

Introduction

The NSW Government announced tighter restrictions for the Greater Sydney Metropolitan area on 17 July 2021 to eliminate community transmission. The new restrictions made provision for closing construction sites from 19 July 2021 to 30 July 2021¹. The new restrictions for construction sites are referred to in this Guideline as 'Closure of Construction Site' and it's noted that the Health Orders direct that work is not to be carried out on a construction site in Greater Sydney, except in well-defined circumstances.

The Purpose of these Guidelines

NSW Government's delivery agencies will continue to manage the impacts of the 'Closure of Construction Sites' on their own projects with their contractors. Approvals for settling claims need to be sought through existing decision-making delegations and bodies.

This Guideline was prepared to support NSW Government agencies with resolving the impacts of the 'Closure of Construction Site' on Government's infrastructure program (the Guideline) and provides additional commercial principles and guidance to be adapted by delivery agencies on a case by case basis. It is also capable of being applied by State Owned Corporations and other tiers of government.

NSW Government's Objectives

The NSW Government's goal is to reopen the construction sites safely and get construction back to operations after the 'Closure of Construction Site' ends on 30 July 2021. It is important that contractors, subcontractors, suppliers and employees have confidence about cash flows and certainty of payment during and arising from the closure, and that disputes and legal action are avoided. This will allow them to focus on return to work plans and ensuring they do so in a COVID safe manner.

It is in the public interest to ensure confidence and solvency of the industry to manage the closure and return to work as quickly as possible. 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 the guiding principles for negotiation.

Principles for managing site closures and reopening

Objectives

- Contractors and agencies are to ensure construction can recommence by 31 July in part or whole, with no lead time or delays, in order to provide the best opportunity for recovering program

¹ [Temporary Movement and Gathering Restrictions](http://www.nsw.gov.au) (www.nsw.gov.au)

GUIDELINES TO SUPPORT PARTIES WITH 'CLOSURE OF CONSTRUCTION SITE' NEGOTIATIONS

- Contractors are expected to have fully developed operating plans in place for recommencement that reflect the reopening plan being developed by government
- Ensure that when workers recommence on site from 31 July, they are fully trained on proposed new 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>)
- Avoid losses of people, skills, materials and equipment over the period to 30 July that would undermine recommencement, and avoid delays in delivering materials and equipment to site from 31 July
- Ensure that all parts of the supply chain remain stable and solvent
- Provide public confidence that payments to industry are valid, related to costs and can be verified
- Ensure speedy decision making and avoid delays in implementing plans for shutdown and recommencement

Expected behaviours

- a collaborative approach by all parties
- transparent and open book dealings on claims by contractors, subcontractors and suppliers
- keep front of mind the NSW Government's objectives
- parties should be fair and reasonable in their approach to the claims and act with the intent of these Guidelines
- parties are required to move swiftly in ensuring cashflow, discussing impacts and assessing claims
- contractors, subcontractors and suppliers should not seek to profit in any way from the coronavirus 'Closure of Construction Site' impacts 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 (cost/time) and this should be implemented in a manner consistent with the Objectives above
 - Contractors should use the period leading up to 30 July to establish procedures and work practices based on the forthcoming reopening plan and ensure that workers, subcontractors and suppliers are fully trained on those practices and procedures
 - Facilitate immediate recommencement of substantial works by 31 July by keeping teams together, keeping subcontracts and supply contracts on-foot, keeping equipment and materials ready to go, and avoiding costly site remobilisation
 - The Public Health Order permits certain works on construction sites to establish safety, security, environmental controls as well as works required to maintain the integrity of plant, equipment and assets (including partially complete works). Where legitimately required, these provisions may allow some work to be undertaken on-site in readiness for recommencement of main works by 31 July. Exceptions are also possible in some cases but must be formally applied for and approved in writing.
 - Where possible, allow staff to take leave as an alternative to standing down staff
- Contractors should discuss their mitigation approach with clients as mitigations may need to be tailored to reflect the stage of the project
- Mitigation actions should be based on an assumption that construction work will be permitted to recommence on 31 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 of the Public Health Order
- Agencies should partially or wholly assess claims and reimburse progressively as claims are verified
- This approach should be supported by open book practices by contractors, subcontractors and suppliers 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
- Claims related to 'Closure of Construction Site' should be prepared independently of consideration of any other claims for pre-existing project performance issues, or to unrelated delay
- 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 at www.service.nsw.gov.au/covid-19-business-support-2021

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
- Opportunities to sustain and accelerate cash flows should be implemented as far as practicable. This can include advance payments on account, as well as bringing forward receipt and payment of the July 2021 account. 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
- Head contractors shall 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.