DuaneMorris® & SELVAM LLP

COVID-19 RESOURCES

Dealing with COVID-19 in the Construction Industry

5 April 2020

The global COVID-19 pandemic, and the response by the Singapore government will have important consequences for the construction industry. This article provides a summary of the current laws, our analysis of how it will affect industry players, and various legal and practical issues that may arise.

The government response is changing rapidly and we will update this article periodically to reflect the latest changes.

The Situation Now - A Quick Summary

On 3 April 2020, the Building and Construction Authority released an advisory requiring all building works to cease with effect from 7 April 2020, 0000 hours to 4 May 2020, 2359 hours (both dates inclusive), subject to limited exemptions ("**BCA Advisory**").

Construction-related businesses that are allowed to continue work, will be subject to the enhanced safe distancing measures under the Infectious Diseases Act ("**IDA**"), which will reduce the efficiency of work. These measures are in place until 4 May 2020, and may be extended if necessary.

In addition, construction companies will have to deal with a shortage of manpower as a result of the extremely restrictive border controls and work pass policies in place, as well as the shortage of supplies and cash flow, both in Singapore and overseas. Construction companies that have been forced to cease work will also have to resolve their fixed and sunk costs, such as wages.

To provide temporary relief to construction companies and other businesses affected by COVID-19, the government will be tabling the COVID-19 (Temporary Measures) Bill on 7 April 2020. ("**COVID-19 Temporary Measures**"). These measures will have an impact on the cash-flow of construction companies.

If the COVID-19 Temporary Measures do not apply to scenario at hand, construction companies may have to consider relying on the Force Majeure Clauses in their contracts or the doctrine of Frustration to mitigate the damage from COVID-19.

BCA Advisory and IDA on Construction Projects

BCA Advisory

The BCA Advisory provides that all construction work must stop with effect from 7 April 2020, 0000 hours to 4 May 2020, 2350 hours (both dates inclusive). The period of suspension may be extended if necessary. This includes all "buildings works" which include erection, extension or demolition of a building, alteration, addition or repair of a building, and the provision, extension or alteration of any air-conditioning service or ventilating system in or in connection with a building.

During the period of work suspension, all building works will cease except for the following essential works and services: (a) maintenance of the structural safety and integrity of building works, (b) maintenance of security of the project site and (c) environmental protection of the project site.

To ensure that building works can be suspended safely and remain safe in the interim, all project parties (developers, builders, qualified persons and site supervisors) ("**Project Parties**") must carry out all necessary works to ensure the structural safety and integrity of ongoing building works ("**Necessary Works**") **immediately.** BCA has provided several examples of "Necessary Works" which include (a) concreting the last pile, (b) installing temporary supports for earth retaining and stabilising structures, and (c) installing temporary supports to enhance the stability of structural precast components.

All Necessary Works are to be completed before the work suspension takes effect on 7 April 2020. If the Necessary Works cannot be completed before 7 April 2020, the parties can request extension of time at https://covid.gobusiness.gov.sg. The Commissioner of Building Control may grant an extension of time up to three (3) days.

IDA Regulations

Certain construction works are exempted from the BCA Advisory. These include:

a) development project that support essential services or national security;

b) development projects assessed to be in critical stages of construction and are unable to stop due to potential safety risks;

c) construction work in progress for (i) critical public infrastructure, (ii) maintenance and services to ensure public safety, and (iii) emergency repairs & maintenance; and

d) works in critical stages of construction, and that cannot be stopped suddenly due to potential public safety risk.

Construction companies can check whether they are exempted, or apply for an exemption, at https://covid.gobusiness.gov.sg.

However, even where work can continue, construction companies must adhere to the IDA Regulations, or face serious consequences. In the context of a construction workplace, the relevant measures that employers should implement include:

a) placing workers in two groups to avoid or minimise physical interactions;

b) implementing measures, as far as reasonably practicable, to ensure that workers do not arrive and leave the workplace at the same time;

c) requiring any worker who exhibits any specified symptom or is physically unwell to report to the employer or principal;

d) taking reasonable steps to ensure a distance of at least one metre between any 2 individuals in the work place; and

e) restricting the arrival and duration of visit of non-workers at the workplace.

