

WHAT SHOULD UK CONSTRUCTION SITES DO DURING COVID-19?

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While the majority of the UK is under a strict police-enforced lockdown, construction sites stand as one of the few exceptions. As of the date of this note, the government's position remains that construction sites should continue to operate during the current Covid-19 pandemic,¹ and in an open letter dated 31 March, Alok Sharma, the Secretary of State for Business Energy & Industrial Strategy ("BEIS"), thanked everyone operating in the UK construction sector for "delivering for our nation through this difficult time".

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That notwithstanding, there is much confusion as to whether construction sites should remain open – some believe that doing so is unsafe, whilst others want to work. The industry is split, and news of major construction firms shutting down their sites, or re-opening sites after a temporary shutdown, dominate industry headlines.

To shut down or not to shut down – it is a difficult decision faced by many site owners or contractors. Either way, there will be serious commercial, legal and practical implications for all relevant parties concerned, particularly in the absence of clear Government instruction or guidance requiring construction sites to close.

In this note, we consider the various health & safety guidance and legal requirements that are specifically applicable to construction projects, and how they impact on the question of whether construction sites should shut down or not.

Site Operating Procedures by the Construction Leadership Council

On 23 March 2020, with support from Build UK, the Construction Leadership Council ("CLC") issued the Site Operating Procedures (the "SOP"), a guidance intended to introduce consistent measures on construction sites of all sizes that are operating during this pandemic period in line with the Public Health England ("PHE") guidelines on Covid-19 (as it currently stands). The SOP covers a range of topics, such as travelling to site, access points, hand washing facilities and other welfare facilities, including toilets, canteens, changing rooms etc. More fundamentally, the SOP expressly states that:

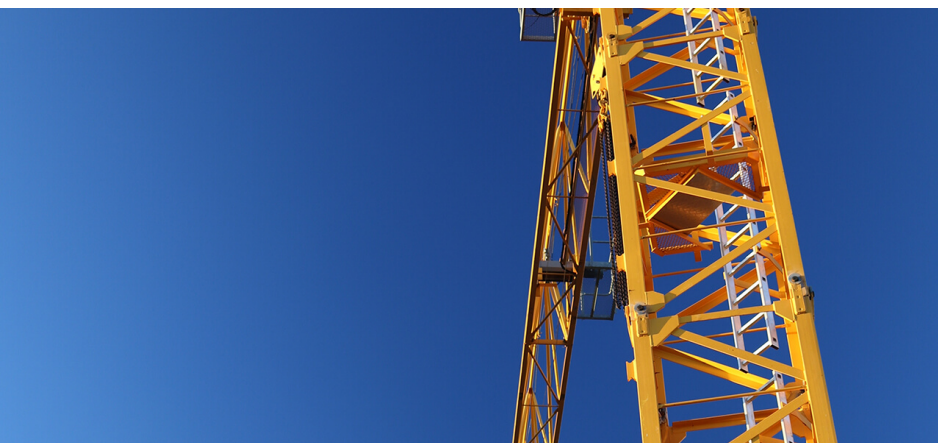
- if an activity cannot be undertaken safely due to a lack of suitably qualified personnel being available or social distancing being implemented, then it should not take place;

- non-essential physical work that requires close contact between workers should not be carried out; and
- if a site is not consistently implementing the measures set out in the SOP, then it may be required to shut down.

Despite the above, the SOP falls short of requiring a construction site to close if the two-metre distancing rule could not be observed, and in particular, it expressly recognises that there will be situations where it is not possible or safe for workers to distance themselves from each other by two metres.

Revised SOP and the Two-metre Distancing Rule

After the publication of the SOP, it was clear to the CLC that the guidance did not provide sufficient clarity on how some of the PHE guidelines, particularly the two-metre distancing rule, would apply to construction sites. In response to industry criticism, a new version of the SOP (version 2) (“Revised SOP”) was published on 2 April 2020. While the Revised SOP did provide some of the clarification sought, it also imposed a stricter regime than the original version by, among other things, making it clear that where it is not possible or safe for workers to distance themselves from each other by two metres then work should not be carried out.



CONSTRUCTION WORKS MAY STILL PROCEED, AND SITES MAY STILL OPERATE PROVIDED THAT MITIGATION ACTIONS ARE TAKEN TO REDUCE THE RISK OF TRANSMISSION.

