

PSC Response sheet 26.5.21

Question Number	Question	FIDIC	ICE/IEI	ICC	WORLD BANK	NEC3	NEC4	JCT 2016 D&B	JCT 2016 Standard Building Contract	RIAI	PWC	PSC
1	Does the contract expressly provide for Force Majeure / Exceptional Events (FM/EE)?	Yes. Clause 18.	No.	Yes. Clause 14.	Yes. Clause 38.	No although the NEC Guidance Notes indicates that Clause 19.1 Prevention "is in effect a force majeure clause"	Clause 19 (Prevention) is in effect a Force majeure event clause. However, NEC4 defines an event occurring that 'stops the Contractor completing the whole of the works by the planned Completions shown on the Accepted Programme.	Yes. Clause 2.26	Yes clause 2.29(15) under the heading of relevant Event (see also 2.26 to 2.28)	Yes. Clause 30	No	No
2	If not does the contract specifically allocate risk in respect of certain events which would usually be considered FM/EE?	Not applicable.	Yes. A War Clause, generally clause 65, provided that the Employer, but not the Contractor, could terminate if work was not completed 28 days after the outbreak of war. This was changed in the 7 th edition of ICE to the contract being deemed abandoned where the Work was not completed in the same period.	Not applicable.	Not applicable.	Yes Clause 19 Prevention, Clause 80 Employer's risks, Clause 81 Contractors risks	The contract allocates risks under clause 80 (Client liabilities) and clause 81 Contractors liabilities). The Prevention clause deals with events neither Party could prevent	N/A	No	N/A	Yes (3.1)	Yes(3.1)
3	Does the contract provide for FM / EE only if it becomes physically impossible or illegal to complete the contract	No. The requirement is: "Having arisen, such Party could not reasonably have avoided or overcome".	Not generally. However, the 7 th edition of ICE provided that "if any circumstance outside the control of both parties arises.... which renders it impossible or illegal...." to complete the Work the contract was deemed abandoned.	Yes. Sub clause 14.1 says: "Force Majeure means any circumstance outside the control of either party and not attributable to the default of either party which arises during the currency of the Contract which renders it impossible or illegal for either party to fulfil his contractual obligations."	No. The requirement is set out in subclause 38.2 and says as follows: "If either party is prevented, hindered or delayed from or in performing any of its obligations under the contract by an event of Force Majeure...".	Not directly in terms of the language in the question. However Clause 91.7 allows the Employer to terminate if an event occurs which A) stops the Contractor completing the works or B) stops the Contractor completing by the date shown on the Accepted programme and forecasts to delay Completion by more than 13 weeks	No. The Prevention clause relates to events that neither Party could prevent, and 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	No. The standard form does not include a definition of force majeure, and force majeure is stated as a relevant event	No. The standard form does not include a definition of force majeure, and force majeure is stated as a relevant event	No. Not defined	No	No. (Clause 12.4 deals with termination after 6 months not FM per se)
4	Does FM/EE only occur if the event could not be reasonably anticipated by the parties?	This is implied but not stated explicitly.	As Above.	No.	No. "Force Majeure" is defined in subclause 38.1 as follows: "... shall mean any event beyond the reasonable control of the employer or of the contractor, ... insofar as they directly affect the execution of the Services and Works included in this Contract and which is unavoidable notwithstanding the reasonable care of the party affected...". This is followed by six examples without limitation under headings (a) to (f). Please note that example (d) includes: "epidemics, quarantine and plague".	Yes, whilst FM/EE language not used, as per Clause 19 and Clause 91.7 for an event which "an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it"	Yes. As above	No as above	No as above	No. Not defined	No	No
5	Does FM/EE only occur if the contractor could not reasonably be expected to have provided for it?	Yes. The requirement is: "The Party could not reasonably have provided against before entering into the Contract."	N/A	No.	As Q 4 above.	As Q 4 above.	As Q 4 above.	No as above	No as above	No as above	No	No
6	Does the contract provide for a time extension in the event of FM/EE?	Yes.	No.	Yes. Subclauses 9.4 and 8.7.	Yes. Subclauses 38.3 and 64.1.	Yes at the discretion of the Project Manager for a Clause 19 event. High enough threshold for delay - delay that can be recovered by increased resources etc does not qualify nor does non critical path delay.	Yes at the discretion of the Project Manager for a Clause 19 event.	Yes. Clause 2.26.14	Yes. Clause 2.28	Yes. Clause 30 (a)	No	No
7	Does the contract provide for compensation in the event of FM/EE?	Yes for some but not all categories of FM/EE. Natural catastrophes – in effect extreme weather events – are excluded. There is also no mention of epidemics or pandemics.	No.	No.	No. However, subclause 32.1 makes the employer responsible for the risks in six categories starting with war which are very similar in many respects to what is typically included in a Force Majeure clause. However, it does not include "epidemic, quarantine and plague". The basis for compensation is also not specified.	Yes at the discretion of the Project Manager for a Clause 19 event. Costs linked to the delay rather than an increase in costs due to say the impact of a virus.	Yes at the discretion of the Project Manager for a Clause 19 event.	No. Clause 4.21 lists the Relevant Matters which does not expressly include force majeure or relevant events	No	No.	No	No