Adherence to these measures may result in a reduction in efficiency and some construction companies may find themselves falling behind schedule.

Construction companies should note that the government measures do not excuse them from meeting their obligations to their own workers. They must still meet the medical insurance requirement for their foreign workers, even though work may have ceased.

In addition, attention should be paid to ensuring that the foreign workers housed in dormitories, leave the dormitories only for essential activities, such as to get food, health care or commute to their job in an essential service. They should also observe safe distancing measures when they are out.

COVID-19 Temporary Relief Measures

Based on available sources, these COVID-19 Temporary Measures will protect construction companies who are unable to meet their contractual obligations as a result of COVID-19. These include both construction contracts and supply contracts, and in fact, "construction contract" has the same meaning as that set out in the Building and Construction Industry Security of Payment Act (Cap. 30B) (**"SOP Act"**).

Criteria for Relief

Relief will only be granted if the following conditions are satisfied:

a) two or more parties entered into or renewed a contract before 25 March 2020, which provides for an obligation to be performed on or after 1 February 2020;

b) either party is unable to perform, and the inability is "to a material extent caused by a COVID-19 event"; and

c) the party seeking relief has served a notification for relief on the other party or parties to the contract, as well as any guarantor or surety for the performance of the obligation in the contract.

If the parties cannot agree on whether a party can obtain temporary relief under the Bill, the matter will be determined by an "assessor", who is a person appointed by the Ministry of Law. The process is a quick and simple one, and parties cannot be represented by a lawyer, and must bear their own costs. The assessor will make a determination having regard to the ability and financial capacity of the party performing the obligation and other prescribed factors. He must also seek to achieve a just and equitable outcome in the circumstances of the case.

Stay of Proceedings

Under the proposed measures he following actions cannot be taken against a party in respect of his breach of contract if that breach is a result of an inability caused by COVID-19:

a) litigation proceedings,

b) arbitration proceedings under the Arbitration Act and

c) the ***enforcement*** of an adjudication determination under the SOP Act, judgement of the court and an award under the Arbitration Act.

Relief against liquidated damages and delays

For construction companies, the COVID Temporary Measures will relieve construction companies that have served a notification from liability for liquidated damages or delays arising from non-performance.

Any period during which the party is unable to perform the contract due to COVID-19 is to be disregarded in determining the period of delay, when calculating liquidated damages or damages for breach of contract.

Further, the fact that an inability to perform the contractual obligation was to a material extent caused by a COVID-19 event will be a defence to a claim for a breach of contract.

This means that the contractor, or sub-contractor will obtain an extension of time ("**EOT**") without having to prove his entitlement to an EOT in an adjudication under the SOP Act, as long as he or she has issued a notification to the developer, or main contractor, and an Assessor has not made a finding that the inability to perform was not caused by COVID-19.

Call on performance bonds

In addition, if a party is unable to perform a construction or supply contract due to COVID-19, the other party cannot make a call on the performance bond in relation to that failure, earlier than 7 days before date of expiry.

The party that is unable to perform due to COVID-19 can extend the term of their performance bond, by notifying the issuer of the performance bond not less than 7 days before the expiry of the bond.

This effectively means that the party will be unable to call on the performance bond in respect of an inability to perform due to COVID-19.

How do the COVID-19 Temporary Measures Affect Construction Companies?

The COVID-19 Temporary Measures only protect parties who are unable to perform due to a COVID-19 event.

If a contractor, or sub-contractor, is unable to perform the contract due to COVID-19, the developer, or main contractor, would ***not*** be able to bring a claim against him, or call on the performance bond.

However, the contractor, or sub-contractor can ***still*** make a claim against the developer, or main contractor, for payments due under the contract, including an application under the SOP Act. The COVID-19 Temporary Measures do not prohibit the commencement or continuation of a claim brought under the SOP Act.

