



ARTICLE

# Navigating project upheaval

## What should UK rail contractors do next?

The UK rail industry has been severely impacted by the COVID-19 pandemic with large projects such as High Speed 2 and Crossrail suspended and disrupted for the foreseeable future. Managing risk, recovering costs and transparent communications are critical for keeping projects on track and to safeguarding contractors' interests – but what happens next?



HS2 is expected to cost **£106bn**<sup>2</sup>. Crossrail is **£2m** over budget at an estimated total of **£18.25m**<sup>3</sup>

**£4.2bn**

UK investment in urban transport from **2020 - 2025**<sup>4</sup>.

Since 2015, the UK government has spent over £16 billion a year on transport projects<sup>1</sup> and £4.2bn is in the pipeline. Delays to these works have significant time and cost implications that result in extension of time and cost claims.

The disruption and loss of productivity caused by COVID-19 have exacerbated the circumstances for the UK rail industry who are already dealing with pre-existing delays, putting contract and claims management under the spotlight. To avoid loss, preparation is key to keeping on top of the crisis.

### Step 1: Getting your ducks in a row

The government's COVID-19 letter to the construction industry isn't crystal clear on what works can and can't continue. This has created a very mixed picture for the railway sector, meaning claims management will likely be a major challenge in the months ahead.

Reaching an agreement between parties should be done as soon as possible and expectations managed upfront; productivity will be much lower than usual, meaning delays and associated cost implications are likely to occur. Time is cost – so continue with caution and mitigate wherever possible.

1 <https://www.statista.com/statistics/477169/value-of-transport-sector-infrastructure-projects/>

2 <https://www.ft.com/content/307e3606-3ab7-11ea-a01a-bae547046735>

3 <https://www.theguardian.com/uk-news/2019/nov/08/crossrail-faces-further-delays-and-will-cost-more-than-18bn-tfl>

4 <https://www.cityam.com/budget-2020-sunak-pledges-600bn-in-capital-investment-for-uk-transport-and-industry/>

*“Good housekeeping is essential at all times – not just in response to COVID-19.”*

### Ensuring safe suspension – protecting the site

Readying the site for closure is a crucial piece of the puzzle – a failure to do so can have a significant impact on personal and public safety, as well as project continuity and insurance. Without corrective action, unfinished works may deteriorate and collapse, adding further delays and costs into the mix as these will need to be redone after the suspension.

Some key measures to consider are:

- storing all materials in a safe place (i.e. protected from elements, theft and alike);
- recording the shelf-lives of hazardous or inflammable materials;
- protecting the site from adverse weather conditions; and
- installing surveying and measuring devices to ‘watch’ the site to ensure everything remains stable and taking early action if movement occurs.

### Communicating clearly – documenting the current state of works

When a project is suspended, it’s important to validate the status of the works at the time - a site survey should be conducted together with the client or client’s agent to ensure you’re all on the same page. Time-stamped photos and videos are your friends here – they will support any insurance claims, will enable a quicker restart, and will help to avoid disputes further down the line.

### Keeping records – backing up claims

Good housekeeping is essential at all times – not just in response to COVID-19. Keeping the correct records can be challenging as contractors are often heavily reliant on their client’s databases, but all claims will need to be backed up with evidence to move forward.

### Keeping the wheels in motion – using time wisely

Many construction sites have ongoing delays that will run concurrent with the delay caused by COVID-19, especially in cases where the design is not finalised. During suspension, every effort should be made to review, agree and finalise outstanding design issues.

## Step 2: Managing claims

Understanding whether to invoke force majeure or to use another contractual mechanism to manage COVID-19 depends on the provisions in your contract – the devil is in the detail. To make a claim for an extension of time or for loss and expense, be mindful of the following:

### Knowing your contract – giving notices and understanding when to act

In times of uncertainty, communication becomes even more important. As a rule of thumb, it’s good practice to notify sub-contractors and suppliers of the current situation to discuss the implications and to keep them in the loop. The contract used will stipulate who is responsible for notifying parties within a certain timeframe and how communications should be responded to. This is particularly important as some contracts will not allow for a claim if notifications haven’t been made correctly or if the notification is late – so act promptly.

