

Are PPE and social distancing costs recoverable under service contracts?

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On 23 March 2020 the Department for Transport announced that England's train operators would transfer from their existing franchise agreements onto emergency measures agreements ('EMAs') for an initial period of six months. Shortly afterwards, Transport Scotland took the same approach for the ScotRail franchise. The EMAs protect train operators from revenue and cost risks by passing them to the public sector, but this in turn brings increased oversight of their existing cost base. The longer the EMAs remain in place, the greater the scrutiny of those costs will be.

This increased scrutiny comes just as many of the contractors engaged by the train operators for operational support (e.g. cleaning companies, train maintenance providers and depot works contractors) face additional costs in performing their contracts. These contractors need to purchase PPE and consumables such as facemasks, gloves and hand sanitiser in order to demonstrate compliance with statutory requirements on employee health and safety, and must also review and potentially adjust work and shift patterns and staffing levels in order to comply with Government guidance on social distancing. Many such contractors were already facing strained profit margins before the coronavirus outbreak and will now surely look to recover these additional costs from the train operators and, in turn, the public purse.

Can a contractor recover costs as a variation?

The degree to which a contractor is entitled to recovery will of course depend on the terms of their contract with the train operator. In an ideal world, such contracts would all be on the train operator's un-amended standard terms and conditions, which would make assessing contractual entitlements to costs a straightforward exercise. Unfortunately, procurement contracts come in many guises. Train operators may have inherited contractors from previous franchisees using standard terms and conditions specific to that train operator's group.

Construction works are often procured on JCT standard form contracts (whether on an amended or un-amended basis) and NEC3/NEC4 term service contracts can be used to procure hard facilities management services (again, on an amended or un-amended basis). As such, contracts always need to be reviewed and assessed on an individual basis. We have set out below the key provisions to examine, as well as practical steps for how to mitigate or share such costs.

Of course the starting point will be to assess what, if any, changes are required to the specification to accommodate new work patterns or equipment. In some cases, this will be straightforward, e.g. implementing more frequent deep cleaning on train carriages or platform seating than that which was originally agreed. If the change is straightforward and in the interests of the

train operator, and standard form terms are being used, then you look at the variation procedure and comply with the mechanics regarding provision of notice, the nature of the variation and the pricing of the same. Note that the contractor will prepare the price by reference to the agreed contractual mechanism (e.g. a schedule of agreed rates) and supply evidence. It will then be for the train operator to decide whether to agree that price or not and, if not, then the variation will not go ahead.

In the case of JCT and NEC3/NEC4 contracts, and unless such provisions have been specifically dis-applied, any instruction by or on behalf of the train operator to deviate from the agreed specification will be treated as a relevant matter (in the case of the JCT forms) or compensation event (in the case of NEC3/NEC4 forms). Each entitles the contractor to its additional costs. With the JCT suit of contracts, if the varied works are similar to those originally within scope or carried out in similar circumstances, then the cost estimates are typically prepared by reference to rates set out in the contract. If the varied works or circumstances are substantially different, however, then they will be subject to a fair evaluation of the forecast actual costs. In NEC3/NEC4 contracts, the costs are calculated on a cost plus basis, which can result in negotiation over what types of overhead should be included.

Not all changes will involve a variation to the specification. For example, changing shift patterns to allow fewer people on

site, so as to enable social distancing, or providing PPE items such as gloves or facemasks, are not typically the types of things covered by the contract. Most contracts work on the presumption that ensuring there are sufficient personnel on site and that they are properly equipped are risks for the contractor as they fall part of its day-to-day business. In fact, quite often the contract will explicitly state this. If the train operator does not want to agree to a variation to accommodate these changes, then the contractor may look to see if there is a change in law provision within the contract that would entitle it to its additional costs.

What if there is a change in law clause?

If the contract is for a short term (typically less than three years), then a change in law clause may not have been included simply because the parties did not anticipate new legislation (including regulations, standards, and guidance that takes effect under the rule of law) relevant to the works or services being implemented. This is because the parties usually have a good idea of coming legislative changes prior to contract signature and if there is nothing on the horizon, then the contractor will usually just accept the risk. In turn, the longer the anticipated duration of a contract, the more likely there is to be a change in law provision, because the harder it is to take a view on whether any such change will occur. In contrast, contractors are less likely to take that risk where the contract is for a longer duration precisely because that risk becomes harder to evaluate.

Change in law clauses are mechanically straightforward: where a relevant change in law occurs, then the contractor is entitled to an automatic variation. The JCT suite of contracts includes a change in law provision where there is a divergence between 'statutory requirements' and the specification that permits the contractor to recover its costs.

