

## 1. INTRODUCTION

- 1.1 There is a real concern that the construction (including maintenance) industry will become embroiled in costly and long-running disputes over the effects of COVID-19 on projects if it does not look to engage in collaborative discussions to try and resolve such issues as and when they arise. This issue was addressed in summary within the [Build UK Guidance on Contractual Issues caused by Coronavirus/COVID-19 \(Wedlake Bell\)](#). Without proper fair and reasonable administration of construction contracts COVID-19 could have a significant and detrimental effect on an industry which is expected to play a central role in helping the economy recover from the effects of COVID-19.
- 1.2 Last month (8 April) the Construction Leadership Council (CLC) published a [statement on Payment & Contracts](#) on how the pandemic could negatively affect on payment and contracts. In doing so, it urged all parties to recognise the unique circumstances we all face. The CLC asks that industry works together to support the long term health of our sector by constructively resolving all contractual disputes arising from the pandemic.
- 1.3 This approach complements that of the public sector which is set out in the [Government PPN 01/20: Responding to COVID-10, PPN 02/20: Supplier Relief due to COVID-19, PPN 02/20: Additional guidance, FAQs and model terms for construction](#) and the related Cabinet Office Guidance Notes for Construction Contracts. These documents seek to give public sector bodies freedom and encouragement to support construction supply chains through collaborative approaches to payment and the revision of contractual clauses.
- 1.4 We believe that these same principles must be reflected across the whole of the industry for it to survive for the long-term.
- 1.5 Our guidance below is supported by Government. The Cabinet Office Guidance Note on responsible contractual behaviour in the performance and enforcement of contracts impacted by COVID-19 is a request from Government for all parties to resolve all contractual issues arising as a result of COVID-19. In particular, parties are encouraged to act fairly and reasonably when administering contracts and agreeing variations, given the impact of COVID-19.
- 1.6 In support of the Cabinet Office Note, this best practice guidance seeks to provide examples of the types of issues that are likely to arise, together with practical advice on how to resolve them in a constructive manner.
- 1.7 The document is a guide only and is not intended to cover all contract types and all issues. It will be revised regularly as the situation develops.
- 1.8 If you have any comments or feedback on this document, please email: [construction.enquiries@beis.gov.uk](mailto:construction.enquiries@beis.gov.uk)
- 1.9 This note applies equally to all those involved in the construction and maintenance supply chain operating in both the public and private sector alike. For ease of reference this guidance refers generically to Employers when referring to the appointing party under a contract (e.g. the employer/clients in "first tier" contracts and the contractor/consultant in "second tier" contracts etc.) and to Suppliers when referring to the appointed party under the contract (e.g. contractors, consultants, sub-contractors etc.).

## 2. CONTRACT ADMINISTRATION AND PROPOSING COLLABORATIVE DISCUSSIONS

- 2.1 It is very important to consider the risks of COVID-19 on live projects and maintenance systems, as it is inevitable that delays will arise as a result of the impact of COVID-19. It is also likely that additional costs will be incurred due to COVID-19.
- 2.2 In respect of delays, both Employers and Suppliers should consider the impact of COVID-19 on the programme, completion dates and response periods. Where possible, amended programmes (KPI/call-out/response/service credit systems) should be provided which reflect the impact of COVID-19 on the Works or Services and extended completion dates (call-off/strategic alliancing/maintenance response periods) agreed which reflect the extent to which the Supplier has been or will be delayed by COVID-19.

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- 2.3 The Supplier's entitlement under any contract to an extension of time and/or additional costs as a result of COVID-19 will very much depend upon the terms and conditions of the contract. The Government's [PPN 02/20: Supplier Relief due to COVID-19](#) and the associated [PPN 02/20: Additional guidance, FAQs and model terms for construction](#) aimed at the Public Sector encourage Employers to consider supplier relief as a result of COVID-19 in order to enable projects to progress and encourage cashflow, either under existing contractual mechanisms or through agreed variations to the Contract.
- 2.4 Therefore notwithstanding the contractual provisions, Employers and Suppliers should seek to take a collaborative approach towards successful project delivery and discuss whether an extension of time can be granted and any additional costs shared in any event, in light of the unforeseeable and unprecedented nature of COVID-19, as set out in more detail at section 4 below.
- 2.5 To assist collaborative discussions between Employers and Suppliers, pro-forma letters from the Supplier and the Employer are attached to this guidance at Annexes 1-2 acknowledging the impact of COVID-19 on the project and to encourage dialogue in respect of the impact of COVID-19 on the Contract and any Supplier Relief. These letters reserve the Employer's and Supplier's rights and entitlements under the Contract. Annexes 1-2 also include the relevant guidance notes and options in "[ ]"s which should be considered and completed when using the pro-forma letters.
- 2.6 Until an agreement is reached in respect of the impact of COVID-19 between a Supplier and Employer it is imperative that the contractual mechanisms continue to be followed to preserve each party's rights and remedies under the contract. This includes complying with any notice requirements in respect of any potential delay and additional costs, as well as following risk management and early warning notice provisions. The general view is that on the majority of projects contracts are not being administered in accordance with their terms.
- 2.7 To assist the industry in adhering to their contracts pro-forma letters from: the Contractor and Employer in relation to an extension of time pursuant to the JCT Design and Build Contract 2016 (JCT D&B 2016), and the Contractor and the Project Manager in relation to a compensation event pursuant to the NEC 3/4 Engineering and Construction Contract (April 2013 Edition) (NEC 3/4 ECC) are attached to this guidance at Annexes 3-4.
- 2.8 The letters set out the relevant contractual clauses and information to be provided in respect of the; cause of the delay, estimate of delay and other likely effects under the; JCT D&B 2016, or, the NEC 3/4 ECC, on the assumption that the JCT or NEC form of contract has not been amended. However, as standard form contracts are commonly amended, parties should adapt the pro-formas to comply with their specific contracts. The guidance notes and options included at Annexes 3-4 should be considered and completed before using them. For strategic alliancing/framework/call-off contracts, specifically within the maintenance sector, the letter should be tailored to the contract and adapted to suit.
- 2.9 A project's usual progress/project meetings should still be continuing (albeit where site based, in-line with: general health & safety, safe and responsible travel, Public Health England Guidance and the [CLC's Site Operating Procedures](#)) along with any other meetings specifically required by the contract, such as risk reduction meetings. In such progress/project meetings, the parties could discuss the following points as part of good project management.
- 2.9.1 What measures have been taken to ensure the works are being carried out in accordance with: general health & safety, safe and responsible travel, Public Health England Guidance and the [CLC's Site Operating Procedures](#);
- 2.9.2 What works, if any, are still continuing in respect of on-site works but also off-site works such as procurement, design etc.;
- 2.9.3 If on-site works have been temporarily suspended why that decision was taken (including the provision of the risk assessment and amendments to the Construction Phase Plan (where relevant), substantiating the position);
- 2.9.4 If on-site works are continuing, how COVID-19 is affecting those works and the progression of the works. For example:

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- (a) Delayed delivery of materials;
- (b) Lack of resources;
- (c) Loss of productivity due to complying with the guidance outlined at 2.9.1 above; and
- (d) Whether any project team members have been furloughed and who is now taking over their role.

