

A-Tishoo, A-Tishoo, The Walls Fall Down ...

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It's official: the swine flu virus is now a 'pandemic' according to the World Health Organisation. The illness is of particular concern to the international construction sector, especially in countries where labourers live in communal accommodation. Rapid spreading of swine flu could potentially bring the sector to a standstill, causing significant delays, costs and lost profits.

So, how can Employers and Contractors prepare for a potential outbreak? To give you a flavour of the potential impact, a recent article in the National described the efforts of ETA Ascon Star (one of UAE's oldest construction companies with a workforce of over 70,000 in 24 camps) to try to minimise the risk of spread.

What should Employers consider?

Employers should check a Contractor's extension of time entitlement caused by a shortage of labour/staff and potential grounds for additional cost claims. They should consider the likely success of a force majeure claim, entitlement to delay damages, whether any resulting losses are an Employer risk event and whether there are any appropriate insurance policies available.

They probably should also include more robust provisions to ensure the "maintenance of adequate labour resources at all times" so that the Contractor has express obligations to have strategies in place should an outbreak occur.

What should Contractors consider?

Contractors should be aware of their contractual duties (e.g. timely completion, co-operation, reporting), health and safety obligations (including compliance with government rules and regulations), extension of time and cost entitlements, whether a force majeure claim applies, whether their insurance policies can protect them, liability for delay damages and lastly, whether epidemics etc. are an "Employer risk" event.

And what should everyone consider?

Parties should consider their duty of care to their employees and balancing this with maintaining staffing levels and compliance with privacy rules relating to disclosure of staff medical information.

Standard Forms?

Risk allocation for pandemics and epidemics tends to differ depending upon which standard form construction contract you are using. With regard to future contracts, given the global reporting and awareness of the pandemic, any effect of swine flu on construction projects will probably be deemed a 'foreseeable' event, not a force majeure. So specific provisions to cover swine flu in all new contracts may be sensible, especially for Contractors, to clarify who bears the risk in the event of an outbreak. For existing contracts it may come down to whether the pandemic was foreseeable at the time of tender.

What does FIDIC say?

Under the FIDIC Rainbow Suite Red (Construction), Yellow (Design & Build) and Silver (EPC Turnkey) Books, the following clauses should be considered:

- Clause 6.7 - has the Contractor complied with its obligation to make suitable arrangements for the prevention of epidemics; without distinguishing between epidemics and pandemics, a persuasive argument can be made that the provisions which refer to epidemics also encompass pandemics.

- Clause 19.1 (Force Majeure) - is the outbreak a force majeure event?

- Clause 17.3(h) (Employer's Risks) - in Red and Yellow Books only - is the outbreak an operation of the forces of nature which is unforeseeable and therefore an Employer risk event?

- Clause 8.4(d) - is there an "Unforeseeable" shortage of personnel or goods caused by the outbreak entitling the Contractor to a time extension?

Clearly, the biggest hurdle for Contractors will be in demonstrating the event was "Unforeseeable" (i.e. "not reasonably foreseeable by an experienced contractor at time of tender").

And the NEC3 engineering and construction contract form?

- Core Clause 19 (the 'prevention' provision, NEC's lesser form of force majeure) - could a swine flu epidemic be considered an event of prevention, i.e. stopping the Contractor completing the works by the agreed date or at all? The test is whether an experienced Contractor would have judged, at the date of the contract, the event to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it. So the global awareness of the pandemic remains the problem.

- Prevention is also a 'Compensation Event' (Clause 60.1(19)) entitling the Contractor to time and/or money.

- Employer's Risks (core Clause 80) do not include anything which could be deemed to cover a flu epidemic, but the parties can agree extra Employer's Risks in the Contract Data section or in the Option Z clauses.

And finally the IChemE International Form of Contract (for use with Process Contracts):

This form contains perhaps the most helpful provisions, at least from the Employer's perspective:

- Clause 3.6 - has the Contractor complied with the requirement always to have and maintain adequate resources for the proper and timely execution of the works?

- Clause 7.2 - has the Contractor developed, implemented and maintained the health and safety and environmental plans stated in schedule 4 (drafted by the parties)? Does that schedule contain any requirements in relation to pandemics?

- Clauses 12.6 and 26 - has the Contractor taken adequate responsibility for the health and welfare of its personnel?

- Clause 14 - could the inclusion of a force majeure event for epidemics also apply to pandemics?

Finally, some practical legal advice ...

Some actions that Employers and Contractors might consider taking are:

- assessing rights and obligations under existing contracts and laws and seeking advice on minimising any exposure;

- re-negotiating existing contracts and reducing risk exposure in new contracts, although I appreciate renegotiation in most cases simply won't be an option. As it is likely that existing provisions favour the Employer (and a force majeure clause is unlikely to be helpful anymore), Contractors will need to insert express provisions if they want time or money;

- implementing preventative strategies (for example business continuity plans);

- investigating appropriate insurance policies;

- considering health and safety obligations to employees; and of course,

- maintaining records and preparing extension of time and cost claims caused by an outbreak.

Taking steps to manage the risks now may save significant time and costs in the long term. Parties to a construction contract should clearly identify who bears the risk if this pandemic strikes down a workforce and take all appropriate precautionary steps to minimise the spread of the virus.

For those of you who subscribe to practicallaw.com, you may also be interested to read the detailed practice note 'Pandemic influenza: is your business prepared?'