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Insights

STORM COVID BLOWS THROUGH THE WIND INDUSTRY

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SUMMARY

How Covid-19 is impacting on one construction market - the wind industry - is analysed by Edward Stewart, Natalie Wardle, Colleen Galbraith and Kimberly Roberts, who focus on what reliefs may be available under FIDIC Silver Book 1999 edition.

As Covid-19 batters the world, its impact on the wind industry is significant. Wood Mackenzie has forecast a 4.7GW reduction in 2020 installations compared to previous outlooks, with other estimates as high as 9GW.

While the short term outlook is gloomy, the long range forecast is brighter, particularly given the developing impression that many people want to capitalise on the reduction in emissions that lockdowns have necessitated and convert this into an acceleration of the energy transition.

With current forecasts of increased installations in 2021, the challenge in the short term is ensuring that projects which are in development or in construction can progress safely and successfully.

Covid- 19 Impact

The nature and extent of Covid-19's impact on the wind industry will be specific to projects and their jurisdictions. However, the global supply chain and specialised labour force make all wind projects susceptible to adverse effects, as does the restrictive environment in which projects must be carried out, particularly offshore.

As a result, it's not just the effects of illness on the workforce that affects projects, but also the restrictions on movement, flow of goods and on-site social distancing and health protocols that can delay projects and drive up costs.

Projects in development may also suffer from delays in obtaining approvals as the widespread adoption of work from home policies slows down the machinery of government. It is, however, encouraging to see some authorities extending procurement deadlines in response to Covid-19, such as on the US project, Park City Wind.

Lenders may also be taking a fresh look at financial models to account for changing fundamentals, such as power demand, but wind projects supported by some form of subsidy are a safe port in a storm.

Contractual Relief

Delays and increased costs due, directly or indirectly, to Covid-19, do not automatically entitle a contractor or supplier to the contractual reliefs of extra time and/or money. Neither do they give the parties an automatic right to suspend or terminate the contract or substitute a supplier. The relief available will depend on the terms of the contract.

Wind projects do not have a common industry standard form contract and the contract will largely depend on the parties' preference, the project and the jurisdiction in which the works will be carried out.

Parties often use their own "bespoke" contract, however it is also common to see use of the FIDIC standard forms, particularly the Silver Book 1999 edition. This is an international construction and engineering standard form EPC contract which lenders often favour. This article considers what reliefs may be available under the 1999 FIDIC forms.

Force Majeure

Contractors may understandably seek to rely on 'force majeure' provisions when assessing the contractual implications of Covid-19. Under the FIDIC standard forms, relief available for force majeure commonly includes discharge from performance of contractual obligations, an extension of time and termination. Cost compensation is available in very limited circumstances, such as war and rebellion.

The availability of relief is conditioned on the satisfaction of certain criteria and compliance with the time periods in which notices must be served. In particular, clause 19.1 of the Silver, Red and Yellow 1999 forms would require Covid-19 to be, "an exceptional event or circumstance:

(a) which is beyond a Party's control,

(b) which such Party could not reasonably have provided against before entering into the Contract,

(c) which, having arisen, such Party could not reasonably have avoided or overcome, and

(d) which is not substantially attributable to the other Party."

Depending on the project, there may be a good case for the Covid-19 epidemic being both ‘exceptional” and satisfying the above criteria. This clause, however, is often amended (e.g. to require the event to be unforeseeable), so a review of the project contract will be necessary to determine if force majeure has arisen. It is also worth remembering that a government’s response to Covid-19, whether through the cessation of travel, quarantine requirements or mandatory industry shutdown, may also give rise to force majeure. That is, the epidemic and responses to it may give rise to separate occurrences of force majeure.

Under clause 19.6 of the Silver, Red and Yellow 1999 forms, either party may terminate the contract if the execution of substantially all of the works is prevented by force majeure for an 84 day continuous period or multiple periods of more than 140 days in aggregate for the same force majeure event. Again, it is common to see amendments to this provision so a review will be required.

Other avenues for relief?

FIDIC also provides for other mechanisms under which contractual relief may be claimed. Examples include the Red and Yellow 1999 forms’ entitlement to an extension of time for “Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions” (clause 8.4(d)), with no restriction on which government took action. Notably this entitlement is not found in the Silver Book 1999 edition, making it a contractor’s risk.

Further examples include relief for delays to the works caused by authorities, such as where sites can operate but face repeated health and safety inspections (Silver, Red and Yellow 1999 forms, clause 8.5), although this relief is restricted to government actions in the place where the project is located and not those in a different country (e.g. where a supplier is located).

In addition, an entitlement to an extension of time and/or costs may arise under clause 13.7 (Silver, Red and Yellow 1999 forms) as a result of changes in Laws. FIDIC adopts a broad definition of ‘Laws’ to include all types of laws, regulations and by-laws of a legally constituted public authority in the country where the project is located. There may, however, still be a debate as to what does and does not constitute a ‘Law’. In the UK, only ‘non-statutory’ governmental and industry guidance has been issued whereas a Royal Decree was issued in Spain at the end of March prohibiting non-essential work, impacting wind projects.

Covid-19 Memorandum

FIDIC recently issued the “Covid-19 Guidance Memorandum” to discuss the impact of Covid-19 on its suite of contracts. While it does not cut across contract terms, it provides a useful reminder to users as to the administration and operation of FIDIC contracts. The memorandum emphasises the contract administration process that is central to FIDIC’s structure and reiterates the requirements to comply with health, safety and environmental obligations. It also discusses the interpretation of its standard forms in relation to 7 scenarios, helping users “consider mutually satisfactory solutions and avoid disputes arising between them”.

Final thoughts

As “the hammer and the dance” continues along the supply chain, contract management will need to be fluid and flexible as projects are buffeted by different policies and restrictions.

This is particularly true as, with limited termination rights and no ability to omit work and replace a contractor (under FIDIC), the parties will need to work together to find a way forward. Regular discussions and updates to programmes to take account of changing circumstances will be crucial.

These are stormy times but the wind industry has the tools to thrive and, with the benefit of enough time, we may look back on this as the Covid-19 gale.

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