- 2.10 It is very important that before the pro-forma letters in the Annexes are used the contract is considered, advice taken if necessary and the relevant letter tailored to reflect the contract, previous correspondence and developments on the project.
- 2.11 It is hoped that the letters within the Annexes provide templates to encourage collaborative and open dialogue between the Employer and the Supplier to agree a way forward that is mutually agreeable whilst in the meantime maintaining their contractual rights and remedies. Parties should carry out the collaborative and contractual dialogue concurrently but usually separately as most parties will want to ensure that collaborative discussions are held on a without prejudice basis and subject to contract.

## 3. WITHOUT PREJUDICE AND SUBJECT TO CONTRACT

### Without Prejudice

- 3.1 “*Without Prejudice*” negotiations allow parties to discuss the issues, offering concessions, suggesting compromises etc., without fear that their suggestions could be used against them at a later date to harm their legal position, if a settlement is not achieved. The protection offered by “*Without Prejudice*” negotiations covers genuine attempts to settle all or part of a dispute by creating a ‘safe place’ for the parties to have free, open and collaborative dialogue.
- 3.2 The reason why the letters at Annexes 1 and 2 are marked “*Without Prejudice*” is that it sets the scene for future correspondence and negotiations making it clear that concessions etc. can be offered within the without prejudice dialogue, but these suggestions cannot be used at a later stage to prejudice either parties’ position.
- 3.3 For example, in section 4 below, which deals with the agenda for a future meeting, one of the agenda items is whether an extension of time can be agreed. Either party to the discussion might suggest that (say) an extension of time be granted now rather than comply fully with all the requirements of the underlying contract – this might have further conditions attached. As identified at paragraph 4.6 below, one or both of the parties might explain the financial impact of the delays/unproductive working/health and safety measures to (say) explain to those involved that it would like some form of financial contribution. When done in the context of a “*Without Prejudice*” letter or meeting these statements cannot be referred to at a later date in an adjudication/litigation or arbitration (see below).
- 3.4 Note, heading a letter “*Without Prejudice*” does not mean it automatically is. To be “*Without Prejudice*” the letter must be sent as part of a genuine attempt to negotiate/settle all or part of a dispute. The label “*Without Prejudice*” should be used for letters of this type to avoid any confusion going forward, but it is important to bear in mind it must be part of a genuine negotiation process (i.e. not just an excuse to berate or abuse the recipient).

### Subject to Contract

- 3.5 Hopefully negotiations will lead to a compromise on the way forward and this will normally be set out in writing as a variation to the underlying contract, making clear which of the contract terms continue to apply, which do not and which are amended, to avoid any arguments in the future as to what was agreed.
- 3.6 The use of the phrase “*Subject to Contract*” seeks to make it clear that a binding agreement is not in place until the terms are put in writing and agreed to by both the parties – for construction/maintenance contracts this will normally be a Deed of Variation to the underlying contract. Model Deeds of Variation for certain amendments can be found in the [PPN 02/20: Additional guidance, FAQs and model terms for construction](#) which is supplementary to [PPN 02/20: Supplier Relief due to COVID-19](#) aimed at construction for the unamended forms of the NEC3 ECC

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and JCT D&B 2016. Whilst drafted for use in the public sector, they can equally apply to private sector agreements for variation of existing construction contracts - as stated in the user notes any amendments to the underlying contract forms would need to be considered as well as any amendments agreed outside the scope of those provided for in the Model Deeds. In such cases advice should be sought.

- 3.7 Some care needs to be taken however as if the parties, via their actions, make it clear that they consider a binding new agreement has been entered into, without the need to put its terms in writing, this may get round the “*Subject to Contract*” proviso. Accordingly at all times then, even if an agreement is reached with a (virtual) handshake in a meeting, it should remain clear that this is “*Subject to Contract*” - i.e. distillation of the agreement reached in a written record expressly agreed to by both parties.
- 3.8 For these reasons it should be confirmed in any agenda to the meeting and in the meeting itself, that the meeting is indeed “*Without Prejudice and Subject to Contract*” (WPSTC) even if an agreement in principal is reached at the meeting itself.

## 4 COLLABORATIVE MEETINGS

- 4.1 Given the above, we suggest that the collaborative discussions to see whether any agreement/compromise on the way forward can be reached are held on a without prejudice and subject to contract basis. These should be in addition to any meetings required by the contract (i.e. risk reduction meetings) or a project’s usual progress meetings, as set out in section 2 above.
- 4.2 The parties should consider which attendees are best placed to attend any WPSTC meeting. It is recommended that any meeting/negotiations take place with representatives from the parties who have authority to settle.
- 4.3 Each project and each party’s position on a project will be different. It is a matter for the parties to agree the issues to be discussed at such meetings and whether any agreement can be reached in respect of the same. To assist we have set out some points that could be considered below.

### Time

- 4.4 Is the Employer willing to agree to an extension/adjustment of time now (without full compliance with all the requirements of the underlying contract) and for what period? Are there any conditions attached to this?

### Termination Triggers

- 4.5 The parties should consider agreeing to waive any relevant termination triggers in the contract. For example:
  - 4.5.1 in the JCT D&B 2016 if all of the works (or substantially all) are temporarily suspended for more than the length of time set out in the Contract Particulars (usually two months) due to force majeure<sup>1</sup> either party can terminate the contract;
  - 4.5.2 in the NEC3 ECC, the Employer may terminate the contract if a prevention event stops the Contractor completing the works by the date shown on the Accepted Programme and is forecast to delay Completion by more than 13 weeks.<sup>2</sup>
  - 4.5.3 in maintenance contracts this could involve the right to terminate for failing to meet time based Key Performance Indicators, or equivalent response time periods.

