

Coronavirus SARS-COV 2

FAQ Problems during the construction process

Stand März 2020

Stichwort	Frage	Antwort
COVID-19 Disease / risk of infection	Does a suspicious case involving a specialist or an employee have to be reported immediately?	There may already be a legal obligation to report a suspicious case. Further details are regulated by the so-called "Corona reporting obligation ordinance". (https://www.gesetze-im-internet.de/coronavmeldev/).
	What happens if there is a deficit in occupational health and safety equipment for construction site personnel?	In principle, this risk is the responsibility of the client and initially leads to the fact that the hygienic standards can no longer be guaranteed. In the worst case, this could lead to the temporary suspension of work. The Robert Koch Institute (RKI) has drawn up a recommendation on the sparing use of resources and the deployment of certain equipment and means (for more details see https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Ressourcen_schonem_Masken.pdf?__blob=publicationFile). The employers' liability insurance association of the construction industry (BG Bau) also makes recommendations in this regard (for more details see https://www.bgbau.de/news-object/?tx_news_pi1%5Bnews%5D=3189&cHash=06563e04fd2aec17f43fec954e8defbe).
	Who has to assess the risk of an infection on a construction site and inform whether continued operation	According to sec. 4 para. 1 no. 1 sent. 1 VOB/B [German Construction Contract Procedures], the client is basically obliged to ensure that general order is maintained on the construction site and the cooperation between the various companies is regulated. If a safety and health coordinator (SiGeKo) has been appointed, it is his responsibility to assess the risk of infection or the general



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	<p>on the site is possible, whether additional measures are required or whether the site must be closed down.</p>	<p>risk of infection on the construction site when various companies and their employees work together (e.g. during construction meetings, work on a building component) and to inform the client and contractor of these risks.</p> <p>For this reason, the SiGeKo should, for example, be requested to supplement the building site regulations with appropriate hygiene and protection regulations, to provide signage with the relevant rules of conduct (including the rules of conduct and instructions of the Federal Ministry of Health) and to monitor compliance with them.</p> <p>If the operation of the construction site can no longer be continued without risk despite compliance with the hygiene and protection regulations, the close down of the construction site must be considered.</p>
Official decrees	<p>de- What should be done if the health authorities order domestic quarantine measures?</p>	<p>The decisive factor is the scope of the respective order of the public health department. In close consultation with the responsible health authority, it is necessary to find out whether it is possible to resume or continue construction work as a result of separate quarantine, isolation and disinfection measures. In such cases, it is advisable to draw up an emergency plan to enable emergency operations to be carried out, if necessary by replacement workers.</p>
	<p>What should be done if access to construction sites/company premises is prohibited?</p>	<p>In principle, this risk is the responsibility of the client. In this case, the contractor would be entitled to an extension of the execution deadlines. In order to secure this claim, the contractor must inform the client in writing of any disruption to the construction process. As a precaution, he should reserve the right to assert additional costs or claims for compensation.</p> <p>Access bans can have different causes, which, depending on the individual case, allow for different action steps.</p> <p>For example, an official order may have prohibited the operation due to COVID 19 diseases or quarantine measures (see above). In this case this should be checked in cooperation with the Si-GeKo and further measures should be discussed.</p> <p>The site or construction site could also be located in a designated risk area. Particularly affected areas are adapted by the RKI according to certain criteria (to be viewed under https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Risikogebiete.html).</p> <p>As a consequence, special orders (quarantine areas, quarantine cities) could be issued by the respective authorities, which could lead to a prohibition of access.</p>



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		<p>However, construction operations are currently not affected by the "curfews"/"contact restrictions" and "closure orders" issued by the individual federal states.</p> <p>A decree issued by the Federal Ministry of the Interior, Construction and Home Affairs (BMI) on 23 March 2020 expressly states that construction operations are currently to be ensured and maintained. Although the decree only applies to federal construction sites, it also has a trend-setting effect on other construction sites.</p> <p>In the event of personal checks or occasional access bans by the local regulatory authorities, it is advisable to issue a "pass" for the respective site personnel. This is a declaration by the employer that the employee is not available.</p>
Delivery bottlenecks	Is the contractor liable for interruptions in the construction process due to delivery bottlenecks?	<p>In principle, unless separate contractual arrangements have been made, the procurement of materials is the responsibility of the contractor. In the event of damage caused by delayed deliveries, the client is entitled to claim damages if the contractor has culpably breached an obligation. Although neither the contractor nor the client is at fault for the pandemic of COVID-19 disease, this seemingly simple statement does not provide final clarity in such constellations.</p> <p>Rather, it is necessary to check on a case-by-case basis whether the material in question is actually no longer available, so that under certain circumstances, due to force majeure, the execution deadlines are extended. In addition to an explicit examination of the contractual distribution of risk, this also requires that the bottlenecks are actually due to the non-availability of materials.</p> <p>Only higher replacement costs were partly attributed by the courts to the contractor's sphere of responsibility and thus the contractor's liability was affirmed.</p>
Personnel shortages	What happens if the contractor suffers a high level of personnel absence due to illness?	<p>Illnesses of employees are subject to the contractor's risk area. If this results in an obstruction of the construction process, it does not necessarily lead to an extension of the execution time according to sec. 6 VOB/B.</p> <p>The contractor must first check whether he can compensate for the lack of manpower, e.g. by additional work of the remaining workers.</p> <p>A COVID-19 disease is at least basically comparable to a "normal" flu or cold. These belong also to the contractor's risk area and may have to be compensated for with additional financial expenditure by the contractor himself or by another subcontractor or supplier.</p>



