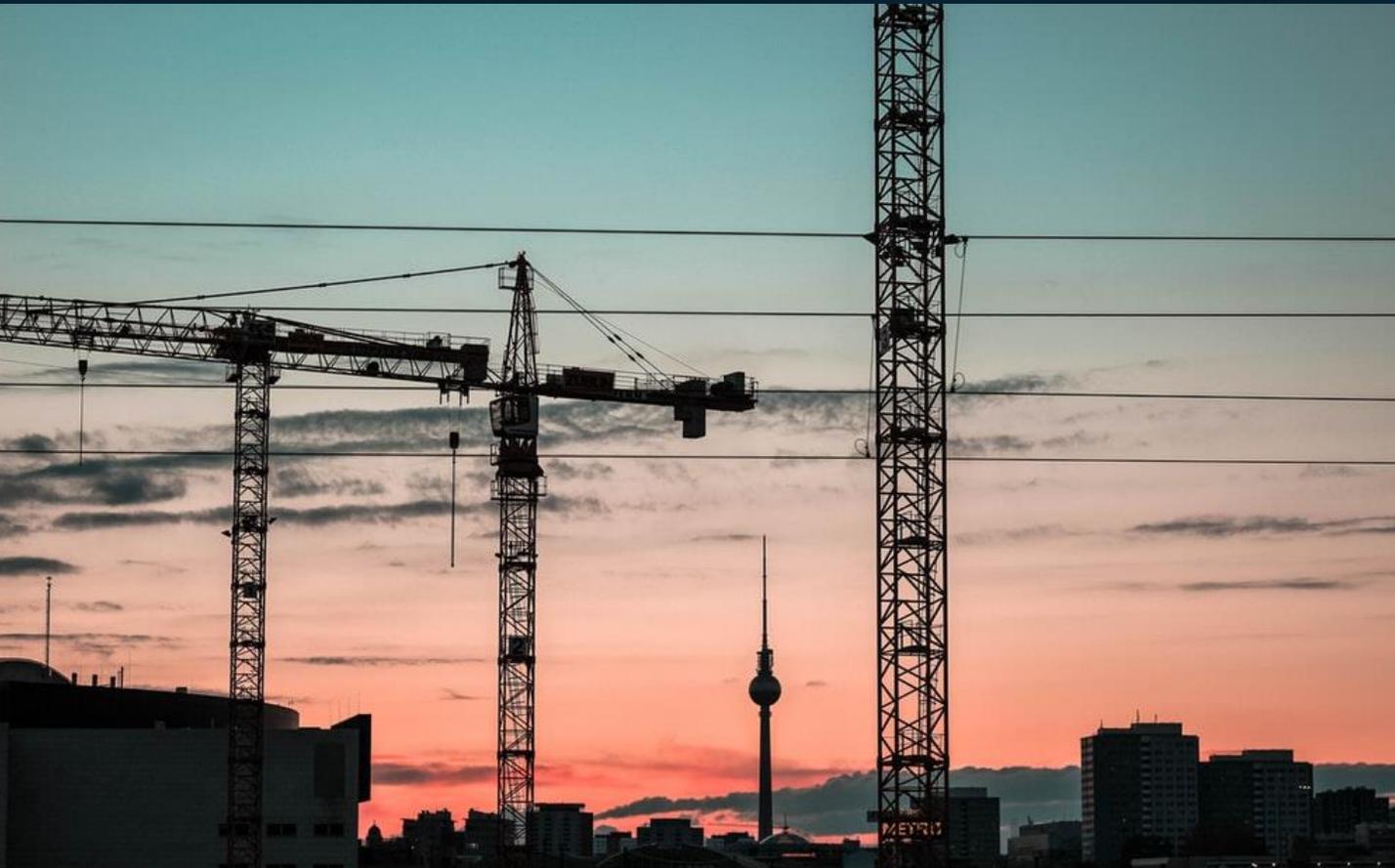




Construction Delay and Compensation

COVID-19 Edition



As the Middle East is preparing for the unknown impact of COVID-19 on its workplaces, workforce and families, many clients are wondering what will happen to their construction projects, will they be delayed and will compensation be required?

The Legal Situation:

Under a standard FIDIC Red Book 1999 Edition (FIDIC) contract, relative to the current coronavirus outbreak, a contractor may be entitled to an extension of time if it can be demonstrated that this was a result of;

- Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental action.
- Any operation of the forces of nature which is unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions.
- Force Majeure.

Whilst Force Majeure is defined within FIDIC, it will have to be argued by the contractor, that COVID-19 falls within the stated definitions/circumstances. With any extension of time, it is incumbent on the contractor to demonstrate that the exceptional event that caused the delay had a direct impact on the works. But if the employer can demonstrate that the contractor was already causing delay, or the delay was only indirectly caused by the exceptional event, then an extension of time might not be awarded. More importantly, in the absence of local or central Government on-site activity restrictions, depending on the jurisdiction, the local court may have significant discretion to determine whether COVID-19 is considered a valid reason under Force Majeure.

With regards to compensation, the granting of an extension of time relieves the contractor of any delay damages for the period of the extension. However, this extension does not automatically mean an entitlement to compensation for the cost of the delay to the contractor. For cost to apply, the contractor needs to demonstrate separately, which means that the employer has an argument not to have to pay compensation where the contract is unamended. An important note, however, is that if the contract Engineer delays in the performance of their duties due to the current crisis this will give grounds for cost.