### Additional Costs

- 4.6 What additional costs are likely to be incurred as a result of COVID-19 by both the Employer and the Contractor? Both parties could put forward all likely additional costs<sup>3</sup> so they can all be considered in the round. It can then be discussed which party will bear the risk of such additional costs and whether that risk could be shared. Examples of sharing the risk of such costs could be a pain/gain target cost arrangement or an open book payment mechanism

1. Clause 8.11.1.1

2. Clause 91.7

3. Sometimes referred to as an honesty system.

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which applies for the duration of the period within which productivity is materially impacted, i.e. “lockdown” or until the end of the Project.<sup>4</sup>

- 4.7 In the same vein, the parties could share details of any business support it is receiving from the Government in respect of COVID-19<sup>5</sup>, such as furloughing staff, loans, tax relief and cash grants to ensure that there is no double recovery of costs.
- 4.8 On a particular project and contract it may be likely that a Supplier will be entitled to an extension of time as a result of COVID-19 but unlikely to be entitled to any loss and expense. However, an Employer could consider:
- 4.8.1 its losses in respect of the delay and the cost for the contractor to take additional measures to mitigate delays (over and above any contractual duty) and be willing to pay for the same;
  - 4.8.2 the risk of contractor and supply chain insolvency, if it was not to share in some of the Contractor's 'pain' and, again, be willing to share in that pain; and<sup>6</sup>
  - 4.8.3 additional costs which could be incurred if the contractor could have the right to terminate the contract if the works are suspended over a certain period of time (as set out above at 4.5 above).
- 4.9 Conversely, a Supplier could take into account :
- 4.9.1 the fact that it will have the burden of proof in bringing any claim for both an extension of time and additional costs (in respect of both proving entitlement and substantiation of delay or additional costs), and the costs and time it is likely to incur in doing so; and/or
  - 4.9.2 that under some forms of contract the Employer may have the right to terminate the contract; in compromising its position or looking to mitigate its costs further.

## Mutually Agreeing to Suspend the Works

- 4.10 The effect of COVID-19 on the project when taken as a whole could mean that the parties may both wish to suspend all on-site works, even though some works could still be carried out safely. If so, the parties should also look to agree:
- 4.10.1 a record of the status of works as at suspension;
  - 4.10.2 the steps to be taken to demobilise and remobilise the works and when these should take place; and
  - 4.10.3 the practical issues such as security, storage, insurance, safety and any on-going payments in-line with the [CLC advice on Temporary Suspension on Sites](#);

## Payments and Valuations

- 4.11 Could valuations and payments be adjusted to assist the Supplier with the Employer potentially taking other security? The parties could consider the suggestions set out in the [PPN 02/20: Supplier Relief due to COVID-19](#) such as:
- 4.11.1 The repayment of retention;
  - 4.11.2 Advanced payments;
  - 4.11.3 Paying for off-site materials with appropriate vesting certificates;
  - 4.11.4 Increased frequency of valuation and payments;
  - 4.11.5 Potentially even changing the basis of the contract from lump-sum to target cost or open book and/or utilising project bank accounts to secure cash-flow; and
  - 4.11.6 Adjustment of time/resource related pricing formulae (e.g. KPIs).

4. Contracting authorities would need to consider and seek advice on any potential breach of procurement rules.

5. <http://www.gov.uk/coronavirus/business-support>

6. Parties should also consider the Government's announcement on 28 March 2020 of proposed changes to the insolvency rules to help businesses impacted by the Covid-19 emergency, including a proposed moratorium on creditor action.

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## Variations

4.12 The parties could discuss whether:

- 4.12.1 any specific materials are likely to be delayed and, if so, whether any variations could be made to the specification to mitigate such delays (subject to issues such as compliance with planning permissions, building regulations and third party agreements such as development agreements/agreements for lease); and/or
- 4.12.2 the works could be re-sequenced or sectional completion added or varied to reduce the Employer's losses or delay be reduced and/or to assist the Supplier in prioritising materials and/or labour.

The time and cost effects of any such variations should be agreed at the same time for certainty.

4.13 **Payments to sub-contractors/suppliers**

The parties could consider how payments to the supply chain could be monitored and protected. Consideration could be given to the Supplier agreeing to provide evidence of the same (perhaps through a digital payment/transaction management system) or the use of a project bank account (which is the default policy for the public sector in England, Wales, NI and Scotland) along with the advantages and disadvantages of the same.

## 5 THIRD PARTY OBLIGATIONS

- 5.1 Each party to the collaborative discussions set out above may need to have separate discussions with third parties (such as insurers) to whom it also owes contractual obligations, either before or after any collaborative meeting.
- 5.2 Suppliers may need to get agreement from their sub-contractors/suppliers before entering into an agreement with the Employer, as such an agreement may affect its obligations down the contractual chain.
- 5.3 Conversely, Employers may be under obligations to funders, purchasers or tenants, and insurers, which will need to be considered. For example, under development agreements Employers may be under:
  - 5.3.1 similar obligations to notify delays, in order to obtain an extension of time; and
  - 5.3.2 obligations such as using reasonable endeavours to procure that the Supplier complies with the building contract and not to agree variations to the same without the third party's consent.
- 5.4 Such agreements should be reviewed carefully (and, if in doubt, advice obtained) so that parties are aware of their obligations and any consents which could be required. Similar collaborative discussions should be held with such third parties to ensure that any agreement reached between the parties would also be agreeable to such third parties, to the extent that their consent will be required (ensuring related issues such as insurance cover are not undermined).
- 5.5 If it is not clear whether third party consent will be given (but would be required) this should be made clear in the WPSTC meeting between the parties and that any agreement reached will be subject to the same.
- 5.6 Some parties may also have the benefit of delayed site start up insurance or business interruption insurance which may cover some costs. Any applicable insurance should be reviewed carefully to ascertain any notification requirements and whether the insurer's consent/approval would be required to any correspondence and/or agreements.

