventions	7

Disclaimer

The South African Forum of Civil Engineering Contractors (SAFCEC) provides this information in good faith and without prejudice. Any advice or guidance provided in this document is to be construed on the premise that specific clauses referenced in the document have not been amended for any specific contract under consideration.

Contractors using the information do so at their own risk, and SAFCEC, or any party associated with SAFCEC, accepts no liability or responsibility whatsoever for the interpretation and use of the information provided.

Introduction

The COVID-19 pandemic can be divided into 3 distinct phases: -

Phase 1

From the time of the declaration of a State of National Disaster on 15th March 2020 until the commencement of the lockdown.

Phase 2

The period of the lockdown, currently from midnight on Thursday 26th March until midnight Thursday 30th April (extension still to be legislated).

Phase 3

The period after the lockdown until work recommences on site. There will be numerous additional costs related to start up, sanitizing, social distancing and potential additional costs related to productivity and supply chain affected by new operating methods.

For the purpose of these guidance notes we will focus on the lockdown period only. However, it is advisable to make any notifications as general and as all-encompassing as possible to ensure that all remedy of remedy are covered.

General Conditions of Contract (GCC) 2010 and 2105 Editions

It is important to note that the General Conditions of Contract do not provide for a *force majeure* occurrence where, because it is a no-fault event, the Contractor is entitled to an extension of time only, with no recovery of costs.

The principal of the GCC is that if the contractor is entitled to an extension of time, he is also entitled to the recovery of those time-related costs as are considered appropriate.

GCC 2010

- Although **Clause 4.3.1** requires the contractor to comply with all applicable laws there is no entitlement to claim should those laws be changed, or new laws or regulations promulgated.
- **Clause 4.1.1** states that *"The Contractor shall, save insofar as it is legally or physically impossible, design, execute and complete the works and remedy any defects therein in accordance with the provisions of the Contract."*
- **Clause 5.12** deals with Extension of time for Practical Completion, specifically **Clause 5.12.2.4** which allows an extension for *"Any disruption which is entirely beyond the Contractor's control."*
- The lockdown has legally prevented the Contractor from executing the works and is a disruption beyond his / her control.
- **Clause 5.12.3** confirms that *"if an extension of time is granted, the Contractor shall be paid such additional time-related general items, including for special non-working days, if applicable, as are appropriate."*

- The claim must be submitted in accordance with **Clause 10.1** and must be delivered within 28 days after the circumstance, event, act or omission giving rise to the claim has arisen or occurred. To be prudent, the 28 days should be measured from Monday 23rd March when the president informed the country of the lockdown.
- The contractor may have received an order to suspend the works prior to the lockdown. In such an instance, **Clause 5.11** applies, and the contractor is entitled to an extension of time and his / her proven additional costs which is wider than only the time-related General Items. Proven costs will require proper records, time sheets, invoices etc. Again, the contractor must submit his / her claim in accordance with Clause 10.1

GCC 2015

In addition to the above remedies, **Clause 8.3** deals with “*Excepted Risks*”. Excepted risks are “risks of damage or physical loss or any other loss caused by or arising directly or indirectly as a result or consequence of:

- **Clause 8.3.1.7** “*Epidemic famine or plague*”.
- **Clause 8.3.2** “*If in carrying out the works any of the excepted risks, other than pertaining to the damage or physical loss referred to in Clause 8.2.2.2, causes the Contractor to suffer delay to practical completion and/or brings about proven additional costs, the Contractor shall be entitled to make a claim in accordance with Clause 10.1.*”

Again, the contractor’s recovery of costs is wider than just time-related general items and include additional proven costs.

General Conditions of Contract - JBCC

23.0 Revision of the date for practical completion

- **23.1** The **contractor** is entitled to a revision of the date for **practical completion** by the **principal agent** without an adjustment of the **contract value** for a delay to **practical completion** caused by one or more of the following events:
- **23.1 – 4**
- **23.1.5** Exercise of statutory power by a body of state or public or local authority that directly affects the execution of the works
- **23.1.6 Force majeure**

Interpretation

Unfortunately, there is in our view neither an immediately obvious correct nor necessarily a “*one size fits all*” solution to this challenge. It is critical, therefore, that each contract (and its applicable provisions) be carefully considered in each case. The immediate - and perhaps most obvious - course is to invoke contractual provisions regulating a **force majeure** situation, where these are available in terms of the relevant contract. However, while it is undoubtedly correct that the COVID-19 global pandemic qualifies as a **force majeure** event, the nationwide lockdown imposed on Monday 23 March 2020 (not the COVID-19 global pandemic) is the immediate event causing the temporary closure of most construction sites and ceasing of related on-site construction activities across South Africa.