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	What happens if the contractor suffers a high loss of personnel due to official quarantine measures?	The situation is similar when personnel are quarantined by official orders and a ban on work is imposed. This also initially falls within the contractor's risk area. Accordingly, the contractor should inform the client of this in writing as soon as possible. It is possible, however, that case law will grant a claim for an extension of the construction period for this purpose and a case of force majeure will be accepted. In this case, detailed documentation and archiving of the procedures for evidential purposes is essential (sick leave, official orders).
	Does the contractor have an obligation to pay damages if skilled workers leave the site and return to their home countries?	If foreign specialists should start their journey home and/or subsequent entry is no longer possible due to the Corona regulations and measures of their home countries, a case of force majeure must probably also be assumed and liability for damages on the part of the contractor for lack of culpable breach of duty must be excluded. In these cases, however, the contractor must immediately notify the customer in writing in accordance with sec. 6 para. 1 VOB/B that he considers himself to be impeded in the proper performance of the service (impediment notification). The execution deadlines shall be extended in the event of acceptance of force majeure in accordance with sec. 6 para. 2 no. 1 lit. c) VOB/B. In such cases, the notice of obstruction unilaterally extends the execution period.
Scheduling	How to proceed for cancellations or postponements of milestones?	This cannot be answered in a general way. Depending on the risk area in which the reason for the respective cancellation of an appointment (construction meeting, acceptance dates) falls, different recommendations for action must be made. In general, however, it can be added that, especially with regard to the unforeseen and unpredictable events caused by the pandemic, the fastest possible, transparent and additionally written information of the other contracting party must be provided and communication and cooperation between the contracting parties should be the highest priority.
Acceptance	Is it now even possible to carry out acceptance tests on the construction site due to the imposed "curfews" and "contact restrictions"?	Here the clear answer is "yes". This is also illustrated by the decree of the Federal Ministry of the Interior of 23 March 2020 (see above). The continued operation of construction sites is of particular importance; if possible, construction operations should not be restricted or suspended. Unless a separate official order has been issued concerning the respective construction site or unless there are deficiencies that prevent construction operations, there is an obligation to continue operation of the construction site and to perform the services. Accordingly, acceptance is still possible in principle. However, the current protection and hygiene regulations must be observed.

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	What are the risks involved in virtual acceptance?	Virtual acceptances are generally not recommended and this form of acceptance should only be chosen if necessary. As a consequence, sufficient problems with the scope of the acceptance could arise. Here, too, the reference to the decree of the Federal Ministry of the Interior of 23 March 2020 that construction sites are to be operated and therefore acceptance tests can also be carried out as planned applies.
Omitted acts of cooperation	Does the client have to be liable if he omits an act of cooperation?	In the construction process, the client must provide certain acts of cooperation. In principle, the failure to comply with the obligation to cooperate does not affect the contractor's right to compensation for damages. However, uncontrollable external influences (such as those caused by the Corona pandemic) are not even within the sphere of the client in this context. Accordingly, an alleged claim for compensation on the part of the contractor, for example due to the lack of a building site being made available or the obstruction caused by the official establishment of a restricted zone, should be excluded.
Liquidity shortages	Can the client terminate the contract due to delay?	A stop of the construction work due to own liquidity shortages in the event of force majeure or disruption of the basis of the business should not have a positive impact on the client. The liquidity risk must be borne by the client.
Termination	Can the client terminate the contract due to delay?	Sec. 8 para. 3 no. 1 of the VOB/B provides for the possibility of termination for the client in the event of delay. To this end, there must be a delay in the start of execution, a delay in completion or insufficient manpower, equipment, scaffolding, building materials or parts. If one of these circumstances is given, the client can set a deadline for the contractor to fulfil the contract and, after the deadline has expired, terminate the contract in writing, according to sec. 8 para. 3 no. 2 VOB/B. However, the extension of the deadline due to force majeure according to sec. 6 VOB/B shall also apply in these cases.
	If the delay exceeds 3 months, can one of the parties terminate the contract?	First of all, sec. 6 para. 7 sent. 1 of VOB/B grants both contracting parties the right to terminate the contract in the event that a complete interruption of the execution services lasts longer than 3 months. Such a right of termination does not cease to exist even if the interruption is unavoidable. An interruption in this context, however, means a complete interruption of the execution services (e.g. building stops or building site closures). Since, however, with repeated reference to the decree of the Federal Ministry of the Interior, construction work is (or should be) continued even during the pandemic measures (at least until the present time), premature declarations of termination are urgently



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		<p>advised against, especially with regard to the financial consequences of ineffective terminations.</p> <p>In addition, sec. 6 para. 7 of VOB/B does not justify termination in case of mere difficulties or merely existing delays.</p>
	<p>Is the contractor allowed to terminate the contract if the client is not granted a building permit due to measures against the SARS-CoV-2 virus?</p>	<p>In the event that a building permit is not granted to the client due to the Corona pandemic, either permanently or for an unforeseeable period of time, it may in individual cases be unreasonable for the contractor to continue with the construction contract if he is able to withdraw from it. In this case, however, a detailed investigation of the circumstances of the individual case is required.</p>



PLEASE FEEL FREE TO CONTACT US!

Further insights on the coronavirus in crisis:

<https://deutschland.taylorwessing.com/de/coronavirus>

Your points of contact

We will be happy to answer any questions you may have and to examine your options for action:



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