In a similar vein, insurers should also be informed of a site closure or change in intended working practices in line with the time restrictions detailed in the policy. Demonstrating that appropriate risk control measures have been considered or implemented is essential in the event of an insurance claim. It’s not enough to rely on general comments on the pandemic. Detailed records overlaid with the impact of each change on the business and project are required.

### Backing up claims – records, records, records

Never underestimate the power of records – they are your lifeline for handling claims and disputes. Contemporaneous documents are required to be made available to demonstrate that:

- notices were given;
- project status was assessed;
- mitigation measures were taken;
- loss of productivity was recorded; and
- additional costs were logged.

### Assessing time and cost – increasing transparency

Contracts such as NEC require that any event that distorts, delays or increases costs is assessed in a certain way within a given timeframe. A programme of these events needs to be submitted to the client to illustrate their impact, for example, impacted programmes are required to demonstrate the delay impact. As COVID-19 is an “open event”, it’s wise to constantly reassess the impact(s) and clearly communicate assumptions to the client each time, including additional risks and constraints that may now be in place (i.e. labour and resource, working hours, workplace restrictions, lead times and so forth).

### Demystifying concurrency – focus on the critical path

Despite COVID-19 driving delays at present, most rail projects face many delay events at one time. These will each have their own contractual consequences and become problematic when they run concurrent to another event. These delays need to be managed separately using different delay analysis approaches. Mitigating the risks here is the contractor’s responsibility. Concentrate on events driving the critical path to move forward.

### Reviewing insurance policies – reaching pragmatic solutions

There is no doubt that disputes may arise with the client or client’s agent, as well as with the insurers. Before making any decisions on taking a litigious stance, explore the possibility of reaching pragmatic solutions by revising contracts and drafting side letters or additional contractual agreements which can be legally relied upon.

### Insurance claims – what is and isn’t covered?

The work stoppages potentially covered under Contractors All Risk/Erection All Risks Policies should be carefully reviewed to understand the specific clauses related to material fact and cessation of works (partial or in full). Unsurprisingly, insurers view a closed/non-operating site as a very different risk to that of a working site. For example, a closed site has an increased risk of theft or fire/water damage. For sites that are closed, a statutory assessment may be required; this is where a site survey will come in useful.

Many insurance policies will include exclusionary language relating to partial or complete cessation of

works. While contracts may automatically provide coverage for work stoppages for a designated period, it is crucial to know the duration and what happens after this. Risk management and reporting requirements are generally strict. Cessation-of-work clauses commonly include wording and obligations on the insured to secure the site, ensure regular inspection and take reasonably practicable steps to safeguard the site from physical loss or damage and/or related third-party liabilities. If an insured event takes place after the site is closed, the insurer must be notified.

## Step 3: Preparing to reopen

As the lockdown restrictions are eased or lifted, work needs to resume safely and quickly. It’s the contractor’s responsibility to develop a plan to reopen and to clearly communicate and agree this with the client. This plan should consider:

- ensuring the health and safety of the workforce including travel to and from work and check-in on site;
- ensuring a sustainable procurement strategy and logistics;
- developing plans and impact study for a prolonged reduction in capacity and cost structure;
- identifying supply chain weaknesses such as areas which may impact critical materials and components and assess alternative supply chain providers with a detailed cost and time analysis;
- conducting a site audit to assess the state of the works and potential deterioration;
- prioritising and scheduling the remaining works in line with health and safety requirements and material availability;
- maintaining access to enterprise management systems, work management systems and design software to allow remote working whenever possible;
- developing a procedure for positive COVID-19 reporting.

Having a constructible safe operation basis to reopen the site will be fundamental in minimising further delays and to prevent future disputes from arising. By following step 1 – get your ducks in a row - and by continuously monitoring the site during shut down, contractors will be able to provide an accurate update on the status of deterioration from the get-go, so works can be prioritised and expectations managed.

