



Guidelines for Valuing COVID-19 Consultant Variation Claims

Ministry of Education guidance for Capital Works and Schools led property projects

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Consultant Guidelines

Introduction

These guidelines are intended for all internal and external project leads for school property projects to ensure a fair, equitable and consistent approach to the valuing of consultant variation claims arising from the Government's regulatory response to COVID-19.

When New Zealand moved to COVID-19 Alert Level 4 on 25 March 2020 the Ministry of Education (**Ministry**) had to close all active construction sites for an initial period of 4 weeks. This has impacted the timing and costs for delivery of these projects.

The move to Alert Level 4 may have also impacted our consultants' ability to provide their contracted services. As with our construction contractors, our consultants are entitled, under the terms of their respective agreements, to claim time and/or additional costs resulting from the lockdown.

In order to provide confidence and certainty to the construction sector, it is important that Government agencies adopt a consistent approach. This guidance document has been developed to help direct project teams working on Ministry projects as they review the legal and commercial issues associated with the lockdown period. It applies to the Ministry's:

- Short Form Agreement for Consultant Engagement (**SFA**); and
- Conditions of Contract for Consultant Services (**CCCS**).

If you are unsure about how this guidance applies to any of your individual contracts, please seek further guidance by contacting COVID19Variations@education.govt.nz

Guidance in general

This guidance is general in nature and sets out the Ministry's expectations to assist in the consistent and equitable valuing of consultant variation claims across school property projects. It is subject at all times to the specific terms of each consultant agreement. It is also based upon information published as at the time of preparation and is subject to New Zealand's unfolding economic and financial situation and alert level requirements.

There will be some individual projects where specific complexities require greater analysis than provided in this guidance. Schools and their advisors should seek specific legal advice where further clarity is needed on an individual project.

Principles of managing variation claims under COVID-19

We encourage adoption of the following principles when managing variation claims:

- Early communication and discussion of potential and known areas of claim.
- Take an equitable, fair and reasonable approach.
- Principals are encouraged to take an open and collaborative approach in discussing and agreeing variation claims.
- Consultants are expected to act reasonably to mitigate project risks and budgets throughout the process.
- Claims are encouraged to be submitted and processed by both parties as soon as practicable.

Principles of valuing variation claims under COVID-19

We encourage adoption of the following principles when valuing variation claims:

- The onus of proof is on the consultant to evidence costs incurred and they should be encouraged to take an open-book approach to justifying costs.
- The review of claims should be undertaken in a standard and consistent manner for the majority of cases.
- Submissions and responses should be undertaken by the parties in a transparent, open and collaborative manner.
- All claims should be assessed on their merits but be treated equitably by adopting a fair & reasonable valuation of substantiated costs.
- Double dipping is discouraged. Where labour wage subsidies have been claimed – these should be clearly shown and deducted from labour costs.

Refer to Appendix 1 of this Guidance for discussion of the specific provisions in the Ministry's SFA and CCCS agreements dealing with variations.

COVID-19 and the lockdown is an unprecedented event in the construction industry. It is the Ministry's expectation that the parties collaborate to agree variation values and an equitable outcome in the best interests of the project.

Parties are reminded the risk of consultant, sub-consultant and supplier insolvency is significantly increased due to COVID-19 with the potential to substantially and negatively impact both the industry and school property projects.

Parties are encouraged to treat those in their supply chain with regard and make efforts to minimise the stand down impact on them and their liquidity.

Diligent record keeping is also encouraged, including the filing of correspondence, meeting minutes etc.

Timing to submit variation claims under COVID-19

It is our expectation parties work together to ensure variation claims are submitted and processed as soon as practicable.

We acknowledge the uncertainties and complexities of the cost impact of the level 4 lockdown and that it may take time for consultant to calculate and substantiate all additional costs. The amount of time required will vary project by project and between consultants.

We also expect some consultants may have multiple variation claims as additional delays and/or costs from the move to level 3 etc. are incurred.

Payment of variation claims under COVID-19

The Ministry intends to process and make payment of variations claims as soon as practicable after receipt. As claims are assessed, further information may be sought on some costs items. The Ministry will work with consultants to ensure, where possible, accepted costs are paid and not delayed by additional analysis required of more complex line items.

Items which may be included in Consultant claims

There are a range of scenarios that may occur on a project as a direct or indirect result of COVID-19. The table below outlines some of the items we anticipate receiving claims for.

