

Client Advisory Bulletin

COVID-19 Preparedness

Updated: April 27, 2020

We have prepared this bulletin to share MHPM_Driver's current perspective on the risks that COVID-19 poses to construction projects. This bulletin is a useful starting point for the analysis of specific actions needed to address the unique aspects of each project. As the COVID-19 situation evolves, we will continue to update this bulletin with new, relevant information.

STATUS

The risk to construction projects in the UAE continues to evolve as public health officials have recommended increased levels of social distancing and restrictions on labour movements to minimize the impact of COVID-19. The [Ministry of Health and Prevention](#) currently reports that the number of COVID-19 cases is growing daily, as it is in most countries around the world. As of the date of writing this bulletin, increasing mitigation efforts in the UAE appear to be having positive effects, as the rate of growth in new cases has declined over the past week. The public health risk is rated as elevated, with additional cautions for higher risk individuals such as those over 70 and with pre-existing medical conditions.

RISKS

Below are the most common project risks associated with construction projects.

1) Project team members may be affected by COVID-19

Although there is much work that can be performed by project team members from home, there are some team members who inevitably must carry out their work on construction sites, in client offices, and in other locations away from home. In these circumstances, there is a risk that these team members may be infected with COVID-19, which could leave the project team short of resources and lead to reduced productivity. To minimize labour disruption and the spread of disease, Owners should ensure that all firms participating in their projects have internal protocols in place to address the following:

- a. **Containment** – Ensure staff who are exposed to the virus, or have a higher risk of being exposed, go into self-isolation to avoid spreading the virus within each firm. This includes people returning from business and personal travel to other countries.
- b. **Education** – Promote practices that are proven to reduce viral transmission and refer staff to reliable sources such as the [Ministry of Health and Prevention](#) and the [Dubai Health Authority](#).
- c. **Continuous Improvement** – Regularly monitor recommendations from health authorities and adjust protocols accordingly.
- d. **Communication** – Request that all firms participating in the project share relevant corporate and site specific COVID-19 mitigation policies. This is essential to allow all parties involved in the project to make informed decisions regarding the possible risk of transmission to their own staff.

- e. **Cleaning** – Owners and their representatives should ensure that the contractors are enforcing relevant disinfection protocols such as Dubai Municipality's External Circular No. 21 dated 17 March regarding the disinfection of sites and labor camps. Application of such protocols will likely reduce on-site productivity on many worksites.

2) Availability and price of materials may change

Some of our projects have suffered delays in the delivery of Chinese and other internationally manufactured materials because of COVID-19 precautions and impacts. Owners should assess their current state of procurement:

- a. **Projects where material supply contracts have been executed** will be governed by the contracts and any particular conditions. If the orders cannot be easily reversed then Owners and Project Managers will have to work with Contractors on mitigating the impacts of these delays by – for example – resequencing the works on site, considering expedited freight options, or the use of temporary alternatives.
- b. **Projects where material supply contracts have not been tendered** should expect to receive pricing that reflects the perceived risk of price increases. Owners should be aware that in times of uncertainty, the expected value of risk is often exaggerated, and prices may be far higher than warranted. Options include, considering appropriate contingencies, delaying award, specifying local or regional suppliers, or Owners taking on the risk of future material cost changes (increases and decreases). Owners should consult with their Project Managers to develop their best strategy.
- c. **Projects where tendering is in process** – if bids have not been received, Owners should consider issuing an addendum to clarify which party will bear the risk. Owners cannot afford to have some bidders assume one direction and others assume something else.

3) Work Disruptions

Each of the Emirates is taking different measures to curb the spread of the disease. This will impact ongoing government operations and require non-essential workers to stay home. Owners should ensure that plans are in place to address the following:

- a. **Restrictions on the transportation of workers** – The restrictions being placed on the movement and transportation of workers is evolving. Until recently, there were no restrictions for workers to move between Emirates, however this changed on April 14, 2020 and there is now a prohibition in place on the movement of workers between different Emirates. Additional restrictions include mandating construction companies to avoid loading the buses to their full capacity, resulting in fewer workers being transported to and from sites in any given trip. These restrictions will inevitably result in time and/or cost impacts that Contractors will seek relief from Owners on.
- b. **Disruption to permitting processes** – Most municipalities have moved their building permit operations online which in principle means that municipalities should continue to issue permits. Meanwhile, Dubai Municipality has issued a circular on April 26, 2020 offering an extension to building permits until end of the year. In spite of these positive measures being taken, experience from our ongoing projects has demonstrated that there are certainly delays in these permitting processes.
- c. **Disruption to building inspections** – The unavailability of building inspectors may require construction projects to stop at key stages before work progresses to the next stage. Alternative strategies may be considered such as engaging independent engineers to conduct the inspections and using photo or video evidence of work that has been covered.

4) Application of *Force Majeure*

The COVID-19 pandemic may trigger *Force Majeure* clauses in contracts. *Force Majeure* is an event or effect that can be neither anticipated nor controlled by the Contractor at the time the contract was signed. Such an event would permit the Contractor and Owner to be released from their contract obligations.

The difficulty arises in that *Force Majeure* is not defined in the law and was left for the courts to develop its criteria and conditions of its application. *Force Majeure* is set out in Articles 273 and 287 of the UAE Civil Code and is only upheld when the performance becomes impossible and not simply onerous. In most construction contracts, the parties themselves designate the events which they consider to constitute *Force Majeure*, these contractual provisions remain valid and the courts generally uphold the parties' agreements.

However, many *Force Majeure* provisions in contracts do not list pandemics as a *Force Majeure* event. For example, Clause 19.1 in the more commonly used FIDIC 1999 '*Red Book*' contract provides that Force Majeure means an exceptional event or circumstance satisfying the following four criteria: (1) beyond a party's control, (2) which such party could not have reasonably provided against before entering into the contract, (3) which, having arisen, such party could not reasonably have avoided or overcome, and (4) which is not substantially attributable to the other party.

Furthermore, the Owner and their Project Manager should ensure that the Contractor is reminded of its duties on mitigation and burden of proof. Both these duties typically rest exclusively with the Contractor and include but are not limited to keeping detailed records and documentation of the impact. Much thought will therefore be given as to whether owners of projects' risks are complying with their duty of mitigation to minimise costs and damages to projects.

SUMMARY - Don't panic but be prepared

1. Request copies of corporate and site-specific policies from all consultants and contractors, confirming that they have appropriate internal protocols to contain and prevent their staff from spreading the COVID-19 virus. These policies should also promote the continuity of office work and site work.
2. Confirm any material delivery delay and cost escalation impacts. Further steps may be determined based on the degree of impact on the business case. Be prepared to accept alternative products if there are shortages of specified products.
3. Monitor changes in the authorities' assessment of public health risk and, if the risk has increased, establish any additional risk management tasks.

In addition, Owners should consider if, or when, the following steps may add value to the project:

4. Conduct risk workshops to assess and quantify changes in project risks given the authorities' assessment of public health risk at that time.
5. Develop a response protocol to facilitate rapid response to changes in public health risk with appropriate involvement from the project team.
6. Conduct a sensitivity analysis to assess how impacts caused by COVID-19 infection would affect the project justification and the success of the business case.