## 6 OPTIONS AND BEST PRACTICE IF AN AGREEMENT CANNOT BE REACHED

- 6.1 Disputes are expensive, time consuming, and often destructive to healthy commercial relationships. If possible it would be better to spend the time and money involved in achieving a compromise for the good of all those involved. Hence this Guidance and its enclosures try to give the parties every opportunity to seek an agreement on how to deal with COVID-19. However, it is recognised not all negotiations will result in a settlement. It is therefore worth noting that RICS offers a Conflict Avoidance Procedure for early resolution of issues. For further details see [www.rics.org](http://www.rics.org).



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6.2 We therefore set out below some brief guidance on the main forms of dispute resolution. Which form is to be used may be dictated by the terms and subject of the construction contract in question and therefore contracts should be reviewed and advice sought, if necessary.

## Escalation Clauses

6.3 A few construction contracts, particularly those for large projects, have “escalation” clauses. Here named senior representatives, normally directors, of both parties can be urged to meet, possibly with having had briefing papers from both sides, in an effort to see if an agreement can be reached without resorting to a more formal dispute resolution which is normally far longer and more costly. However, parties should not look to invoke such clauses solely to prolong and protract a dispute in order to improve its short term commercial position. Such use would not be in keeping with the Government’s Guidance Note on responsible contractual behaviour in the performance and enforcement of contracts during the Covid-19 emergency.

Not all construction contracts contain such a provision and the process involved will vary from contract to contract.

## Adjudication

6.4 For the vast majority (but not necessarily all) construction contracts the main method of resolving disputes is adjudication. The identity of the adjudicator (and if not identified in the contract, the organisation who will appoint the adjudicator), together with the conduct of the adjudication will often turn on the relevant terms of the contract.

6.5 Adjudication is a fast process - it can take as little as 4 weeks from the dispute being referred to the adjudicator to reach a decision. As adjudication is carried out at speed it can put a considerable amount of pressure on the parties to organise and present information quickly.

6.6 Partly due to the speed involved some adjudications can lead to what is perceived as a rough and ready decision and overturning an adjudicator’s decision, even if the adjudicator gets the facts and law wrong save for exceptional circumstances (e.g. the jurisdiction or breach of natural justice), can be difficult. A party faced with an adjudicator’s decision achieved in a matter of weeks, which it may not agree with, will still have to comply with the decision, but will then have to go to court or arbitration to have the dispute reviewed again should it wish to (say) recover any monies paid as a result of the adjudicator’s decision.

## Litigation

6.7 Before litigation in court even commences the parties are encouraged to engage in the Pre Action Protocol<sup>7</sup> (the Protocol) whereby both parties exchange the basis of their dispute and attend a without prejudice meeting to see if they can compromise all or some of their differences. The Protocol will not apply if the dispute in question has already been subject to an adjudicator’s decision.

6.8 Should this fail litigation via the courts can then commence. Litigation is governed by a detailed set of court rules which sets out formal procedures under which each party sets out its case, disclosing documents such as emails etc., exchanging witness and expert’s reports. As a result litigation can prove to be proportionately very costly and take a long time to resolve. Construction cases involving substantial sums can take months (if not years) to resolve.

## Arbitration

6.9 Arbitration is an alternative to litigation, but will only apply if the contract contains an arbitration clause. An arbitrator, who is normally a construction professional, will deal with the dispute using their powers under the contract/the Arbitration Act. As a broad rule, arbitrations (although private and confidential) tend to follow the same procedures as litigation in court, but this is not by any means always the case.

6.10 Accordingly arbitration often involves disclosure of documents, emails etc., expert reports and witness statements and the arbitrator will have to be paid for their time. Arbitration for particular major construction disputes can also be very costly and time consuming. The reality is that arbitration often incurs similar time and cost implications as litigation whilst having the benefits of expert decision makers and confidentiality (like adjudication).

7. [https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot\\_ced](https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_ced)

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## Mediation

- 6.11 Mediation is a process whereby a trained professional becomes involved to see if they can encourage the parties to compromise and settle their differences in a WPSTC forum. There is no formal process to mediation, mediators and the parties alike can adopt whatever procedure they think will result in a settlement.
- 6.12 Mediations normally start by the parties presenting written submissions of their case to each other and the mediator, followed shortly by a meeting. The mediator will meet the parties together and separately, normally over the course of a day, in an effort to achieve a settlement.
- 6.13 Most mediators seek to encourage settlement by highlighting to the parties, either on their own or with each other present, the strengths and weaknesses of the facts, evidence, law and commercial positions, together with what would happen if a compromise is not reached? For example, a mediator might remind an Employer that without a financial settlement, the project may take even longer to complete and have even more severe financial repercussions as a result. Mediators might remind Suppliers that a compromise on some items, could avoid the cost and delays involved in adjudication, litigation etc., and even then the outcome of these processes are never certain.
- 6.14 The benefits of a mediation are that it is confidential, extremely quick, relatively cheap and binding settlement that can be far wider in nature than a court judgment or arbitrator's/adjudicator's award/decision. However, the process does not guarantee a successful outcome - although the likelihood of a settlement once a mediation is underway, either at the mediation or shortly thereafter is quite high.
- 6.15 The mediator will still have to be paid, and there can be costs involved in preparing the mediation agreement, the documentation and the time spent at the mediation. Although these are usually low compared to more litigation, arbitration and adjudication.
- 6.16 Mediation is usually a voluntary process and so parties cannot be compelled to mediate, although parties can be penalised by the courts if they unreasonably refuse to do so. Good mediators try to ensure that the parties are engaged by emphasising that it is in their interests to do so. Also mediators do not give a binding decision – settlement is normally achieved by making sure the parties realise what the effect of a failure to achieve a compromise would be, rather than the parties simply relying on their strict legal rights.
- 6.17 In addition to the above and more specifically in response to the COVID-19 crisis, targeted at SMEs and low value disputes, the Construction Industry Council launched its Low Value Disputes Model Adjudication Procedure on 1st May, and the Royal Institution of Chartered Surveyors is also launching a 15-day adjudication service, which will have capped fees. For further details see [www.cic.org.uk](http://www.cic.org.uk) and [www.rics.org](http://www.rics.org).

## 7 CONCLUSION

- 7.1 We hope that this guidance, together with that from Government will generate collaborative and constructive approaches to the resolution of contractual issues on construction projects during these challenging times.
- 7.2 We recognise that the situation is continually evolving, and as such, will revise our guidance if necessary.
- 7.3 If you have any comments, or feedback, please email: [construction.enquiries@beis.gov.uk](mailto:construction.enquiries@beis.gov.uk).
- 7.4 This document provides general guidance and does not constitute legal advice. A party's contractual rights will depend on the wording of its particular contract and the factual circumstances on its project. If in doubt, advice should be sought.

