

MANAGING COVID-19 WITHIN CONTRACTS

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INTRODUCTION

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This guide was originally produced by Build UK in 2020 to help the construction industry deal with the effects of coronavirus (COVID-19) – and similar pandemics – within existing and future contracts. Since then, COVID-19 has continued to have a profound impact upon the industry, with projects being disrupted, delayed and postponed. Moving forward, projects that are yet to commence will have to deal with any current restrictions, in addition to changes that might occur over the life of the project.

The Government continues to put construction at the heart of its recovery plans, and it is vital that the industry is ready to respond to the challenges and opportunities that this presents. This will be possible only if parties at all tiers have the cash and confidence to invest in the assets to be delivered and the resources needed to deliver them.

There has been detailed guidance from both Government and industry on dealing with the commercial issues arising from COVID-19 over the last 18 months, and this guide provides a summary of the information available. It builds on Build UK's [Contract Terms Guidance](#) by encouraging active management of risks and pragmatic allocation of residual risks that cannot be mitigated.

The Construction Leadership Council (CLC) has issued a range of guidance which can be accessed via [CLC Taskforce: COVID-19 Contractual Guidance](#). The CLC has been clear that actions at this time will be remembered and that all firms should think hard about how their reputation could be damaged by not doing the right thing, and its guidance is designed to help parties put this collaborative philosophy into practice. Now, more than ever, it is crucial that the industry works together to restore both itself and the wider economy to full health.



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2. Use open book processes

- In the current circumstances, where there is a high risk that developments around COVID-19 could cause fundamental changes to the time and/or cost of a project, there is a strong case for making contracts at all tiers 'open book'. This provides visibility and established target cost and disallowable cost mechanisms, such as those used in NEC and the JCT Constructing Excellence contract, can be used to transfer reasonable contracting risk and incentivise efficiency.
- Such mechanisms are important to ensure that open book is not confused with 'cost plus' or 'cost reimbursable' where the entire time and cost risk of a project rests with the Client.
- Open book processes are therefore particularly helpful when it comes to measuring time and/or cost impacts of a COVID-19 event. For example, if a change in guidance reduces the number of operatives that can be on site at one time, it is very difficult to measure the effect if there is no transparency as to how many operatives were assumed in the original price.
- This avoids any arguments about what was included or should have been included and leaves the parties free to focus on how best to work around the new constraint.

Using this Guidance

This publication is issued by Build UK Group Limited in order to give general guidance only on what it considers to be best practice; if you require guidance on a specific issue, you should seek your own independent professional advice.

3. Do not ignore the possibility that things could get better

- It is natural to focus on the risks of further outbreaks or increases in restrictions; however, construction projects can run for months or years and it is possible that restrictions might be relaxed or removed before a project is completed.
- Open book arrangements will allow Clients to benefit from such improvements to the same extent that they are taking the risk on delays or additional costs.
- Sub-contracts that are entered into later in the construction period might be subject to different restrictions to those that were in place when the main contract was entered into. Contracts should contain sufficient flexibility to ensure that best value can be delivered throughout the construction period.

4. Keep good records

- Whether the parties have agreed to work collaboratively or one party has given notice of a contractual claim, good records are essential.
- If a Client is to be asked to reimburse costs, they will expect to be able to audit what those costs are and that they were actually and necessarily incurred. If a party seeks to demonstrate a contractual entitlement, they will need records of the event giving rise to the entitlement and of the time and/or cost incurred. Further information on what records to keep and how to maintain them can be found in the [CLC Record Keeping Guidance](#).