



COVID-19

#10 THINGS YOU SHOULD KNOW BEFORE REOPENING CONSTRUCTION SITES

PROJECTS AND CONSTRUCTION

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On Friday 1 May 2020, An Taoiseach Leo Varadkar announced a series of new measures including a [roadmap](#) to ease COVID-19 restrictions and reopen Ireland's economy and society.

Construction was one of the last sectors to close in the lockdown phase, but it will be one of the first to return to work. With the very limited exception of essential projects, construction sites in Ireland have been closed since 28 March 2020.

The Roadmap envisages the phased return of construction workers to sites across the country on 18 May 2020.

Here are ten critical things you should know before returning to site.

1. Guidance from the Construction Industry Federation (the CIF)

On 14 April 2020, the CIF published new [Standard Operating Procedures](#) (SOPs) setting out comprehensive plans for “*a standardised approach to (re)commencing construction projects in Ireland.*” The SOPs set out a 24-point strategy for safely returning to site.

Key control measures required for managing the spread of the virus on live projects are at the core of the document. These include recommending social distancing of at least two metres in the working environment and practising good hygiene. Site meetings should only be held on an “*absolutely necessary basis*” and consideration should be given to holding meetings in open areas where possible. Where site operatives are required to operate within a two-metre distance of each other, the SOPs recommend the introduction of robust protocols including the wearing of personal protective equipment (PPE).

The SOPs also provide for a detailed suite of standardised documentation for use by the industry in order to review works practices, monitor adherence to the SOPs and the implementation of mitigation measures at potential virus transmission points. These include control measures in relation to deliveries, seating arrangements in vehicles, cleaning of equipment, removal of turnstiles, staggering start and finish times, increasing access points and the potential introduction of one-way systems on-site. The SOPs also call for individual COVID-19 Compliance Officers to be appointed at every level within the contractual chain.

From a health and safety perspective, it is recommended that the Project Supervisor for Construction Stage (PSCS), the main contractor and the client should jointly formulate a COVID-19 plan for each project in order to set out a risk profile for each work activity on site. Crucially, all project health and safety documentation should be reviewed to ensure that it conforms with the SOPs. This may require contractors to update their Safety Statements and Construction Stage Health and Safety Plans.

Whilst most of the recommendations are focused on the activities of contractors, the SOPs also highlight the role of the client, noting that clients should accept that compliance with the new procedures will have productivity and cost implications. The SOPs recommend that before construction resumes on any site, a

revised risk assessment is conducted by the client and the contractor to ensure the project can recommence and that revised delivery schedules and programmes are agreed. This is easier said than done however from both a contractual and commercial point of view. Contract budgets are often tightly controlled, and adherence with the SOPs poses numerous challenges for clients operating within such parameters.

Subsequently, On 24 April 2020, the CIF published the [Back to Work Resource Pack](#) which complements the SOPs and provides a final checklist before returning to work. This recommends ensuring that:

- Management teams are familiarised with the SOPs.
- A safety review has been carried out for each site and put in place before work can restart. This includes ensuring that all relevant PPE can be sourced and secured before work commences.
- A COVID-19 Compliance Officer is appointed and briefed.
- All subcontractors have the SOP and are adapting to it.
- All workers undergo the C-19 [online induction programme](#) before entry is permitted to site.
- Workers are briefed on the SOPs.
- Workers do not congregate on the way to site, on-site or on leaving the site and making sure they do not take lunch or other breaks in groups.
- An initial small team is sent to repurpose the site to meet the demands of the SOPs.
- The official notice / permission to work is placed on the hoarding of the site and the relevant associated Local Authority.
- Standardised C-19 information posters are placed in prominent positions across the site.
- An appropriate person is appointed to talk to members of the public if queries arise.
- Local Gardai are informed of any intention to carry out work.

(Collectively, the **CIF Guidance**).