*The Construction Leadership Council would like to express their thanks for the contributions made to the development of this guidance by: The Building Engineering Services Association, Civil Engineering Contractors Association, ECA, Mace, Rider Levett Bucknall, Tideway, and U+, together with the Infrastructure and Projects Authority and the Department for Business, Energy and Industrial Strategy. Specific thanks goes to Andrew Croft of Beale & Company Solicitors LLP, Helen Stuart of Trowers & Hamblins LLP, and Jon Miller of Fenwick Elliott LLP, for their invaluable insight and technical contributions.*



## ANNEX 1- SUPPLIER DIALOGUE LETTER

[\*\*\* Insert Employer's Details]

[\*\*\* Insert Delivery Method]

[\*\*\* Insert Date]

Dear Sirs,

Project [\*\*\*](“the Project”) — Contract dated [\*\*\*] (“the Contract”) – COVID-19

### WITHOUT PREJUDICE SAVE AS TO COSTS AND SUBJECT TO CONTRACT

In light of recent developments we have to write to you now in relation to COVID-19, in the context of the continuing impact of the disease in the UK and throughout the world.

As you will be aware, COVID-19 constitutes a “biological agent” under the Control of Substances Hazardous to Health Regulations 2002, and it is anticipated that the already-substantial impact of the disease on the UK and worldwide economy is set to increase substantially over the coming weeks.

We have done, and will continue to do, our best to prevent COVID-19 and its effects from impacting on the work we are carrying out, including putting into place working arrangements which reflect Government guidance and the [CLC's Site Operating Procedures](#).

However, it is now apparent as a result of COVID-19 that both delays and additional cost on the Project and for our work in relation to the Project could become unavoidable. We will be writing to you separately in relation to our contractual entitlement.

Our principal duty at this time is to ensure the health and safety of our personnel, sub contractors and indeed everyone involved or affected by the Project. We will at all times work with you and with our supply chain to minimise any effects that COVID-19 may have on not only the Project but all those involved. We will keep the impact of COVID-19 on the Project under constant review.

The Government's Public Procurement Notices and the associated Guidance Notes for Construction Contracts (aimed at the Public Sector) encourage Employers to consider supplier relief as a result of COVID-19 in order to enable projects to progress and encourage cashflow, either under existing contractual mechanisms or through agreed variations to the Contract.

Without prejudice to our obligations and rights under the Contract, we suggest that we meet which given the current climate should probably take place virtually e.g. on Zoom/Microsoft Teams, to discuss the impact of COVID-19 on the Project and the Contract and to seek to agree a way forward on a subject to contract basis.

The essence of any meeting would be to adopt a collaborative approach from the outset to discuss the relevant issues.

Yours faithfully,

For and on behalf of [ \*\*\* Insert Supplier]

**ANNEX 2 - Employer Dialogue Letter**

**[\*\*\* Insert Supplier's Details]**

**[\*\*\* Insert Delivery Method]**

**[\*\*\* Insert Date]**

Dear Sirs ,

**Project [\*\*\*](“the Project”) – [\*\*\*] Works (“the Works”) – Contract dated [\*\*\*] (“the Contract”)**

**WITHOUT PREJUDICE SAVE AS TO COSTS AND SUBJECT TO CONTRACT**

**[We acknowledge receipt of your letter dated [\*\*\* Insert Date of letter /notice]]**

Clearly we appreciate the very difficult challenges that you are facing in the current climate and the need for the project team to work together to overcome them as safely and as efficiently as possible.

We suggest that we hold a meeting with you by way of videocon in the next 7 days to ascertain how we can best mitigate the impact of the current issues and potential site remobilisation issues. This could include discussing coming to an agreement as to their effects and /or impact under the Contract.

Critical to the effective project management of the scheme in these circumstances, is the adherence to the processes and procedures set out in the Contract to manage any delays. However, without prejudice to any contractual entitlement, any discussions and/or notice that may or may not have been issued, we would like to agree a way forward that works for all parties.

We hope that we can work together to find solutions to the current issues. In the meantime, our rights are reserved.

Yours faithfully,

**For and on behalf of**

**[\*\*\* Insert Employer]**

## ANNEX 3 - CONTRACTOR NOTICE UNDER JCT DESIGN AND BUILD CONTRACT 2016

[\*\*\* Insert Employer's Details]

[\*\*\* Insert Delivery Method]

[\*\*\* Insert Date]

Dear Sirs,

Project [\*\*\*]<sup>10</sup> (“the Project”) – [\*\*\*]<sup>11</sup> Works (“the Works”) – Contract dated [\*\*\*] (“the Contract”) – notice under clause 2.24.1 by Contractor of delay to progress

In light of recent developments we have to write to you now in relation to coronavirus/COVID-19, in the context of the continuing impact of the disease in the UK and throughout the world. As you will be aware, COVID-19 constitutes a “biological agent” under the Control of Substances Hazardous to Health Regulations 2002, and it is anticipated that the already-substantial impact of the disease on the UK and worldwide economy is set to increase substantially over the coming weeks.

By virtue of clause 2.24.1 of the Contract, if and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed, we have to give notice of the following:-

1. It has become reasonably apparent that the progress of the Works (or Section) [\*\*\* is being /is likely to be]<sup>12</sup> delayed.
2. The material circumstance giving rise to, and causing, the delay is the COVID-19 pandemic.<sup>13</sup>
3. As a result of the COVID-19 pandemic, we have been unable to [\*\*\* describe how Works delayed, e.g. unable to secure sufficient labour to carry out the Works in a particular area].<sup>14</sup>
4. In our opinion the COVID-19 pandemic is a Relevant Event under clause 2.26.14 (Force Majeure) of the Contract.<sup>15</sup>

[\*\*\* The situation with COVID-19 is constantly changing. As a result it is difficult to estimate the expected delay which will be caused by the COVID-19 pandemic, however, at this stage, we estimate there will be an expected delay of [\*\*\*] weeks to the completion of the Works (or Section) beyond the Completion Date.]<sup>16</sup>

**OR**

[We will, as soon as possible, give particulars of the expected effects of the Relevant Event(s) including an estimate of the expected delay in completion of the Works (or any Section) beyond the Completion Date.]<sup>17</sup>

Our principal duty at this time is to ensure the health and safety of our personnel, sub contractors and indeed everyone involved or affected by the Works. We will at all times use our best endeavours and work with you and with our supply chain to minimise any effects that COVID-19 may have on not only the Works but all those involved.