The developer, or main contractor, can prevent the contractor, or sub-contractor, from enforcing an adjudication determination against it, if and only if, the developer, or main contractor is unable to pay ***as a result of*** COVID-19, i.e. the developer has suffered a severe cash-flow issue due to COVID-19.

We note that this is unlikely as most developers are sufficiently funded, and it will be difficult for the developer, or main contractor, to persuade the Assessor that their lack of funds was caused by COVID-19.

It is also important to note that if the construction or supply contract was with a party situated outside Singapore, and the construction or supply contract provides for disputes to be resolved through international arbitration, as defined in the International Arbitration Act, then the COVID Temporary Measures would not apply, and the developer, or main contractor, can enforce the arbitration award against the contractor, or sub-contractor, notwithstanding that the failure to perform was as a result of COVID-19.

Who pays for additional costs incurred as a result of COVID-19?

One issue that has not been expressly provided for in the BCA Advisory or the COVID Temporary Measures is whether a contractor or sub-contractor may make a claim for additional work, or increased costs and/or loss or expense occasioned by the outbreak. These can arise from the following:

a) essential works that are ongoing even though the project has stopped, such as the (a) maintenance of the structural safety and integrity of building works, (b) maintenance of security of the project site and (c) environmental protection of the project site;

b) the necessary works required under the BCA Advisory, to ensure the structural safety and integrity of ongoing building works; and

c) border controls imposed in light of the COVID-19 situation may affect the availability of certain sources of manpower which have forced the contractor or sub-contractor to obtain manpower from more expensive sources;

d) likewise, the closure of non-essential industries in Singapore and overseas may limit the availability of materials, resulting in an increase in prices;

e) the costs of paying workers' wages, and other sunk costs, that continue to accrue when work has stopped.

Contractor's right to recover Additional Work required by legislation

Where the legislation in question is silent on recovery of costs, reference will have to be made to the terms of the actual contract. If, for example, an argument may be made that additional work required as a result of the works above (i.e. paragraphs 36(a) and 36(b)) constitutes a variation of the contract, the contractor may be able to recover such costs from the developer.

Contractor's right to recover Costs caused by the delay

The costs incurred by the contractor, or sub-contractor, during the period when work has stopped would constitute "loss and expense".

Whether the contractor is entitled to such loss and expense depends on the terms of the contract. For instance, "Loss and Expense" is defined under the Public Sector Standard Conditions of Contract for Construction Works (2014 Ed.) ("**PSSCOC Form**"). Clause 22 of the PSSCOC Form limits the contractor to the events specified therein.

It is important to note that even if a contractor is entitled to Loss and Expense, the contractor will still not be able to recover them through the SOP Act. This is because under Section17(2A) of the SOP Act, an adjudicator must disregard claim for damage loss or expense unless supported by: (i) any document showing agreement between the parties on the quantum of the claim; or (ii) any certificate or other document that is required to be issued under the contract.

If recovery through the SOP Act is not available, the contractor may have to resort to litigation or arbitration as the case may be, to recover these costs.

Contractor's right to adjust contract price to take into account increased costs of manpower / materials

As for increased costs arising from the restrictions, whether these can be recovered from the developer depends on the terms of the contract, which reflects the allocation of risk within the contract.

As such, Contractors will have to identify contractual provisions which entitle it to claim its additional costs. In this regard, the following types of clauses may be relevant:

a) "Changes in Legislation" Clauses. These are provisions which provide for adjustment of the contract sum to account for additional costs arising from changes or additional requirements in the applicable legislation, regulations, or conditions imposed by relevant authorities which directly impact the works to be carried out under the contract;

b) "Fluctuation" Clauses. Some contracts expressly foresee and provide for changes in the cost of labour and/or materials throughout the life of the project. For example, the PSSCOC Form provide for an adjustment of the contract sum to take into account the rise or fall in the price of certain materials as specified in the Appendix, with reference to the material price indices published by the BCA. The PSSCOC Form requires that the Employer must be informed of the price difference upon the delivery of the materials to the project site; and

c) "Force Majeure" Clauses. It is also possible that force majeure clauses, if drafted broadly enough, may provide grounds for claiming additional costs. However, this is unlikely as force majeure provisions are generally drafted to entitle the contractor to an EOT, but not to recover costs from the developer.