2. Guidance from the Royal Institute of Architects of Ireland (the RIAI)

On 23 April 2020, the RIAI published a series of its own proposals supplementary to the CIF Guidance. The publication, entitled [RIAI Proposals for Reopening of Construction Sites to Promote Suitable Protocols for Working Environments](#) (the **RIAI Proposals**) sets out initiatives for getting construction sites functioning in a manner that complies with the COVID-19 restrictions without compromising the quality of construction and compliance with the building regulations. The RIAI Proposals have added significance insofar as the Architect is typically the principal interface between the employer and the contractor under standard form RIAI Contracts. Therefore, Architects and all others acting in project management, employer's representative or contract administrator roles should familiarise themselves with this document.

The RIAI Proposals highlight that construction sites present different degrees of risk depending on the type of the project, the site set-up and construction techniques. The RIAI proposals, therefore, recommend evaluation of the specific risks applicable to each project. Risks should be carefully considered against headings such as:

- Open or closed site
- Confined spaces
- Speed of construction
- Adequacy of horizontal and vertical circulation routes
- Multi trades activity

For example, the RIAI proposals identify excavation, groundworks, foundations and piling as low risk. Structural frame, roofing, basement and substructures are considered medium risk whereas cladding, glazing, mechanical, electrical and certain fit-out activities are considered higher risk.

In addition to risk evaluation protocols, the RIAI Proposals recommend building sites operate on shifts to restrict the number of people on-site at any one time. There are also recommendations in relation to cleaning at designated stages throughout the working day and daily toolbox talks on social distancing.

The RIAI Proposals provide an extensive summary of the various PPE options for on-site operatives, including distinct recommendations depending on the risk profile of each project. For example, on high-risk

projects, full hazmat suits are recommended together with multi-use wraparound face protection screen and disposable approved face masks.

Further measures in relation to site set-up are recommended to enhance safety on site, such as walkways being widened, stop and go systems for all stairwells and establishment of site prefabrication areas remote from the main areas of work. Additionally, the RIAI Proposals list the potential modifications that can be made by contractors across a multitude of works activities, including changes to the “*buddy system*” allowing for two people to work as part of a permanent team in close proximity.

Finally, the RIAI Proposals provide protocols for site inspections during COVID-19, including greater use of video and photography to reduce travel to all parts of the site and virtual site meetings.

3. Changes in Law / Force Majeure

The main changes in law are *currently* reflected in the Emergency Measures in the Public Interest (Covid-19) Act 2020 and the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 which were both signed into law in late March 2020. As a result of this legislation, construction activity has virtually halted nationwide for six weeks thereby leaving contractors to consider their options in terms of potential claims against their upstream counterparties.

Most standard form contracts used in Ireland contain rigorous procedures for addressing what happens in a change of law scenario, thereby potentially activating the right of the contractor to claim for additional time and/or money under the contract. Examples of some of the applicable provisions are set out below.

Type of Contract	Position and Considerations
RIAI (Blue Form and Yellow Form)	Under Clause 4, where the cost of the performance of the Contract is increased (or decreased) as a result of legislative enactment, the Architect shall certify such an increase or decrease.
JCT (DB 2016)	<p>Clause 2.6.12 provides that the exercise of a statutory power by Government or a local authority which “<i>directly affects the execution of the Works</i>” will qualify as a Relevant Event, allowing an extension of time, subject to the Contractor taking appropriate steps to mitigate the delays.</p> <p>Clause 2.15.2 may also provide an avenue for Contractors in that it states that changes to Contractor’s Proposals following the Base Date to comply with the requirements of relevant authorities will amount to a Change and a Relevant Matter thereby potentially activating the right to claim for loss and expense under Clause 4.20.</p>
NEC4	A “Compensation Event” can be triggered under Clause 60.1 which can potentially operate to provide the Contractor with an increase in Prices. While changes in law are not expressly listed as a “Compensation Event”, where the event is not listed as one of the events in the contract, this can potentially be construed as such.

Type of Contract	Position and Considerations
PWC	Changes in law are included as Optional Clauses under the PWC Form of Contract and their implementation will depend on the Schedule. Option Clause PV1.1.4 provides that the Contract Sum shall be adjusted as a result of increases in the costs of the Contractor performing its obligations as a result of changes in law made after the Designated Date.