Force majeure as defined in the JBCC in the respective **sub-clauses 1.1 of the PBA and NSSA** can be shortened to read as *an exceptional event or circumstance that could not have reasonably been foreseen or anticipated by the parties that prevents the contractor from executing or completing the works*. Once a national disaster was declared on Sunday 15 March 2020, it was certain that at some stage in the national government’s response to curtail the spread of COVID-19, either a nationwide or targeted lockdown would inevitably be imposed under the Act. It was therefore, at least since 23 March 2020, entirely foreseeable (if not certain) that either a nationwide or targeted lockdown would be imposed, which would in either event likely cause the temporary closure of most construction sites and the ceasing of related on-site construction activities across South Africa. Therefore, the COVID-19 global pandemic is not the event causing the temporary closure of most construction sites and the ceasing of related on-site construction activities as a direct result of a **force majeure** event.

The JBCC PBA and NSSA sub-clause 2.1 [Laws, Regulations and Notices] provides: -

- The **contractor** shall comply with the **law** [CD], obtain permits, licenses and approvals required and pay related charges for the execution of the **works** [17.1.4]. The **employer** shall comply with the **law** [CD], obtain permits planning, building or similar permissions and pay charges for the **works** other than those which are the responsibility of the **contractor** [26.4.1].
- **Law** is defined in **sub-clause 1.1** as “*the law of the country [CD]*”, which is assumed for present purposes to be the law of the Republic of South Africa. The **contractor** and **employer** each have an overarching statutory obligation to comply with the **law**. The imposition of the nationwide lockdown in terms of the Act and regulations issued thereafter pursuant to that legislation to manage the nationwide lockdown, therefore, constitute **laws** as defined in the PBA and NSSA.

The PBA and NSSA clause 17.0 [Contractor Instructions] provides:

- 17.1 The **principal agent** may issue **contract instructions** to the **contractor** regarding:
 - 17.1.4 *Compliance with the **law**, regulations and bylaws [2.1]* (our underlining).
- The **principal agent** therefore enjoys a specific discretion in this regard. To the extent that the **contractor** has an overarching statutory obligation to comply with the **law** including especially the nationwide lockdown and subsequent regulations issued in terms of the Act, it is unnecessary for the **principal agent** to issue a **contract instruction** regarding compliance with the imposition of the nationwide lockdown imposed on Monday 23 March 2020 in accordance with the Act.
- In the absence of a **contract instruction** (which in any event need not be given by the **principal agent**), the statutory obligation to comply with the imposition of the nationwide lockdown requires temporary closure of most construction sites and ceasing of related on-site construction activities, would in the prevailing circumstances be interpreted widely as “*an event or circumstance that is beyond the control of the **parties***”, albeit that in the prevailing circumstances it is not a **force majeure** event.
- In accordance with **PBA and NSSA clause 23.0** [Revision of the Date for Practical Completion] a **contractor** / **subcontractor** would (subject to timeous provision of the required notice in terms of the PBA and NSSA sub-clauses 23.1.5 and 23.1.6) be “*entitled to a revision of the date for **practical completion** by the **principal agent** without an adjustment of the **contract value*** (PBA and NSSA clause 23.1).
- A **contractor** / **subcontractor** is obliged, in addition to timeously furnishing the required notices to, in accordance with PBA and NSSA **sub-clause 23.4.1**, “*take reasonable steps to avoid or reduce such delay*”.
- Undoubtedly, the imposition of the nationwide lockdown on Monday 23 March 2020 in accordance with the Act, which has caused the temporary closure of most construction sites and ceasing of related on-site construction activities across South Africa, is an “*exercise of a statutory power by a body of state or public or local authority that directly affects the execution of the **works***”.
- In accordance with PBA and NSSA **clause 23.0** [Revision of the Date for Practical Completion] a **contractor** / **subcontractor** would (subject to timeous provision of the required notice in terms of PBA and NSSA **sub-clause 23.4.2**) be entitled to a revision of the date of **practical completion** *but without an adjustment of the **contract value***.

Comment

The determination of additional time to complete a project is relatively straight forward as provided for in **clause 23.0** of the JBCC PBA and NSSA, but the prompt provision of all relevant information by the **contractor** / **subcontractor** to the **principal agent** and the **employer** to resolve the COVID-19 claim is critical. The difficulty then arises how to allocate costs incurred as a result of such delay.

Generally, where the **employer** is at fault, the **contractor** must be compensated. In the COVID-19 scenario neither **party** is to blame ... should the additional costs be shared equally by the **parties**?

General Conditions of Contract – NEC

The contract is generally executed in terms of the law of the country where the site is located and in terms of **Core Clause 12** Interpretation and the law, **Clause 12.1** this contract is governed by the *law of the contract*.

Therefore, the parties to this contract listed in **Core Clause 10** Action, namely the *Employer*, the *Contractor*, the *Project Manager* and the *Supervisor* give effect to this contract under *law of the contract* within the law of the country where the site is located.

- **Scenario 1**

The parties to the contract became aware that the COVID-19 virus could potentially impact the contract at the time the World Health Organisation (WHO) declared the virus a global pandemic and as such the WHO advocate that various measures should be put in place to reduce the virus infection rate. The various measures advocated by the WHO if undertaken may well result in a situation preventing the performance of the *works*.

In a situation whereby any matter could, increase the total of the prices, delay completion, delay meeting a key date or impair the performance of the *works* in use, either the *Contractor* and or the *Project Manager* in terms of **Core Clause 16** Early warning, should notify the other under **clause 16.1**. Following such a notice the matter is entered into a Risk Register by the *Project Manager* where after the *Contractor* and the *Project Manager* attend a risk reduction meeting wherein they attempt to mitigate the identified matter.