Reportedly, the Revised SOP was literally withdrawn within hours of its release as it caused an immediate uproar within the industry. In particular, those continuing “business as usual” argued that it would mean all sites would have to close, which is inconsistent with the government’s position that construction sites should remain open during the pandemic. For example, in order to comply with the two-metre distancing rule, workers may try to lift heavier loads than they should handle alone, because sharing the load with colleague(s) would amount to a breach of such rule; and if accidents or injuries happen, which often do during complex construction operations, it may simply be impossible to administer first aid to operatives whilst keeping six feet apart.

To date, the Revised SOP remains withdrawn but the CLC states that an updated version is being developed, but does not specify the likely timeframe for the release.

Sector Guidance

In the sector-specific guidance on “Social Distancing in the Workplace during Coronavirus (Covid-19)” published by BEIS on 7 April 2020 (“Sector Guidance”), the position on how social distancing may apply to the construction sites was again explained. While the Sector Guidance largely reiterates the measures set out in the SOP, it does provide the clarification that where it is not possible to follow the social distancing guidelines in full in relation to a particular activity, but it is considered that such activity is needed to continue for the construction site to continue to operate, then, mitigating actions should be taken to reduce the risk of transmission of Covid-19. The Sector Guidance then continues to say that staff should be advised to keep two metres apart as much as possible, and work should be planned to minimise contact between works, and skin-to-skin and face-to-face contact.

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In other words, a strict application of the social distancing rules, and in particular the two-metre distancing rule, is not required for construction works. Construction works may still proceed, and sites may still operate provided that mitigation actions are taken to reduce the risk of transmission.

Construction (Design & Management) Regulations 2015

Aside from the Covid-19-specific guidance, there are the statutory duties imposed by the Construction (Design & Management) Regulations 2015 (“CDM Regulations”), which are the main set of regulations for managing the health, safety and welfare of construction projects. Most notably, a principal contractor (as appointed by the client) must actively manage health and safety risks during the construction phase, including among other things, taking account of the health and safety risks to everyone affected by the work in planning and managing the measures needed to control them, as well as ensuring that suitable welfare facilities are provided throughout the construction phase.

For a principal contractor, these duties can be particularly onerous and in some instances may not be practicable to fulfil in light of the difficulties caused by the pandemic. For example, one of the recent concerns is the lack of appropriate face masks for construction workers due to the relevant manufacturers, understandably, prioritising demands from the health sector and critical services. However, this means that level three filtering facepiece (FFP 3) masks, which are required by law to be worn as they provide crucial protection from cancerous dusts like silica and inhaling other poisonous chemicals, may not actually be available for those performing construction work, such as painting and decorating or joinery. By the CDM Regulations, such work will simply have to stop, and it will not be anything directly to do with the risk of Covid-19 infection.

While compliance with the duties imposed by CDM Regulations will be important, the need to carefully assess the risks arising from the pandemic, and to actively manage such risk by taking appropriate preventative or mitigation measures are simply part of any employer’s statutory obligation under the Health and Safety at Work etc. Act 1974, under which all employers are responsible for ensuring the health and safety of their employees and those that are affected by their activities so far as reasonably practicable. The lack of masks will only be one of many examples where due to lack of PPE, construction works simply cannot proceed as it will amount to a potential breach of law.

Conclusions

"Health and safety is not negotiable, and will have irreversible consequences on the lives of many."

Notwithstanding the various Government guidance and industry guidelines issued to date to help clarify what construction sites should do during the pandemic, confusion and differences in opinion still exist among those in the industry as to whether construction sites should remain open, and if so, how practicable can this be especially in light of the existing and regulations applicable to construction projects.

Whether a construction site should remain open or not will depend on a number of key factors, such as the options available under the relevant construction contracts, the likely contractual consequences for each option, and other commercial considerations, such as reputational implications and commercial relationships with customers, employees and suppliers etc.

Many of these will not provide a straightforward answer given the unprecedented circumstances, and parties will be well advised to take a pragmatic approach and work together to find an acceptable solution, at least for the foreseeable future, with a view to minimising any adverse impact on the ultimate viability of the project.

However, among all factors, it is argued that health and safety should always come first and must be prioritised. No doubt, Covid-19 has and will continue to have a dramatic and unavoidable impact on the whole of the construction industry; many of the challenges are arguably negotiable and can be overcome in the long run. However, health and safety is not negotiable, and will have irreversible consequences on the lives of many.

A careful risk assessment must be taken in determining whether and to what extent construction operations can or should continue at a site in view of the unprecedented challenges the world is currently facing.

This article was authored by Pauline Page, a former partner in our London office.

[1] Notwithstanding UK Government's position, the Scottish Government issued guidance on 6 April 2020 that all non-essential construction works should stop immediately due to Covid-19 concerns.

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