In the meantime, we will keep the status of the Project under constant review.

Yours faithfully,

For and on behalf of [\*\*\*Insert Contractor entity]<sup>18</sup>

8. See Note 3 and 4.    12. Note 7    16. Note 6 and 9.  
9. Note 3 and 4.    13. Note 6    17. Note 6 and 9.  
10. Note 5.    14. Note 6.    18. Note 12.  
11. Note 5.    15. Note 8.

## ANNEX 3

### EMPLOYER RESPONSE TO CONTRACTOR NOTICE UNDER JCT DESIGN AND BUILD CONTRACT 2016

[\*\*\* Insert Contractor's Details]

[\*\*\* Insert Delivery Method]

[\*\*\* Insert Date]

Dear Sirs,

Project [\*\*\*]<sup>19</sup> (“the Project”) – [\*\*\*]<sup>20</sup> Works (“the Works”) – Contract dated [\*\*\*] (“the Contract”)

We acknowledge receipt of your letter dated [\*\*\* Insert Date of letter /notice].

Clearly we appreciate the very difficult challenges that you are facing in the current climate and the need for the project team to work together to overcome them as safely and as efficiently as possible.

We suggest that we hold a meeting with you and the Employer's Agent by way of videocon in the next [7] days to ascertain how we can best mitigate the impact of the current issues and potential site remobilisation issues. This could include discussing, on a without prejudice basis, coming to an agreement as to their effects and /or impact under the Contract.

Critical to the effective project management of the scheme in these circumstances, is the adherence to the processes and procedures set out in the Contract to manage any delays. Therefore ahead of such a meeting we invite you to provide us and the Employer's Agent the following<sup>21</sup>:

1. [confirmation as to whether you consider any of these events to be Relevant Events for the purposes of the Contract] [\*\*\*delete if already identified in the notice];
2. [details of the expected effects of the identified Relevant Events including an estimate of the expected delay in the works, in compliance with clause 2.27 of the Contract, to the extent that you are currently able to] [\*\*\*delete if provided in the notice];
3. details of how you are using your best endeavours to prevent delay in the progress of the Works in accordance with clause 2.25.6.1 of the Contract, including:
  - 3.1 details of any risk assessment undertaken; and
  - 3.2 details of any remote working arrangements that are continuing and/or any on or off-site works that are continuing.
4. [confirmation that you are complying with the Public Health England guidance and also the [CLC's Site Operating Procedures](#) - as updated from time to time.] [\*\*\*if on-site works have not been temporarily suspended].

**OR**

5. [confirmation of the steps taken to maintain the safety and security of the Site as well as the relevant insurances. It may be helpful to refer to the points raised in the [CLC advice on Temporary Suspension on Sites](#): .] [\*\*\*if the on-site works have been temporarily suspended]

We hope that we can work together to find solutions to the current issues. In the meantime, our rights are reserved.

Yours faithfully

For and on behalf of

[\*\*\* Insert Employer<sup>22</sup>]

19. Note 5.  
20. Note 5.  
21. Note 14.  
22. Note 14.

## Annex 3 - Explanatory Notes

1. With the coronavirus/COVID-19 pandemic changing daily, the draft notice under clause 2.24.1 by Contractor of delay to progress should be issued immediately.
2. The draft notice under clause 2.24.1 by Contractor of delay to progress and accompanying response from the Employer have been drafted on the basis the Contract is an unamended JCT 2016 D&B Design and Build Contract ("JCT 2016 D&B"). Regard should be had to these notes before the notice and letter are issued.
3. Please check the Contract carefully in relation to whom the notice is to be given, and whether it needs to be given in a particular manner (e.g. Special Delivery). The JCT 2016 D&B states the delay notice is to be given to the Employer<sup>23</sup>, but adds that the Employer's Agent can accept any notice on behalf of the Employer<sup>24</sup> but the notice should be given to the address in the Contract Particulars unless the Employer/Employer's Agent has notified a different address. If no address is stated in the Contract Particulars then it should be sent to last known principal business address or (where a body corporate) its registered or principal office.<sup>25</sup>
4. It is acceptable to:-
  - 4.1 give a notice to more than one party but, if there is any doubt, the Contract should be checked carefully; and
  - 4.2 issue by email (unless the parties have agreed in writing otherwise<sup>26</sup>), under an unamended JCT 2016 D&B - your contract may be different.
5. The address of the site, project and description of the works should be taken from the Contract.
6. The delay notice needs to state:
  - 6.1 the "material circumstances";
  - 6.2 the causes of the delay; and
  - 6.3 whether the cause is a Relevant Event.<sup>27</sup>

In this initial notice there is no mandatory requirement to state or estimate what the delay to the Completion Date will be, however it should be done if practicable. Wording for two suggested alternatives has been included.

7. The Contractor should state whether the Contractor "is being" or "is likely to be" delayed. The notice has been drafted on the basis that coronavirus/COVID-19 has delayed the Works. Please note however that this will only give rise to an extension of time and not additional monies. Please consider all of the other Relevant Events which could give rise to an extension of time (see – e.g. if the Employer has failed to give instructions on time due to a shortage of staff as a result of the coronavirus outbreak, this could still give rise to an extension of time, but this also could give rise to loss and expense, as a Relevant Matter). It is perfectly acceptable to mention more than one Relevant Event in a notice. [Build UK Guidance on Contractual Issues caused by Coronavirus/COVID-19 \(Wedlake Bell\)](#) sets out a summary of further potential Relevant Matters to apportion costs.
8. The notice must state that what has happened is a "Relevant Event" – i.e. a reason why an extension should be given.
9. These further particulars can be given either in the notice, bearing in mind that the effects of coronavirus/COVID-19 are very difficult to predict, or in a further letter setting out the expected effects including an estimate of the delay to any the Completion Date or any Section.<sup>28</sup> The particulars, if not set out in the letter, should be sent "as soon as possible" after the letter.<sup>29</sup>
10. Any estimate of a delay to a Section/Completion Date in the current climate is bound to be tentative. The Contractor is obliged to notify the Employer of any material change in the estimated delay to the Section/Completion Date or any other particulars (i.e. the impact/effects of COVID-19 on the Works).<sup>30</sup>

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11. The JCT 2016 D&B places an obligation on the Employer to respond to the request for an extension of time within 12 weeks of receipt of the particulars (i.e. not the initial notice) or, if it is even sooner, the Employer should endeavour to give a response by the Completion Date.<sup>31</sup> There is no deeming provision in the JCT 2016 D & B if the Employer/Employer's Agent fails to respond in this timeframe.
12. The entity for the Contractor should be the same as that stated in the Contract.
13. This is a non-exhaustive list of information that may assist an Employer in understanding the Contractor's claim and the current position on site and can be adapted to the specific project.
14. The entity for the Employer should be the same as that stated in the Contract.

