

Introduction

The Guidelines released on 20 July 2021 to support the 2 week 'Closure of Construction Site' were premised on the industry reopening in full on 31 July 2021. The changes to Public Health Orders announced on 28 July 2021 provide a legal path to reopening for many projects on 31 July 2021 as planned. However, projects are impacted by strict lockdowns in eight local government areas (LGAs).¹

The Purpose of these Guidelines

Delivery agencies will continue to manage the impacts of the restrictions imposed on construction sites through the Public Health Orders on their own projects with their contractors. Approvals for settling claims need to be sought through existing decision-making delegations and bodies.

This updated Guideline was prepared to assist affected parties to resolve the impacts of restrictions imposed through the Public Health Orders. It is intended that agreed solutions will lead to demonstrable longer-term benefits of project outcomes and are in the public interest. It supports a negotiated outcome to allow parties to openly agree strategies and settle claims in order to enable projects to proceed without further claims for disruption.

NSW Government's Objectives

The NSW Government's goal is to reopen construction sites safely and effectively in accordance with the Public Health Order. The NSW Government supports negotiated outcomes, which offer contractors an opportunity to propose an approach to mitigate and reorganise that, while not strictly envisaged by contracts, would minimise impacts. This provides an opportunity for an improved outcome including minimising costs based on project specific information and risk mitigation measures and higher productivity than would otherwise be the case in a highly disrupted environment. This will improve delivery of the Infrastructure Program and is likely to result in better social outcomes for the people of NSW.

Some agencies may also look to seek to accelerate works after the closure to make up lost time on projects which will be on a case by case basis.

The NSW Government objectives will guide negotiations and are incorporated in these guiding principles for negotiation.

Principles for negotiated outcomes

Objectives

- Contractors should minimise the impacts of restrictions on projects, including long term costs and delays to the project. Project resources cannot be held on full standby for protracted

¹ <https://www.health.nsw.gov.au/Infectious/covid-19/Pages/public-health-orders.aspx>

GUIDELINES TO SUPPORT NEGOTIATED OUTCOMES

periods, but consideration will be given to cases where retaining resources at some level today will defray costs likely to be experienced in the future.

- Contractors should consider opportunities to reorganise works to maintain continuity (or facilitate recommencement) and minimise costs and delays over the life of the project. They should put proposals to clients for consideration.
- Arrangements should be implemented by agreement as far as practicable.
- Ensure that when workers recommence on site, they are fully trained on COVID related practices on site and have a current COVID Safety Plan (template via: <https://www.nsw.gov.au/covid-19/covid-safe/general-safety-plan>)
- Provide public confidence that payments to industry are valid, timely, related to costs and can be verified.
- Ensure speedy decision making and avoid delays.

Expected behaviours

- a collaborative approach by all parties.
- transparent and open book dealings on claims by contractors.
- keep front of mind the NSW Government's objectives.
- parties should be fair and reasonable in their approach to proposed solutions and claims and act with the intent of these Guidelines.
- parties are required to move swiftly in discussing impacts, determining solutions to mitigations, assessing claims and ensuring cash flows.
- contractors should not seek to profit in any way from the coronavirus impacts across the supply chain and should treat subcontractors, consultants, and suppliers in a fair and appropriate manner and provide evidence this is being done.
- where clients and contractors have not had discussions to agree an approach that meets the principles, or where there is no agreement, that should be notified to the CEO or Secretary of the relevant agency (or a Deputy nominated by the Secretary), as well as to Infrastructure NSW and NSW Treasury. This avenue is also available to subcontractors and suppliers of affected projects.

Mitigation measures

- Contractors must mitigate impacts, and this should be implemented in a manner consistent with the Objectives above.
- Contractors continue to establish procedures and work practices based on the COVID Safety Checklist for construction in Greater Sydney, and ensure that workers, subcontractors and suppliers are fully trained on those practices and procedures.
- Contractors should discuss their mitigation approach with clients and confirm approaches to extend delivery programs, reprioritise activities, using staff leave provisions, proposed staff standdowns and sharing of critical subcontractors.

Final

30 July 2021

Assessing and paying claims

- Contracts vary from project to project. Regardless, NSW Government clients will consider claims based on reasonable and necessary costs that reflect the implementation and implications of agreed mitigation approaches.
- Agencies should partially or wholly assess claims and reimburse progressively as claims are verified:
 - The 2 weeks 'Closure of Construction Sites' period should be assessed and settled in accordance with previous guidelines.
 - Further claims should be assessed in such a way that the objectives contained in this guideline are met, and assessed, settled, and paid in a regular and progressive manner to ensure cash flow and project continuity.
 - Where possible and initially, any pre-existing project performance issues should be separated from these claims.
- This approach should be supported by open book practices by contractors to verify costs, accepting that the approach should be proportionate to the size of the project or contract. This approach will also be applied for extensions of time and re-programming of works.
- Claims will be assessed speedily, which will be assisted by clarity of claims.
- Contractors, subcontractors and suppliers should explore all other avenues of Government support for which they are eligible and avoid double dipping. Guidance on available support measures can be found on the NSW Government's website.²
- Parties can negotiate outcomes within these guidelines, as an alternative to relying on contractual provisions, and propose an approach to mitigate and reorganise that enables minimising impacts and rapid mobilisation.
- Construction sites can be put on standby for a short time to discuss mitigations, but not for the duration of impacts.
- This may result in claimable costs that are not strictly envisaged in contracts, including costs of holding resources on standby for a short time while negotiations take place.

Cash Flows

- Contractors should identify where they have short payment cycles for suppliers and subcontractors, and clients should implement payment arrangements with contractors to support those payment cycles
- Contractors are advised that the Security of Payment Act applies during the closure of construction sites.

² <https://www.nsw.gov.au/covid-19/financial-support#:~:text=Pandemic%20leave%20disaster%20payment,someone%20who%20has%20COVID%2D19.>

GUIDELINES TO SUPPORT NEGOTIATED OUTCOMES

- Opportunities to sustain and accelerate cash flows should be implemented as far as practicable. This can include advance payments on account and prepayments may be offset against future claims.

Terms for contractual relief

- Parties should establish arrangements to ensure that any contract relief flows through the entire supply chain.
- Any liquidated damages that may apply to a contract and are affected by the closure of construction sites shall be dealt with through extension of time provisions and any settlement of claims as part of the negotiated outcomes.
- Head contractors should pass these terms of relief to their applicable subcontractors and suppliers and avoid claiming damages from subcontractors and suppliers.
- Agencies will issue a contractual notice to waive notices of delay and intention to claim under this event to encourage 'without prejudice' discussions regarding next steps.
- The period for which claims under this event is applicable is the lesser of 12 months or completion, from 19 July 2021.