Initial practical guidance for builders, contractors and sub-contractors dealing with issues and impacts related to the global COVID-19 pandemic ("COVID-19")

The construction industry, as with other sectors in such uncertain times, is in uncharted territory. Many construction projects around the globe, both large and small, have either ceased operations entirely as a result of government directives or are suffering from delays and disruption arising from unavailability of resources, supply chain restrictions, financial constraints and other issues connected to COVID-19.

As a consequence, contractors will be faced with the need to renegotiate terms and agree a way forward, both during and after the apparent impact of COVID-19. Our current conversations with clients reveal that this applies equally upstream (for project owners) and downstream (in relation to sub-contractors and supply chains).

Whilst many contractors are concentrating on immediate difficulties associated with human factors, health, internal operations and financial constraints, it is inevitable that contractual issues resulting from project delays, site closures, suspensions and project terminations will begin to bite. In the short-term, contractors face difficulties in respect of both upstream and downstream payments, and around the corner they will face untested ground in terms of the allocation of risks and exposure – the relative unknowns of past, current and future contractual obligations.

Many variables remain at this time, not least the duration of lockdowns, restrictions and future measures to control COVID-19, which will vary between countries. These factors are already leading to very different approaches by various contractors in the management of commercial risks and to the practical implementation of innovative solutions in an attempt to keep construction sites operational. Behind the relatively localised, project specific issues, both project owners and contractors are operating within broader uncertainty as to how the world markets and economies will react and recover.

Readiness is key

It is an unfortunate reality that in these circumstances, relationships between contracted parties involved with construction projects may turn contentious, as distress, disagreements and disputes arise.

It is important to acknowledge that every project is different, and at the very least, will be at a different stage of design, procurement or execution, which brings individual nuances in terms of potential time and cost impacts. This in turn means that each project will require specific consideration to understand the possible risk exposure of the contracted parties.

When faced with any potential renegotiation, negative occurrence or area of dispute between respective parties, preparation and readiness is key. In our experience, typical actions that contractors should take at this time to protect their interests, beyond contractual and notice requirements that their legal teams will advise on, include the following:

- Contractors should take stock of the status of the project at the point at which COVID-19 issues started to impact them in terms of cost, progress, critical sequences to completion and the condition of the installed works;
- They should capture detailed project records that evidence the impact of COVID-19 on procurement, resources, approvals and other potential disruptive effects;
- They should develop and implement both short and long term plans to preserve and maintain partially complete and installed works which remain under the contractors control and responsibility; and
- Finally, contractors should examine and understand potential future warranty, insurance and risk provisions that may be impacted by the extension of the construction duration and completion/handover date.
Take full control of the situation

It is clear that we are dealing with unprecedented circumstances, but this does not mean we should take a stance of ‘wait and see’.

The first and most important factor, as with any critical project situation, is to ensure that communication channels are maintained between all contracted parties. Indeed, the risk of disputes between parties invariably increases when communication channels are restricted or a ‘wait and see’ approach is adopted in relation to critical events.

Secondly, practical scenarios and strategies should be drawn up as to how construction projects can recommence operations once working restrictions are lifted or eased, and how contractors can preserve the financial stability of their operations in the interim.

It is virtually impossible to second guess how future restrictions may develop in such rapidly changing times, but it is possible for contractors to equip themselves with the knowledge and tools needed to make the right decisions when a return to relative normality is in sight. Scenarios should anticipate potential price escalations, assess the likely implementation of slow/staggered remobilisations, make plans for future workforce restrictions, assess additional health and safety measures, identify future potential bottlenecks in the supply chain and investigate alternative construction methodologies and practices.

It is highly likely that upon recommencement of each project, proposals will need to be prepared and agreements drafted between contracted parties setting out matters such as:

- how the parties intend to deal with the known cost and time impact(s) suffered to date;
- what measures will be put in place to safeguard the parties and the future completion of the project; and
- how known legacy issues and ongoing restrictions may cause future time and cost implications.

Road to Recovery

Should the need for external support arise, Accuracy frequently assists contractors to take control of distressed projects and identify strategic opportunities for rapid recovery. In our experience the essential starting point is to undertake a rigorous assessment of the actual time and cost consequences of COVID-19. This might include:

- establishing any relevant key date(s). This could involve an assessment of when emergency provisions were directed (on a country by country basis) or when a contractor started experiencing and suffering impacts due to COVID-19 related issues;
- establishing how the contracted works were progressing pre-impact, any gradual declines in progress as a result of COVID-19-related issues, and recording the achieved progress of the works at the time of site closure because of COVID-19;
- the identification and assessment of any potentially competing, relevant delay events that are unrelated to COVID-19 yet were affecting critical or non-critical activities in the period leading up to the COVID-19 related impact(s);
- the assessment of any unexpected costs incurred to date related to COVID-19, including establishing the current value of any inventory on site (to protect the contractor should the project be terminated);
- the compilation of substantiated time and cost claims, based upon collated contemporaneous records and evidence, aligned with the terms of the contract, and presented in an open and collaborative manner to project owners; and
- the maintenance of proactive, open discussions with project owners and assistance in the practical formulation of future agreements.
Road to Recovery (cont.)

Of equal importance is the evaluation of risks associated with the recommencement of a project in relation to both time and costs to completion. Forecasting the outturn position of a project is ordinarily difficult, but in these exceptional circumstances, there is an additional need for the careful assessment and consideration of new risks and uncertainties. Our approach to such forecasts typically includes the compilation of robust action plans and the assessment of scenarios, by considering matters such as:

- areas of potential future cost increases and projected productivity and/or procurement impacts on time;
- localised constraints and associated costs that may remain in place after work continues (government restrictions, additional workforce provisions, new/additional safety protocols, workforce limitations, etc.);
- the susceptibility of sources and locations of supply chain materials, plant, equipment and key items to establish potential supply-chain risks and bottlenecks;
- contingency plans for alternative sources for supply chain materials, plant, equipment, key items and workforce; and
- the identification and assessment of alternative methods of construction and logistics, including potential cost, time and contractual obligations and implications.

Any road to recovery will likely be a rocky one, as the situation in which contractors and other project stakeholders find themselves is unique. Above all else, that road will be made more bearable by adopting the mantra of ‘win-win’ – achieving an outcome that delivers the project yet treats the supply chain in a fair manner. Contractors have a choice to take control of the situation now, rather than wait for the full effects to materialise, buying them time and opportunity to ease the journey back to relative normality.

Since 2004 Accuracy’s construction claims professionals have been advising parties involved in global capital projects on the challenges they face in both contentious and non-contentious situations. Our Project Advisory and Disputes practice brings a unique mix of expertise and a passion for making projects successful around the world. In addition to our construction dispute and project advisory capabilities, Accuracy also has experienced financial and insurance experts, who can assist in the understanding and evaluation of other potential avenues such as financial protection and advice on potential remedies for recovery.