NEC3/NEC4 contracts provide drafting as the X2 option, which allows for change of law to be treated as a compensation event, but note that this is only binding if it has been specifically included.

What matters, therefore, is the contractual definition of "change in law", which can vary from contract to contract. Some contracts take a broad definition, e.g. the JCT suite uses a broad definition of "statutory requirements" that captures rules and orders having the force of law together with local authority and statutory undertaker bye-laws and regulations. Other contracts take a narrow approach, specifically excluding non-binding guidelines and recommendations, and then there are those such as NEC3/NEC4 that, unhelpfully, do not provide a definition at all, leading to disputes as to what type of change is covered. This matters because any contractor wishing to recover PPE or social distancing costs under a change of law is likely to point

to the following documents as a starting point:

- 'Social Distancing – Construction Working Safely During COVID-19 In Construction And Other Outdoor Work Guidance For Employers, Employees And The Self-Employed' (issued by the United Kingdom Government on 11 May 2020).
- 'Office Guidance Working Safely During COVID-19 In Offices And Contact Centres Guidance For Employers, Employees And The Self-Employed' (issued by the United Kingdom Government on 11 May 2020).
- 'Our Plan to Rebuild' (released by the Scottish Government on 11 May 2020).

Contractors must have regard to this guidance in order to demonstrate compliance with their obligations under health and safety legislation, which includes performing risk assessments to determine how best to manage the risk of COVID-19 within their workplaces. However, these guidelines are not of themselves statutory. They are widely drafted and provide suggestions and recommendations, but do not currently carry the force of law. Therefore, unless the contractual definition of change in law specifically covers non-statutory guidance or the United Kingdom or Scottish Governments decide to place their guidance on a statutory footing, it is unlikely that they will fall within a change of law definition to trigger a variation.

A careful balancing act, and a more holistic approach

Given the ever-watchful gaze of the Department of Transport and Transport Scotland, and the ongoing battle between cost and revenue pressures, it is understandable if train operators push back on contractual changes as a way to avoid increasing costs. However, the industry will be mindful of the balance to be maintained between cost management and maintaining public faith that the rail system remains safe to use. The additional costs that contractors are incurring comes at a time when some of the smaller entities are already struggling and there is a real risk that it could drive some into insolvency. This worst case scenario would leave the train operator having to re-procure works and services within a tight time frame and, ironically, potentially at a greater cost as any new contractor will include PPE and social distancing costs within its price. A clear priority for train operators throughout the pandemic has been to keep staff and passengers safe, and this will continue to be key as more people are allowed to travel. After stark messages to 'stay at home', there is a need to give the public confidence that they can travel safely and that the industry has their interests at heart. Visible assurances may be needed, and if acceptable variation terms can be agreed, there could be opportunities to give the public the assurances they are looking for in order to

travel.

In light of the extraordinary circumstances in which we all find ourselves, it is ultimately to the benefit of train operators and contractors alike to find flexible solutions to common problems. While the focus of this article has been on the additional costs faced by contractors, train operators themselves also have to purchase PPE and manage social distancing on their services and within their stations. The early days of the crisis and lockdown placed greater pressure on PPE supplies and encouraged a hard line approach towards assessing social distancing risk and contract performance. Now that train operators and contractors have more experience to draw on, it is possible to take a more holistic approach.

For example, larger contractors could consider whether it is possible to pool their purchasing power with that of the train operator to co-ordinate the purchase of PPE equipment for both their own and the train operator's staff, thereby reducing the overall cost to both parties. This could also apply to the purchase of hand sanitiser for passenger use at stations. Similarly, in light of the cooperation from trade unions, train operators could potentially consider if, and to what extent, their station staff can assist cleaning contractors with respect to disinfecting trains (e.g. having train operator staff periodically wipe down ticket barriers and ticketing machines). Deploying train operator staff in such activities would increase visibility to passengers, thereby helping to improve confidence about public transport safety. Finally, contractors should also look to discuss with train operators to what extent any reduced timetables would allow for different shift patterns to be deployed for maintenance, construction and cleaning staff in stations, depots and track side. There is an irony in the fact that reduced train operations may allow for some construction activities to take place at an accelerated pace. This would provide a long-term benefit to train operators once the EMAs expire and services begin to return to normal by minimising potential disruption to services in the event that works overrun. It may also help contractors who may otherwise have to furlough staff or be concerned about cash flow.

Coronavirus has forced many changes to life in the United Kingdom and the management and performance of contracts is no exception. When the only certainty these days is that things will be uncertain for a good while yet, contractors and train operators should work together to identify opportunities and benefits, as much as cost and risk, on the basis that we are all in this together.

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