8	If so, is the compensation limited to actual expenditure on the part of the contractor?	Yes. Limited to Cost incurred as a result of the Exceptional Event. Cost is defined as: "All expenditure reasonably incurred (or to be incurred) by the contractor in performing the contract, whether on or off the site, including taxes, overheads and similar charges but does not include profit."	N/A	Not applicable.	Not applicable.	Yes by way of Defined Costs.	Yes by way of Defined Costs.	N/A	N/A	No. Not defined	N/A	N/A
9	Does the contract provide for compensation in respect of some elements of FM/EE but not others?	As Q 7.	N/A	Not applicable.	As Q 8 above.	Not in Core clauses but may have 2 clause amendments particularly re costs.	Not Defined	N/A	N/A	No.	No	No
10	Does the contract expressly provide for a right of termination on the part of the employer in the event of FM/EE?	Yes. Subclause 18.5 gives either the party the option to terminate where: "... the execution of substantially all the Works in progress is prevented for a continuous period of 84 days... or for multiple periods which total more than 140 days...". Termination takes effect seven days after Notice is received. Under 18.5 the Contractor is paid cost essentially.	Yes. Refer to Q 2 above.	Yes. Subclause 14.2 says as follows: "Should further performance of the contract be prevented by Force Majeure for a continuous period of not less than 42 days either party may, after giving the other a further 28 days' notice of his intention to do so, terminate the contractor's employment under the contract."	Yes. Subclause 38.6 says: "If the performance of the contract is substantially prevented, hindered or delayed for a single period of more than sixty (60) days or an aggregate period of more than one hundred and twenty (120) days on account of one or events of Force Majeure during the currency of the contract, the parties will attempt to develop a mutually satisfactory solution, failing which either party may terminate the contract by giving a notice to the other".	Yes at Clause 91.7 - see Q3 answer.	Yes Clause 91.7 for delays in excess of 13 weeks	Yes, clause 8.11.1 says: "If, before practical completion of the Works, the carrying out of the whole or substantially the whole of the uncompleted Works is suspended for the relevant continuous period of the length stated in the Contract Particulars by reason of one or more of the following events: .1 force majeure; then either Party, subject to clause 8.11.2, may upon the expiry of that relevant period of suspension give notice to the other that, unless the suspension ceases within 7 days after the date of that notice, he may terminate the Contractor's employment under the Contract. Failing such cessation within that 7 day period, he may then by further notice terminate that employment	Yes, clause 8.11.1 says: "If, before practical completion of the Works, the carrying out of the whole or substantially the whole of the uncompleted Works is suspended for the relevant continuous period of the length stated in the Contract Particulars by reason of one or more of the following events: .1 force majeure; then either Party, subject to clause 8.11.2, may upon the expiry of that relevant period of suspension give notice to the other that, unless the suspension ceases within 7 days after the date of that notice, he may terminate the Contractor's employment under the Contract. Failing such cessation within that 7 day period, he may then by further notice terminate that employment	No.	No	No
10a	If so, does the sum payable to the contractor include any element of compensation for the early termination of the contract?	No compensation for early termination.	No.	In such circumstances subclause 14.3 provides for payment of cost to the contractor but without compensation for early termination.	Compensation in such circumstances is dealt with in subclause 59.1.3 which involves cost but without compensation for early termination.	No	No	No. Clause 8.12.3 sets out the process for submission of an account within two months for payment of cost only, no compensation	No. Clause 8.12.3 sets out the process for submission of an account within two months for payment of cost only, no compensation	N/A	No.	No
11	Does the contract provide for termination by the contractor by reason of FM/EE events?	As Q 10 above.	Generally not but refer to Q 2 and Q 3 in respect of the 7 th addition of ICE. Apart from that, there was a Frustration Clause to cover the situation of the "...Contract being frustrated whether by war or by any other supervening event which may occur independently of the will of the parties..."	As Q 10 above.	As Q 10 above.	No	No	Yes as above	Yes as above (for Employer)	No.	Allows for termination after a period of at least six months at cl. 12.4(4) for specific Force Majeure type	Allows for termination after a period of at least six months at cl. 12.4(4) for specific Force Majeure type
	Additional comments	Subclause 18.6 deals with release from performance under the law and covers any event (not necessarily an exceptional event) which is "outside the control of the parties" and which: "(a) makes it impossible or unlawful for either party or both parties to fulfil their contractual obligations; or (b) under the law governing the contract, entitles the parties to be released from further performance of the contract". In such circumstances, unless the parties can agree to amend the contract so that it can continue, either party may give Notice resulting in both parties being discharged from their obligations. In such circumstances the contractor is entitled to Cost as in Q 10, in other words, cost without compensation for early termination.										
		This contract also provides for the release from performance in subclause 65.1 which says as follows: "If the contract is frustrated by the outbreak of war or by any other event entirely outside the control of either the employer or the contractor, the project manager shall certify that the contract has been frustrated."										