23. Clause 2.24.1.

24. Article 3.

25. Paragraph 1.7 and Clause 1.7.3.

26. Clause 1.7.2.

27. Clause 2.24.1.

28. Clause 2.24.1.

29. Clause 2.24.2.

30. Clause 2.24.3.

31. Clause 2.25.2.



## ANNEX 4

### CONTRACTOR/PROJECT MANAGER NOTICE UNDER NEC3/4 ENGINEERING AND CONSTRUCTION CONTRACT AND EXPLANATORY NOTES

[\*\*\* Insert Contractor/Project Manager's Details]<sup>32</sup>

[\*\*\* Insert Delivery Method]<sup>33</sup>

[\*\*\* Insert Date]

Dear Sirs,

Project [\*\*\*]<sup>34</sup> (“the Project”) – [\*\*\*]<sup>35</sup> Works (“the Works”) – Contract dated [\*\*\*] (“the Contract”) – notice under clause [61.1/61.3]<sup>36</sup> by Contractor/Project Manager of a Compensation Event

In light of recent developments we have to write to you now in relation to coronavirus/COVID-19, in the context of the continuing impact of the disease in the UK and throughout the world. As you will be aware, COVID-19 constitutes a “biological agent” under the Control of Substances Hazardous to Health Regulations 2002, and it is anticipated that the already-substantial impact of the disease on the UK and worldwide economy is set to increase substantially over the coming weeks.

As a result of the COVID-19 pandemic we expect a material change to the [Completion Date/Key Dates] and the Defined Cost. By virtue of clause 61 of the Contract, we give notice that [we expect] the following Compensation Event[s] [have happened/to happen]<sup>37</sup>:

1. [List the relevant Compensation Event/s that have happened or are expected to happen.<sup>38</sup>]

[\*\*\* The situation with COVID-19 is constantly changing. As a result it is difficult to propose the changes to the Prices and any delay to the Completion Date and Key Dates along with any alterations to the Accepted Programme but we have enclosed a quotation showing the same based on the following assumptions [insert].<sup>39</sup>

OR

[[Upon your instruction] [As soon as possible] we will provide a quotation proposing the changes to the Prices and any delay to the Completion Date and Key Dates along with any alterations to the Accepted Programme but we have enclosed a quotation showing the same based on the following assumptions [insert].<sup>40</sup>

Our principal duty at this time is to ensure the health and safety of our personnel, sub contractors and indeed everyone involved or affected by the Works. We intend to work with you and with our supply chain to minimise any effects that COVID-19 may have on not only the Works but all those involved.

In the meantime, we will keep the status of the Project under constant review.

Yours faithfully,

For and on behalf of [\*\*\*Insert Contractor/Project Manager entity<sup>41</sup>]

32. See Note 1, 2, and 6.

33. Note 6.

34. Note 7.

35. Note 7.

36. Note 2.

37. Notes 8 and 9.

38. Note 9.

39. Note 13.

40. Notes 8.

41. Notes 12 and 16.

## ANNEX 4

### PROJECT MANAGER RESPONSE TO CONTRACTOR/NOTICE UNDER NEC3/4 ENGINEERING AND CONSTRUCTION CONTRACT OPTION A

[\*\*\* Insert Contractor's Details<sup>42</sup>]

[\*\*\* Insert Delivery Method<sup>43</sup>]

[\*\*\* Insert Date]

Dear Sirs,

Project [\*\*\*]<sup>44</sup> (“the Project”) – [\*\*\*]<sup>45</sup> Works (“the Works”) – Contract dated [\*\*\*] (“the Contract”)

We acknowledge receipt of your letter dated [\*\*\* Insert Date of letter /notice].

Clearly we appreciate the very difficult challenges that you are facing in the current climate and the need for the project team to work together to overcome them as safely and as efficiently as possible.

[We notify you of our decision under clause 61.4 that the Prices, Completion Date and/or the Key Dates are not to be changed because we consider that the issues raised in your notice<sup>46</sup>:

1. arise from a fault of yours
2. has not happened and is not expected to happen
3. has not been notified within the timescales set out in the Contract
4. has no effect upon Defined Cost, Completion or meeting a Key Date or
5. is not one of the Compensation Events stated in the Contract.]

OR

We agree that the event notified is a Compensation Event. Please provide a quote of the proposed changes to the Prices and any delay to the Completion Date and Key Dates along with any alterations to the Accepted Programme to include the following assumptions [insert<sup>47</sup>] within 3 weeks.<sup>48</sup> [\*\*\*delete if provided in the notice]. We [do] [do not] consider that you gave early warning of the event which an experienced contractor would have given.<sup>49</sup>

We suggest that we hold a [early warning] [risk reduction] [\*\*\*delete as applicable]<sup>50</sup> meeting with you by way of videocon in the next [7] days to ascertain how we can best mitigate the impact of the current issues and potential site remobilisation issues. [\*\*\*delete if already held].

Critical to the effective project management of the scheme in these circumstances, is the adherence to the processes and procedures set out in the Contract to manage the effects of any delays. Therefore ahead of such a meeting we invite you to provide us with the following<sup>51</sup>:

6. [confirmation as to whether you consider any of these events to be Compensation Event(s) for the purposes of the Contract] [\*\*\*delete if already identified in the notice];
7. any details of how you are preventing (or propose to prevent) delay in the progress of the Works, including:
  - 7.1 details of any risk assessment undertaken; and

42. Note 12.

43. Note 6.

44. Note 7.

48. Note 11.

49. Note 14

50. Note 5.

51. Note 15.

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7.2 details of any remote working arrangements that are continuing and/or any on or off-site works that are continuing.