Type of Claim	Risk Title	Likely Project Variations	Calculating cost	Guidance Notes
Delays				
Delays	Extensions of Time	The overall effect on project programmes as a result of the impact of direct and in-direct delays	EoT claims	Fair and reasonable assessment of time lost in line with principles outlined
Fees				
Labour	Reduced productivity	Additional labour costs resulting from inefficiencies in working remotely	Reasonable valuation of increased costs	<ul style="list-style-type: none"> To be assessed on a case-by-case basis – impacts will differ depending on the nature of the services etc. Some consultants have confirmed no inefficiencies in working remotely
	Additional attendances	Additional labour costs resulting from additional services required as a result of COVID-19	Reasonable valuation of increased costs	To be assessed on a case-by-case basis – impacts will differ depending on the nature of the services etc. (further discussion below)
	Sub-consultant insolvency	Increase in pricing when procuring alternative sub-consultants to pick up current services	Direct increase in sub-consultant costs	Must be demonstrated and evidenced

We anticipate most consultant claims will relate to additional attendances necessary because of COVID-19. Below are some examples of claims you may see. Please note that these are examples only and should not be read as a closed list of all items consultants may submit claims for. It is also important to be aware of the original agreed scope of the consultant's engagement because this may inform whether the claimed item should be approved or not.

1. Engineer to Contract (Major Works only) – additional attendances relating to:
 - Contractor variation claims
 - Review of updated programme
 - Review of updated site-specific safety plan
2. Quantity Surveyor – additional attendances relating to:
 - Contractor variation claims
3. Project Manager – additional attendances relating to:
 - Demobilisation of the site
 - Remobilisation of the site
 - Updated programme
4. Project Manager where no 'engineer' engaged (i.e. Medium and Minor Works) – additional attendances relating to:
 - Demobilisation of the site
 - Remobilisation of the site
 - Contractor variation claims
 - Review of updated programme
 - Review of updated site-specific safety plan

Appendix 1. Valuing Variations by Ministry Standard Agreement Type.

Consultancy Agreements

Conditions of Contract for Consultancy Services (CCCS)

1. Clause 7 of the General Conditions of Contract deals with variations. There are no Ministry special conditions which amend these General Conditions.
2. Consultants may notify the project lead of circumstances they believe justify a variation – this is the early warning notice process under clause 2.13. If progressing to a variation claim under clause 7.1, consultants should provide details of the estimated impact on the costs of the services and on the programme and completion date. Importantly, consultants should also make a recommendation as to how to proceed.
3. Note that not all consultants will issue an early warning notice. Some consultants will not be impacted by the lockdown at all (having capability to continue the services remotely, on budget and on time) and therefore not seek a variation. Others may see the Ministry's Infrastructure News acknowledgment and proceed directly to a variation claim under clause 7.1.
4. We recommend project leads talk to their consultants about the impact of the lockdown. It may be that the only impact is to milestones and timeframes.
5. The project lead may also order a variation, or can ask the consultant to propose a variation to the services.
6. If a variation is sought then the project lead must respond to the consultant in writing confirming whether or not it considers the "circumstances" to be a variation. Each claim will need to be assessed on its own merits, but in general the Ministry has already taken a leading position acknowledging across construction and consultancy that the Covid-19 lockdown will entitle variation claims.
7. The parties must then agree the value of the variation in accordance with the provisions of clause 7.2. If you can't agree, then the matter will be treated as a dispute under clause 10 of the General Conditions.
8. To value a variation:
 - Use the rates for valuing variations (if previously agreed) in Appendix B. Where there are no agreed rates in Appendix B, agree in writing the rates to be used. An email trail between the **project leads** and consultant will suffice.
 - Consider the total value of the variation, impact on programme and completion date of the services. Where the contract has been agreed to end *on completion of the Services to the Client's satisfaction*, varying the completion date will not be necessary.
 - Where practicable, the value of the variation and impact on programme and/or completion date should be agreed between the **project leads** and the consultant

before variation work progresses. If the value of the variation cannot be agreed, agree to a budget for the variation works which will not be exceeded without further agreement between the **project leads** and the consultant. As above, an email trail will suffice to document this.

9. It is difficult at this stage to predict all the additional costs (if any) a consultant may be entitled to or attempt to claim resulting from the lockdown. We encourage you to seek transparency from consultants and also to apply principles of fairness and reasonableness.

Short Form Agreement (SFA)

1. The SFA allows either party to notify the other of a circumstance it considers is a variation. The Ministry has already acknowledged the lockdown event as such a 'circumstance'.
2. We recommend project leads talk to their consultants about the impact of the lockdown and whether any variation is sought.
3. The key variation provisions are found in clause 6 of Appendix 1 (Ministry amendments to the Short Form Model Conditions of Engagement) of the SFA. In summary, clause 6 provides that:
 - The project lead may order variations to the services in writing or may request the consultant to submit proposals for variations to the services.
 - No work pursuant to a variation may commence until the scope of services and the fees and expenses (or basis for their calculation) for the variation are approved in writing by the Ministry.
4. The guiding principle is again valuation by agreement so that the consultant is reasonably compensated for the impact of the variation (in this case the impact of Covid-19 lockdown).
5. An email trail between the project lead and consultant should be sufficient to document most variations to fees and completion date under an SFA.



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