As a matter of approach, contractors should:

a) review the construction contracts; and

b) consider in particular, the contractual provision for Extension of Time (EOT).

Notwithstanding COVID-19, the contractor would still need to comply with the contractual requirements for EOT. There are of course implications for EOT. In general, when EOT is granted, the employer/developer may not impose liquidated damages on the contractor. Further, the contractor is then entitled to claim for Loss & Expense which is discussed above. There may be instances however, for example the PSSCOC Form, where a force majeure clause may entitle a contractor to an extension of time, but not to a claim for Loss & Expense.

An issue may arise where the COVID-19 outbreak occurs concurrently with another reason which may not entitle the contractor to an EOT (for example, the contractor is already in delay for the project). It would be necessary then to seek legal advice to evaluate the issue of concurrent delay and assess whether the contractor is entitled to EOT, and to also make a claim for Loss and Expense.

Dealing with Labour Issues

Another issue that construction companies will face as a result of COVID-19 is whether they can, or should take steps to reduce their manpower costs.

The Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment (which was very recently updated in March 2020), ("**Tripartite Guidelines**") provides for a guidelines on how to apply measures in situations of excess manpower.

The Tripartite Guidelines recommend that companies apply measures gradually, in the following sequence:

a) adjust working arrangements without wage cuts;

b) adjust working arrangements with wage cuts. For example, by having shorter work weeks, or asking employees to take annual leave;

c) decrease wages, with the consent of their employees; and

d) put employees on no pay leave, as a last resort.

For the construction industry, it may not be practical to adjust working arrangements, especially if the project has come to a halt due to the BCA Advisory. Therefore, these companies may decide to move straight to stage (d) and place workers on no pay leave, if there is no other option. As no-pay leave is a drastic measure, companies should ensure that:

a) they have considered and/or implemented other measures, and consulted their unions and employees;

b) senior management should lead by example, by accepting earlier and/or deeper cuts in cost-saving measures; and

c) no-pay leave should be applied in conjunction with other cost-saving measures.

It is mandatory for employers to notify the Ministry of Manpower within 1 week after adjusting the workers' pay or imposing no-pay leave.

Considerations in relation to Foreign Workers

It is important to note that under Section 22A(1) of the Employment of Foreign Manpower Act, it is an offence for any person to deduct any sum from the salary payable to a foreign employee, as consideration or as a condition for the continued employment of the foreign employee.

Therefore, placing foreign workers on no-pay leave may be an offence, unless prior approval is obtained from the Ministry of Manpower.

Further, as long as the foreign worker is in Singapore, the employer is obliged to pay for their medical care.

We do not recommend placing foreign workers on no-pay leave, unless the cessation of work continues beyond a few months, and only with the consent of the foreign workers. As we have stated above, the contractor / sub-contractor can consider making a claim against the developer for the costs of foreign workers' wages.

Conclusion

COVID-19, is a phenomenon of unprecedented scale, and the measures put in place are novel and untested. We expect that these measures will be adjusted over time, in response to the impact on the population and the economy. In the meantime, we at Duane Morris & Selvam LLP would be happy to address any queries you may have.

KEY CONTACTS

SARBJIT SINGH CHOPRA
Managing Director
+65 6311 0041
ssingh@selvam.com.sg

SEAN LA'BROOY
Director
+65 6311 0059
slabrooy@selvam.com.sg

DANIEL SOO
Director
+65 6311 3675
dsoo@selvam.com.sg

SUNG HEE KIM
Director of Korea Desk
+65 6311 3653
shkim@duanemorrisselvam.com