Should the matter then result in a situation where the *Contractor* is prevented from performing the *works*, **clause 19.1** deals with such event which stops the contractor from completing the *works*, subject to the proviso that neither party could prevent and an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him / her to have allowed for it, then the *Project Manager* gives an instruction to the *Contractor* stating how he is to deal with the event.

In terms of **clause 61.3**, if the *Project Manager* had not notified that the **clause 19.1** event is a compensation event, the *Contractor* would then give notice under the same clause stating that he believes the **clause 19.1** event is a compensation event in accordance with **clause 60.1(19)**. The parties then act in accordance with the contract and the procedure surrounding the compensation event runs its course in terms the remainder of **Core Clause 6** Compensation events.

- **Scenario 2**

Government Gazette GN 43148 No.R.398 dated 25 March 2020 gazetted regulations dealing with a lockdown period from 26 March 2020 to 16 April 2020 which is subsequently extended to end April.

The Gazette excluded construction as an essential business thereby placing the contractor in a situation whereby he / she is prevented from performing the *works*. The introduction of such a law would pursuant to Secondary Option X 2.1 result in a compensation event. The *Project Manager* may notify the *Contractor* of a compensation event for a change in the law and instruct him to submit quotations. To the extent that the *Project Manager* does not notify the *Contractor* the *Contractor* would proceed in terms of **clause 61.3** and give notice that he / she believes the Gazette is a change in the law and as such believes that the change in law is a compensation event in accordance with secondary **clause X 2.1**.

In some cases, the *Project Manager* notwithstanding a X 2 secondary option may instruct the *Contractor* in terms of **clause 34.1** to stop any work, in which case and in terms of **clause 61.3** if the *Project Manager*, had not notified that his / her **clause 34.1** instruction is a compensation event, the *Contractor* would then give notice under the same clause stating that he believes the **clause 34.1** instruction is a compensation event in accordance with **clause 60.1(4)**. The parties then act in accordance with the contract and the procedure surrounding the compensation event run its course in terms the remained **Core Clause 6** Compensation events.

Conditions of Contract for Construction – FIDIC 1999

Clause 13.7 of the FIDIC document provides for the contractor to be compensated for delays and costs incurred as a result of changes to the laws of the country. Changes in law clearly include the introduction of new laws as well as the repeal or modification of existing laws.

The lockdown regulations were gazetted on 25 March 2020, and that date should be seen as the date of the change of law taking effect. The lockdown itself was, however, announced by the president on the 23rd, thereby making the contractor aware. Recovery under **clause 13.7** is subject to compliance with **clause 20.1**; the contractor must therefore have notified the employer within 28 days of becoming aware (or from when the contractor should have become aware) of the event and of its intention to submit a claim.

In addition, the steps of **clause 20.1** requiring claim submission, as well as the submission of interim claims are to be followed. It is also recommended that the contractor remains in touch with the engineer and employer to provide regular updates as to site security, start-up plans etc. and that all mitigation measures are considered and put forward for discussion. It is also important to have agreement with the employer as to which services remain “essential” during the lockdown period.

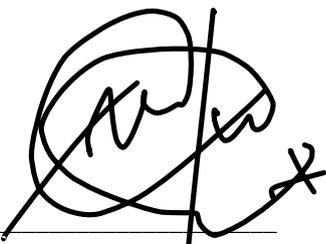
A second option is the *force majeure* provisions contained in **clause 19**. A claim under this clause is probably less safe than the change in law claim – firstly because whilst the *force majeure* definition in **clause 19.1** does not expressly exclude pandemic or epidemic, it also does not expressly include it. Furthermore, in order to recover costs incurred, the event in question must be expressly described in **clause 19.1 (i) to (iv)**. As this event is not captured by any of the events set out in (i) to (iv), it is unlikely that a claim under **clause 19** will provide an adequate mechanism for recovery.

A final option is provided for (only) in the case of employers (such as SANRAL), who have issued, via their engineers, formal suspension instructions pursuant to **clause 8.8** of the contract. For these contracts, the recovery of costs and delays incurred are addressed in **clause 8.9**. It is important to note that claims pursuant to a suspension notice are also subject to compliance with the notice and claim submission requirements set out in **clause 20.1**.

The COVID-19 pandemic requires contractual interventions

COVID-19 is an extraordinary crisis and therefore requires “give and take” from both contracting parties to try and reach equitable solutions – release of some or all retention being held, earlier payments and the like. Such measures may need negotiation between the parties and be incorporated as *Supplementary Agreements to the Contract* before they can apply. Given the parlous state of the civil engineering industry to start off, with this must not be permitted to be the literal straw that breaks the camel’s back.

The South African Forum of Civil Engineering Contractors (SAFCEC) would like to thank the South African Institute of Civil Engineering (SAICE) and MDA Attorneys for their assistance in the compilation of these guidance notes.



Webster Mfebe
Chief Executive Officer