

## GUIDANCE NOTE: **COVID-19**

This Guidance Note provides tips on reducing your contractual risks for the COVID-19 pandemic.

### Can I claim an extension of time (“EOT”) for delays due to COVID-19?

This depends on your contract.

The contract can allow the contractor to claim an EOT for delays caused by the COVID-19 pandemic, including:

- the unavailability of labour or subcontractors;
- the unavailability of materials;
- complying with changes to legislative requirements (e.g. social distancing and masks); and
- complying with industry shutdowns and travel restrictions.

Most construction contracts allow EOT claims for delays caused by others, or which were not reasonably foreseeable when signing the contract. It might also allow claims for delay costs as well.

We recommend you review your contract and:

- check when you can claim an EOT;
- check when you can claim delay costs; and
- make sure your construction period includes more time than you need.

To claim an EOT, you must update your client on the progress of your works, and notify them of delays as soon as possible. Communication is key, and so is taking steps to minimise the delay.

Make sure you claim the EOT within the time required by the contract. If you do not, you will lose your right to an EOT.

For regulated domestic building contracts, an EOT must be claimed within 10 business days of the delay occurring.

### Can I agree with my client to suspend work under the contract?

Yes, you can agree with your client to suspend work under the contract.

If you agree to suspend work under the contract, make sure the agreement is in writing and covers:

- who is responsible for the work during the suspension (e.g. insurance, safety, site security etc.);

- what costs you can claim for the suspension (e.g. overheads, insurance, equipment, temporary fencing, scaffolding, dewatering etc.);
- how long you can take to remobilise on site;
- the remaining construction period;
- an adjustment to the Date for Practical Completion; and
- any other issues, such as re-hiring costs, price increases etc.

Also check your construction works insurance, which might automatically suspend because of non-activity on the site.

### Can I agree with my client to terminate the contract?

Yes, you can agree with your client to terminate the contract.

An agreement to terminate will need to be in writing and cover:

- whether any deposit is returned;
- payment for completed works;
- ownership of unfixated plant and materials;
- ownership of ordered materials;
- who is responsible for any ongoing safety works (e.g. dewatering, temporary bracing etc.);
- who is responsible for losses or costs caused by the termination (e.g. any finance or loan costs, or loss of government grants etc.);
- who is responsible for ongoing building approvals;
- who can request any refund of the Home Warranty Insurance premium and QLeave levy; and
- whether your client can use designs and plans you obtained for the project.

There are many risks associated with termination. We recommend you seek legal advice on any termination, even if it is by agreement. An unlawful termination can have serious consequences. For example, your client might make a non-completion claim under the Home Warranty Insurance Policy if you incorrectly terminate the contract. Any amount paid by the QBCC under the policy can be recovered from the contractor.

### What if the site has to be shut down?

If a site is shut down because the owner must go into quarantine, or because of an industry wide restriction by the government, then the contract might allow a claim for an EOT and delay costs.

However, it is likely to be different if a site is shut down because of your employee or subcontractor contracting COVID-19. That might simply be a consequence of you complying with your workplace health and safety obligations.

## How can I protect myself in future contracts?

Some ways to protect yourself are:

- check the availability and cost of materials before quoting and signing a contract;
- check the availability and cost of subcontractors before quoting and signing a contract;
- use allowances for Prime Cost Items and Provisional Sums for materials and products you suspect will be delayed or increase in price;
- specify which suppliers will be used, so any agreed change in suppliers will be a variation to the contract;
- share the supply risk for materials and supplies with your client;
- check you can claim an EOT for delays caused by:
  - the unavailability of labour or subcontractors;
  - the unavailability of materials;
  - complying with changes to legislative requirements; and/or
  - complying with industry shutdowns and travel restrictions; and
- allow for longer construction periods.

If you have any queries, please do not hesitate to contact Master Builders Members Legal.

***This Guidance Note is not legal advice and ought not to be considered legal advice. We recommend that you engage a lawyer to consider all of the relevant circumstances applicable to your particular set of facts.***