Our Top Tips to Mitigate Contract Risk During COVID-19:

Undoubtedly the COVID-19 outbreak will have an impact on the construction industry and the execution of construction contracts. Insolvency remains a key feature in the construction sector at present. Therefore, the risk of project delays, with little chance of receiving compensation and the potential risk of delay damages applying if the contractor cannot demonstrate that the delay was a direct result of an exceptional event, would only increase this risk further.

Here are some practical steps that clients can take to help manage and mitigate the risks:

- Ask your contractor to carry out a materials audit to identify where materials are being imported from. Consider switching to materials that can be sourced from countries less severely affected. Where materials cannot be sourced elsewhere, ask your contractor how they are intending to maintain continuity of supply. Where materials off-site provisions apply, ask your contract Engineer how the materials are to be inspected and valued.
- Ensure regular cleaning of site welfare facilities, staff canteens and meeting places and the provision of adequate washing facilities along with following government guidelines.
- Under a standard FIDIC contract, the contractor is required to notify the employer as soon as a delay becomes reasonably apparent and must use best endeavours to mitigate any delay. Re-sequencing of the works could mitigate a delay, particularly where supply of materials becomes an issue.

- Ask your contract Engineer what business continuity plans are in place to ensure that the regular progress of the works is not affected.
- Make sure that adequate records are kept of progress against program and labour on site, as this will assist in reviewing extension of time claims.
- Be mindful of how delays due to the outbreak may affect pricing qualifications in tenders.

To manage potential insolvency risk in the short to medium term:

- Ensure that due diligence checks are carried out on the supply chain, as well as main contractors prior to appointment, including checking up references and pre-qualifying of trade contractors to help ensure the right quality of suppliers. If these checks have been carried out sometime ago, these must also be re-done.
- Procurement teams should look beyond lowest price and ensure that financial security factors into the pre-qualification process.
- Ensure that any building contracts are properly signed and executed. Performance Bonds or Parent Company Guarantees provide an additional layer of protection. Letters of Intent create uncertainty and risk.
- Look for tell-tale signs of financial problems. If productivity levels are falling, the main contractor is defaulting on payments or is seeking to negotiate early payments, then these are signs of an underlying issue. Ensure that the correct protocols have been observed with regard to payment of materials off site, particularly where they may be from affected countries.
- If the contractor does become insolvent, immediately secure the site to prevent removal of any plant and materials.

Finally, remember that every contract is different and legal advice should be sought to assess the unique circumstances of the project. Whilst we have provided some practical advice here it should not be used to replace the advice of a qualified legal professional.



Colliers International Construction Consultancy

As specialist construction consultants we provide project, cost and construction management services. Our success is based on two simple principles;

- i. Construction advisory that is tailored to each client, based on the knowledge of our staff whom first and foremost are construction people.
- ii. Our services ensure risks are eliminated, quality of design & construction is delivered, optimum program timelines are achieved, all at the lowest price possible.

Our Project Management & Cost Consultancy Services include:

Project Management

- Development Management
- Program Management
- Project Management
- Client Representation
- Construction Supervision
- Tenant Coordination
- Building Surveying

Quantity Surveying

- Cost Modelling & Benchmarking
- Cost Planning/Management/Control
- Risk Appraisal
- Life Cycle Costing
- Value Engineering
- Procurement Strategy & Advise
- Tendering & Evaluation
- Tender Documentation & Bills of Quantities
- Contract Documentation & Administration
- Cash Flow Forecasting

Project Monitoring

- Bank/Financial Institution Representation
- Early Warning Advice
- Project Cost Analysis and Advice
- Program Monitoring
- Stage Payment Recommendations
- Quality & Specification Inspections



FOR MORE INFORMATION

Bob Flanagan

Managing Director
Project Management & Cost
Consultancy Services - MENA
bob.flanagan@colliers.com

Contributor :

Colin Wood

Director
Project and Building Consultancy - UK
Colin.Wood@colliers.com

Justin Ng

Director
Project Management & Cost
Consultancy Services - MENA
justin.ng@colliers.com

About Colliers International

Colliers International is a global leader in commercial real estate services, with over 18,000 professionals operating in 68 countries. Colliers International delivers a full range of services to real estate users, owners and investors worldwide, including global corporate solutions, brokerage, property and asset management, hotel investment sales and consulting, valuation, consulting and appraisal services and insightful research. The latest annual survey by the Lipsey Company ranked Colliers International as the second-most recognised commercial real estate firm in the world. In MENA, Colliers International has provided leading advisory services through its regional offices since 1996.

Disclaimer

The information contained in this report has been obtained from sources deemed reliable. Any information on projects, financial or otherwise, are intended only to illustrate particular points of argument and do not constitute forecast of actual performance. While every reasonable effort has been made to ensure the accuracy of the information, we provide no warranty or guarantee as to the accuracy or completeness of the information in this report and Colliers International assumes no liability whatsoever in relation to the forecast, figures or conclusions contained herein. Any statements or opinions must not be treated as investment or valuation advice and must not be relied on for investment or any other purposes. Readers are encouraged to consult their professional advisors prior to acting on any of the material contained in this report.