8. [confirmation that you are complying with the Public Health England's guidance and also the [CLC's Site Operating Procedures](#) - as updated from time to time.] [\*\*\*if on-site works have not been temporarily suspended].

## OR

9. [confirmation of the steps taken to maintain the safety and security of the Site as well as the relevant insurances. It may be helpful to refer to the points raised in the [CLC advice on Temporary Suspension of Sites.](#)] [\*\*\*if the on-site works have been temporarily suspended].

Yours faithfully,

For and on behalf of

[\*\*\* Insert Project Manager<sup>52</sup>]

## Annex 4 - Explanatory Notes

1. The pro-forma letters are drafted with the NEC3/4 Engineering Construction Contract pricing Option A in mind. Other pricing options may not require this approach. Parties should also remember that NEC takes a proactive approach to contract management and early warning/risk register communications both separate to and within project management meetings should also be considered, in addition to adapted use of the proformas.
2. A Contractor or a Project Manager can serve a notice on the other. Clause 61.1 relates to notice given by the Project Manager. Clause 61.3 relates to notice given by the Contractor. The person who issues the notice will depend on the Compensation Event being notified. Under clause 61.1, the Project Manager should notify compensation events 60.1(1), 60.1(4), and 60.1(17) at the time of giving the communication triggering those compensation events; and under clause 61.3, the Contractor should notify all of the others within eight weeks of becoming aware of them. If not then neither the Prices, Completion Date or a Key Date are changed. Not only will the Contractor not be entitled to obtain any additional monies, but there will be no extension to the Completion Date which could lead to a liability for Delay Damages. **This deadline should therefore not be missed under any circumstances.** With the coronavirus/ COVID-19 pandemic changing daily, the notice under of a Compensation Event should be issued immediately.
3. The draft notice of a Compensation Event and accompanying response from the Project Manager have been drafted on the basis the Contract is an unamended NEC3 or 4 Engineering and Construction Contract Option A. Regard should be had to these notes before the notice and letter are issued.
4. A unique feature of the NEC is that a notice must not include any other communication - the notice must be a standalone document.<sup>53</sup>
5. NEC ECC3 refers to risk reduction meetings, NEC4 refers to Early Warning Meetings, and so this wording should be amended depending on which form you are using.
6. Please check the Contract carefully in relation to whom the notice is to be given, and whether it needs to be given in a particular manner (e.g. Special Delivery). The NEC3/4 Engineering and Construction Contract states the Compensation Event notice is to be given to the Project Manager/Contractor.<sup>54</sup> If the Contract specifies the use of a communication system, a notice should be sent via that communication system (e.g. a digital contract management system), but where no communication system is specified then it should be sent to the last notified address, or, if none notified, the address of the recipient stated in the Contract Data.<sup>55</sup>
7. The address of the site, project and description of the works should be taken from the Contract.
8. The notice needs to state the Compensation Events that apply. It would be good practice to provide as much detail as possible. In this initial notice there is no mandatory requirement to provide a quotation for the proposed Changes to the Completion Date/Key Date and/or what the Prices will be without an instruction to do so from the Project Manager, however this can be included, if practicable. Wording for two suggested alternatives has been included. If this is included any assumptions on which it is based should be included, as if it is submitted then the contractor would not be entitled to any further time or money should the situation change.
9. We anticipate that under an unamended NEC3/4 Engineering and Construction Contract that the following Compensation Events may apply as a result of COVID-19: clauses 60.1.(1), 60.1.(2), 60.1.(4), 60.1.(5), 60.1.(6), 60.1.(17), 60.1.(19) or option X2 (if stated to apply). Other Compensation Events may be applicable dependent on which Main Option applies to the Contract. [Build UK Guidance on Contractual Issues caused by Coronavirus/COVID-19 \(Wedlake Bell\)](#) sets out in summary further potential Compensation Events – including apportionment of costs.
10. The NEC3/4 Engineering and Construction Contract places an obligation on the Contractor to notify a Compensation Event within 8 weeks of the event occurring. If the Contractor fails to notify within this time, the Contractor is not entitled to a change in the Completion Date, a Key Date and/or the Prices, unless the event should have been notified by the Project Manager.<sup>56</sup>

53. Clause 13.7.

54. Clause 61.

55. Clause 13.2.

# CLC COVID-19 CONTRACTUAL BEST PRACTICE GUIDANCE

11. The NEC3/4 Engineering and Construction Contract places an obligation on the Project Manager to respond to the notice of a Compensation Event within 1 week of receipt of the notice (or any longer period that is agreed). If the Project Manager fails to reply to a notification of a Compensation Event within the required time, the Contractor may notify the Project Manager of that failure. If the failure continues for a further 2 weeks after that notification, it is treated as acceptance by the Project Manager that the event is a Compensation Event and an instruction to submit quotations.<sup>57</sup> In a Project Manager's response to a notice of a Compensation Event it should confirm its decision under clause 61.4 as to whether it is a Compensation Event (and if so, request a quotation) or whether any of the issues in that clause apply and give reasons for the same. If an instruction is given to provide a quotation the contractor should provide this within 3 weeks (unless otherwise extended by the Project Manager).<sup>58</sup>
12. The entity for the Contractor should be the same as that stated in the Contract.
13. If the effects of the Compensation Event are too uncertain to be forecasted reasonably the Project Manager can state in its instruction assumptions which the quotation is to be based upon.<sup>59</sup>
14. If the Project Manager considers that the Contractor did not issue an Early Warning Notice which an experienced could have given, the Project Manager should confirm the same in any instruction to submit a quotation.<sup>60</sup>
15. This is a non-exhaustive list of information that may assist a Project Manager in understanding the Contractor's quotation and the current position on site and can be adapted to the specific project.
16. The entity for the Project Manager should be the same as that stated in the Contract.
17. As under the NEC form of contract it is the Project Manager that responds to a notice of a Compensation Event, we suggest that the Employer/Client separately send to the Contractor a letter on WPSTC basis suggesting collaborative discussions on the way forward based on the pro forma at Annex 1.

56. Clause 61.3.  
57. Clause 61.4.  
58. Clause 62.4  
59. Clause 61.6.  
60. Clause 61.5.