



## **Construction Industry Labour Shortages**

Date: 12 October 2021

### **Introduction**

The challenges faced by the UK Construction Industry are well documented with the HGV driver shortage impacting on material availability and subsequent material price increases.

What may not have been on the radar of Contractors is the potential shortfall in labour which the Construction Industry now faces. This is due to a number of reasons such as:

- A 4% increase in unemployment with employed statistics falling from 2.3m to 2.1m, according to the Office for National Statistics (ONS).
- EU workers leaving the UK, placing a greater strain on labourers and specialist trades.
- An anticipation of 500,000 UK born construction workers that are expected to retire in the next 10-15 years.

A drop in the availability of labour could leave many Contractors facing an increase in labour costs as they battle to entice the labour to them. Contractors could also face the possibility of incurring costs from their Clients as a result of delays due to being unable to maintain progress on site.

In light of the potential dangers faced by Contractors, Ramskill Martin considers some important questions:

### **Considerations**

#### **Are you currently in contract? What can you do to protect yourself?**

##### JCT

Under most forms of the 2016 JCT Suite of Contracts, the Contract Price is effectively fixed for the duration of the Contract. A change in price would not constitute a variation and if a change is instructed and it includes the labour that has increased in price, your exposure unfortunately increases.

It is important to note that if JCT Fluctuations B and C apply, the party would be protected from price fluctuations.

When considering the time impact a shortage of labour could have, there does not appear to be any clear Relevant Event under the JCT which would give rise to an Extension of Time.

It could be argued that a shortage of labour to the extent we are currently facing on a national level could constitute a "*force majeure*" event, however, this would depend on the exact wording of the Contract.

The test for a “*force majeure*” event comprises 3 criteria which are as follows:

- The event was beyond the reasonable control of the affected party;
- The affected party’s ability to perform its obligations under the Contract has been prevented, impeded or hindered by the event; and
- The affected party took all reasonable steps to avoid or mitigate the event or its consequences.

We would advise that where a party suffers delays as a result of labour shortages (where all reasonable steps have been taken to mitigate), the delays are notified immediately to the Contractor/Client. By adopting this approach, Contractors have the opportunity to take additional steps rather than failing to submit the requisite notice and losing any entitlement.

### NEC

The risk associated with price fluctuations in the NEC are entirely dependent on the Contract selected. As Options A and B are fixed price Contracts, unless Secondary Option X1 is selected, the Contractor would bear the risk of any increases.

If Options C and D are selected, the Employer would bear the risk of any price inflation as a result of the Contractor being paid its incurred Defined Costs (which will be contemporary and therefore contain the effect of inflation), and thus the Employer will bear the risk. Ultimately, the long-term inflation risk will be shared via the pain/gain mechanism as the Target Price under the Contract will remain a fixed threshold unaffected by inflationary increases.

Options E and F result in the Employer entirely bearing the risk as the Contractor’s Defined Cost will be paid throughout the project.

When considering the time element, the likely Compensation Event applicable to labour shortages would be 60.1(19) for an event which:

- *“stops the Contractor completing the whole of the works”*; or
- *“stops the Contractor completing the whole of the works by the date for planned Completion shown on the Accepted Programme”*;

and which

- *“neither Party could prevent;*
- *an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for it”*; and
- *“is not one of the other compensation events stated in the contract.”*

The Employer could allege that a labour shortage would not satisfy an event which an experienced Contractor would not have judged likely to have such a small chance of occurring. Unfortunately, this does not appear to have been tested in the Courts to provide an indication on the likely result in a formal dispute. Nevertheless, we would still recommend that Notices are submitted as soon as any delay associated with significant labour shortages becomes apparent.

## **Not currently in contract. Considerations for negotiating terms.**

Our recommendation is that, regardless of the form of Contract, you should endeavour to remove any ambiguity and ensure that a clause is incorporated into the Contract which stipulates that any labour shortages give rise to an Extension of Time and relief from damages.

### Negotiating to Enter into a JCT Contract

Force majeure is not a defined term in English Law and relying on the “test” discussed above can be subject to interpretation which does not provide certainty. Following COVID-19, many Contracts specifically include a COVID-19 clause and we would recommend the same approach is adopted here for labour supply issues.

This can be included as an additional Relevant Event within the Schedule of Amendments. It is highly unlikely that an Employer would agree for this to be a Relevant Matter giving rise to the recovery of loss but a Relevant Event would give rise to an entitlement to an Extension of Time and protection from damages.

To ensure that where a labour shortage increases the rates, we would advise that, under the JCT Fluctuation, Option B is included.

### Negotiating to Enter into an NEC Contract

We would recommend that you seek to include a specific Compensation Event via the Z Clauses, to include for labour shortages. As the NEC includes both time and money within Compensation Events, it is likely that the Employer would seek to limit this to additional time only providing relief from damages.

### Negotiating to Enter into a Bespoke Contract

The points above also apply when entering into a Bespoke Contract. Parties must ensure that they seek to include a contractual entitlement to not only fluctuations within the price of labour because of the shortages but also a right to an Extension of Time as a result of any delays.

## **Conclusion**

The entitlement of parties already in contract will entirely depend on the wording of the Contract. Ramskill Martin’s team of Consultants can assist you with the interpretation of the wording of the Contract, however, our recommendation would be to ensure that Notices are submitted in accordance with the Contracts in place. This prevents the parties failing to adhere to the provisions of the Contract and losing any entitlement they may have had due to time bar/condition precedent clauses.

For those currently negotiating Contracts, the past 18 months has raised many challenges and re-enforced the requirement to include specific clauses which would give rise to the entitlement for additional time for delays caused by a pandemic such as COVID-19, material shortages and labour shortages.

These clauses need to be carefully drafted and it is of paramount importance that they are discussed during contract negotiations. Failure to do so could result in Contractors being at the risk of absorbing the cost of price increases for labour and also at risk of damages being deducted for any delays associated with labour supply issues.