**NZS3910:2013 – A Lonely Place For An Engineer**

In our bubbles it is hard to keep hold of all the strands that are coming at you from contract parties, government and professional bodies. Sorry, here is another one. We are going to look at the ‘possible actions now’ in this article. Many of the members have asked, “what is the right contract position to take with live projects?”. It appears that the parties are generally settling on following key terms of the contract:

* 5.11.10 – deals with ‘statute, regulation, or bylaw’ change
* 6.7.1 – deals with Suspension of Works
* 10.3.1 – deal with Extension of Time (EOT)
* 14.1 – deals with Frustration

So let’s work over these. There is certainly a lot of debate and the government has recently issued specific guidance around public works contracts. The main area of discussion seems to be about 5.11.10 and the impact of this clause. It reads:

*‘If after the date of closing of tenders the making of any statute, regulation, or bylaw, or the imposition by Government or by a local authority of any royalty, fee, or toll increases or decreases the Cost to the Contractor of performing the Contract, such increase or decrease not being otherwise provided for in the Contract, the effect shall be treated as a Variation.’*

There appears to be no consensus on this in the industry. Well that’s because it comes down to each and every contract situation being different. For example, what is the cost imposed to the parties? Here are some examples:

1. Scaffold or plant hire costs during lock down
2. Staff costs during lock down
3. Company overheads during lock down (rent, mortgage etc)
4. Site shut down costs
5. Additional separation between site and occupiers
6. Remobilisation

The first three are effectively examples of P&G on a contract. But is that claimable? Engineers should be noting the Government assistance packages at this point. The wage subsidy, this has been issued to deal with this exact situation. Most of the staff that Contractors have are on contract, not salary, and so these costs could be abated.  What about mortgage holidays or allowances under leases for ‘No Access’. The ADSL lease specifically deals with this due to the Government mandate to shut down all non-essential business premises.  The current Covid-19 lockdown falls within the terms of the “No Access” clause 27.5 of the lease. With that all rent cease to be payable from March 26, 2020. Then there are the hired items. All Contactors, with any commercial sense, have off hired the scaffold and other hired items with immediate effect unless they have in writing from the supplier a no charge period.

What are you left with, the true variations, the things like the time, materials and costs to lock down the site, to instigate greater separation between site and occupier for essential buildings or to remobilise and undo the locking down of the site. So claims under 5.11.10 (other than for true variations) are generally going to be windfall, double dipping or at worst profiteering at the Client expenses. Remember they also have the same battles.

What about suspension (6.7.1)? This can be put in place but there is no default of the Contractor nor the Principal. How do we deal with that? Well clause 6.7.5 may be appropriate in the situation (a negotiated suspension) with the express removal of the threat of abandonment at 6.7.4 and removal of the entitlement to a full variation under 6.7.3. Why no variation, on the basis there is no loss of opportunity. If you can’t employ your resources elsewhere there is no opportunity. Legally your resources are stuck in bubbles. However, there is no “necessity” for the contract works to be suspended in accordance with clause 6.7.1 of the contract. The works can still be completed, but in time. This situation is triggered by the Health Act which puts in place an overarching mandate where no one can attend site. This situation gives rise to delay that is not due to the fault of the Contractor nor the Principal (i.e. it would be a different story, if say, a building consent delay due to the fault of the Principal occurs whereby it is necessary for the Engineer to suspend the works).

So where is this landing… it’s a matter of time. Contractors will need to look to clause 10.3 to claim an Extension of Time (EOT), or clause 14.1 which deals with Frustration and may excuse the Principal or the Contractor from performance. However, the key aspect to this is whether the Covid-19 outbreak will entitle the parties to invoke those clauses and this in turn will depend on the impact of the outbreak on a particular project.

My view would be that neither party should enact clause 14. The basis of this is that the contract **can** still be completed, it is just a matter of time. In addition, the Client cannot get another Contractor to complete the works. Thus, frustration is not a suitable fit. However, given time the works will be completed. Thus, my current view is that under 10.3 an Extension of Time would be awardable and enable the works to be completed.

Then, in this case we must turn to the costs. Of the possible items an EOT could be claimed, an award for only clause 10.3.1(f) is applicable in my view. Noting that these circumstances were not ever envisaged at the time of this contract’s drafting by the NZS. On the basis of clause 10.3.1(f) cost would however not be claimable. The Contractor would be given just more time to complete the works. This is confirmed by clause 10.3.7.

So, to conclude, at this stage, the current view is that the shutdown period is a nil cost period, but time should be awarded to the contractor to prevent Liquidated damaged being applied by the Principal once the shutdown is over and works re-commence. Albeit that these are unprecedented times and many Clients will submit to the Engineer to Contract that only an EOT under clause 10.3.1(f) is due. There should be consideration of fair and reasonable P&G to be paid by the Principal (save for such things like scaffolding that has come off-hire etc or staff wages etc.). But the Contractor must provide a claim, substantiation of these costs and evidence of any assistance packages for assessment. This may include copies of rental agreements, hireage contracts and proof of payment to justify and verify that no windfall is occurring.

In basic terms and from discussing the matter with Lawyers and other peers we should concluded that the situation is unique in law and contract. Thus, it will be down to the lonely Engineer to Contract, for each contract, to determine an initial outcome in consultation with parties. The parties would then need to agree or disagree with this outcome. If there is a disagreement with the outcome, parties would then need to follow the dispute resolution process and potentially write case law by going to court if no mediated agreement could be found.

So… all said we are in uncharted seas with no compass, so be reasonable to the parties on both sides of the contract.

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