Following publication of the Roadmap, two further statutory instruments have been published in the form of (i) Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 (Continuation of Part 2) Order 2020 and (ii) the Health Act 1947 (Section 31A – Temporary Restrictions)

(Covid-19) (Amendment) (No. 2) Regulations 2020. It remains to be seen if any new industry-specific legislation will be considered for enactment following the publication of the Roadmap. If legislation is introduced to implement certain of the working recommendations contained within the CIF Guidance and the RIAI Proposals, then this is also likely to have further consequences from a delay and disruption perspective.

In addition to changes in law, contractors may also seek to bring a claim for force majeure under their construction contracts. Once again, most standard forms in Ireland facilitate this. However, critically, the majority of such contracts only allow for an extension of time, rather than an increase in the contract sum. Therefore, it is possible that many contractors will adopt a two-pronged approach in relation to their claims, relying on both change of law provisions and force majeure. The various positions in relation to force majeure under some of the main standard forms in Ireland are discussed in some detail in our previous article [COVID-19 and Construction: Defining the New Normal](#).

4. Timelines for Making Claims

As a general rule, if your contract is executed as a deed it will attract a twelve-year liability period for claims to be brought from the date the cause of action first arose. If your contract is executed underhand, then this will typically attract a six-year liability period. That said, the ability to bring any potential claim under the contract depends on there being a contractual entitlement to do so. Moreover, with the introduction of the Construction Contracts Act 2013, gone are the days where parties have a prolonged battle over final accounts many years after the projects completed.

Many construction contracts contain detailed notification requirements which are to be made within certain timeframes, often expressed as a period of weeks. For example, under the NEC4 suite of contracts parties are required to submit Early Warning notices in connection with any matter which could affect the cost, programme or quality of the project. In certain circumstances, failure to give adequate notice can lead to a claim for additional time and money under a Compensation Event being denied.

Some other more bespoke contracts may even include condition precedent time bars. This can include a requirement for the contractor to give notice to an Employer's Representative within a certain number of days of becoming aware of any new circumstance necessitating an extension of time or a change to the contract sum. In these types of contracts, where circumstances are such that the claims are not fully quantifiable (such as is currently the case with COVID-19) then the contractor should give as much detail as possible, so far as is practicable, including an indicative proposal for any extension of time or cost increases. Depending on the complexity of the clause, this may also include requirements for fortnightly updates to the proposals. Failure to strictly follow such procedures can lead to claims being void under the contract.

5. Health and Safety Documentation

If you are a contractor, you should be mindful that the employer may be entitled under the construction contract to be provided with an updated Construction Phase Safety Plan (taking account of the Roadmap), together with a demobilisation plan documenting the safety measures implemented and circumstances leading up to the site closure. If you are an employer you should be asking the contractor to submit draft working proposals for review, detailing the proposed strategy for return to site on 18 May 2020.

One potential problem which may arise is in the role of the PSCS itself. Given that the PSCS's role is to manage and coordinate health and safety matters during construction stage, the PSCS will play a key role in ensuring that the SOPs protocols and COVID-19 restrictions are adhered to within the workplace. However, it is a common practice within the industry for an employer to choose to appoint the main contractor as PSCS. Given that the implementation of such measures are likely to have time and cost implications, there is a potential conflict of interest in having a Contractor as PSCS. The contractor may have a vested interest in implementing measures which go beyond that which is necessary in order to ensure maximum recovery. Employers should be mindful of this possibility and should take advice where appropriate.

6. Records

Maintenance of accurate records throughout the return to site phase will be critical in monitoring

construction progress against the programme and adherence with the SOPs. The RIAI Proposals recommend increased use of video and photography for this purpose. Always remember to include date and time stamps with your photographs. It is advisable to circulate contemporaneous records internally with your colleagues to ensure that the sequencing of key events is also accurately captured. Site minutes, correspondence with local authorities, interactions between COVID-19 Compliance Officers, attendances on-site and other matters should be carefully collated. Such information will be essential in mounting claims for extension of time and increases to the contract sum (more on this at Point 8 below).