## Adjusting to the new normal – what comes next?

To offset higher debt as a result of the crisis, higher efficiency and profitability levels in the construction industry will be required, which is likely to put contractors and stakeholders under pressure to deliver more for less. A shift towards leaner, more efficient **operating models** is expected, which will see the increased use of automation, artificial intelligence and digital-driven work processes to drive performance improvements. This will present clients and contractors with new opportunities, however, new skills will need to be developed across the supply chain to take advantage of these.

## Helping you along the way

With unrivalled sector expertise and hands-on experience of TFL and CRL Projects, our integrated team of programme and claims specialists can provide crucial guidance in these times of need.

We advise on contractual, technical and commercial issues relating to construction projects to ensure every aspect is properly risk assessed, governed, well-executed and fully supported from beginning to end. This includes:



### Risk mitigation

- Progress audits
- Time-impact evaluation
- Claims advisory



### Claims advisory and project management

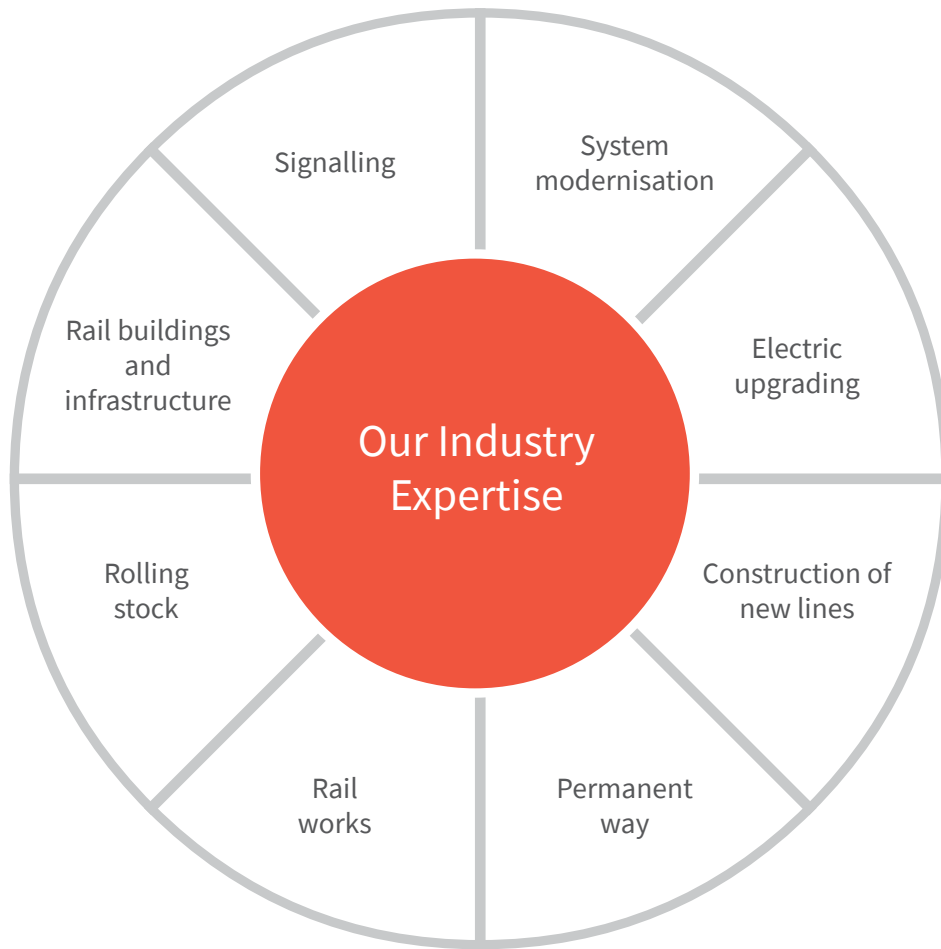
Assessing delay and cost impacts of:

- Demobilisation
- Re-mobilisation and ramp-up periods
- Suspension periods
- Support with insurance claims
- Preparing claims and Compensation Event quotations
- Evaluating claims from sub-contractors
- Contract advice on suspension rights
- Evaluation of receive claims
- Evaluation of liability



### Resolving disputes

- Settlement negotiations/adjudication
- Mediation
- Expert witness: expert opinion and evidence



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