7. Insurance / Third-Party Funders

The CIF Guidance recommends consulting with your insurer before returning to site to ensure that you are adequately covered for a return to site. This may involve getting your insurer comfortable that appropriate steps have been taken to adhere to the SOPs and that protocols are in place to ensure that all levels of the contractual chain are aligned in terms of next steps. Business interruption insurance may cover issues for contractors relating to COVID-19. Likewise, robust Owner Controlled policies may also make provision for employers to mitigate some of the potential delay issues associated with the current crisis. If you are a contractor, you may be asked by your employer what actions you have taken with your insurers more generally in connection with business interruption during this period and in relation to your potential entitlements for delays under any relevant policies.

Sequencing and best practice is not just critical for insurers but also third-party funders of projects. This is of particular relevance given that the vast majority of private sector projects in Ireland are third party funded in some form or another. However, compliance with the SOPs could create problems for borrowers / developers who are working to specific budgets. If you are a developer and a bank monitor has been appointed to your project you should be actively engaging with them on any steps being taken with your contractor, including in relation to potential contractual notifications.

8. Delay, Loss and Expense

Claims for extension of time and increases to the contract sum may seem straightforward in the context of the current site shutdown period. However, these will be significantly more complex where sites reopen, and contractors are required to adhere with the CIF Guidelines. Contractors will be required to accurately detail where delays have occurred and what specific matters have led to an increase in the contract sum. Productivity will be analysed against Pre Covid-19 levels to see whether there are any real decreases in efficiency and programme across specific work areas. Contractors may also be invited to set out the status of any activities during the lockdown phase which did not require physical presence on-site including, where applicable, any and all steps that were being taken to mitigate any delays. It is likely that delays to the critical paths after sites reopen will require specialist analysis and assistance from delay and quantum experts. In terms of loss and expense, it will be important also to consider whether staff overheads and whether any staff were furloughed during the period of site shutdown, thereby decreasing overheads.

9. Liquidated and Ascertained Damages (LADs)

LADs act as a contractual safety net for employers where the contractor misses its completion date. They typically cover losses incurred by the employer as a result of late delivery by the contractor. The rate of LADs is usually expressed as a set figure per day or week. For example, if your project is delayed for eight weeks (which will probably be the case for the COVID-19 site shutdown phase), and the specified rate is €10,000 per week, then the employer may be entitled to levy liquidated damages up to €80,000 for this period. However, the contractor may be entitled to relief from liability if the COVID-19 shutdown qualifies as a relief or a compensation event (see above). Also LADs under Irish law must be a "*genuine pre-estimate of loss*". This means that if the rate of LADs is arbitrary this could amount to a penalty which is unenforceable. All calculations regarding LADs should, therefore, be shared with your contractor at the time they are applied. Any damages being claimed back from the contractor must be evidenced and appropriately quantified. Contractors should be mindful of such counterclaims and also any reliefs they may have available and should be seeking clarity from their employer counterparties as to their intentions.

10. Adjudication

Parties to construction contracts in Ireland may refer payment disputes to a third-party adjudicator appointed pursuant to section 6(4) of the Construction Contract Act 2013 (the Act). Adjudication is a fast track dispute resolution mechanism for the construction industry. Given that the vast majority of adjudications are carried out remotely, contracting parties prefer to initially adjudicate payment disputes arising from this crisis. The more traditional methods of dispute resolution such as conciliation and mediation are often dependent on face time with the other party. Obviously, virtual mediations and conciliations are something which parties will be looking at in the meantime. However, the parties' right to adjudication is enshrined under the Act and with cashflows and project budgets being stretched to their limits in the coming months, we expect to see a significant increase in this form of dispute resolution in Ireland. If you are considering adjudication as an option, it will be essential to take appropriate legal advice.

Conclusion

The COVID-19 situation is a once in a lifetime event and the full impact on construction projects and the construction economy in Ireland is not yet capable of being measured. However, the CIF Guidelines and the RIAI Proposals set out clear protocols in relation to industry practices going forward. Such practices should be reviewed and considered in the context of the contractual framework before returning to site. If you have any queries in this regard, please do not hesitate to contact us.

For more information, please contact Jamie Ritchie at jritchie@lkshields.ie.

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