

## VALUING EX-GRATIA PROLONGATION COSTS ON PUBLIC PROJECTS IN SINGAPORE

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### INTRODUCTION

Like most countries worldwide, the Singapore Government implemented certain measures earlier this year to curtail the rising number of COVID-19 infections. On 07 April 2020 the Singapore Government passed the 'COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020)' and the 'COVID-19 (Temporary Measures) (Control Order) Regulations 2020' ("Circuit Breaker"), introducing mandatory requirements for, inter alia, special safe management measures for the building and construction industries. These measures have resulted in substantial delays being incurred on many construction projects.

Following the Circuit Breaker's activation, the Building and Construction Authority ("BCA") of Singapore issued a series of circulars, focused on the Construction industry regarding a variety of matters. Of the numerous support and stimulus packages implemented by the Singapore Government, one aspect of these related to assisting contractors who were faced with mounting costs on government construction projects ("Public Projects"). On 29 June 2020, the BCA issued a circular titled "Circular on Ex-Gratia Co-Sharing of Prolongation Costs due to COVID-19" <sup>i</sup> ("BCA Cost Circular") and on 25 September 2020, the BCA issued amendments to the BCA Cost Circular titled "Circular on Treatment of Claims Arising from COVID-19 in Public Sector Construction Contracts" <sup>ii</sup> ("Prolongation Cost Template").

In the BCA Cost Circular and the Prolongation Cost Template, the Singapore Government agreed that, following the award of an extension of time ("EOT") for delays incurred during the Circuit Breaker, and the disruption incurred post-Circuit Breaker, they would fund a share of the prolongation costs on an ex-gratia basis.

### GOVERNMENT CONTRACTS IN SINGAPORE AND WHAT THEY SAY

Public Projects in Singapore typically use the Public Sector Standard Conditions of Contract ("PSSCOC") as their standard form of contract, wherein Clause 22.2 of the PSSCOC expressly precludes a contractor from recovering prolongation costs regardless of whether an EOT has been awarded for a compensable event. However, that is not to say that a contractor is precluded from recovering additional costs under other provisions of the PSSCOC, e.g. variations, loss and expense, etc., but these are not the subject of this piece.

i At the time of writing, there have been 11no. Amendments to the regulations

ii <https://www1.bca.gov.sg/docs/default-source/bca-restart/circular-on-co-sharing-of-prolongation-costs.pdf>

iii <https://www1.bca.gov.sg/docs/default-source/bca-restart/circular-treatment-claims-covid-19-public-sector-construction-contracts.pdf>

As contractors have experienced unforeseen and increased costs because of COVID-19, the recovery of prolongation costs has become a topical issue within the construction industry. The



Singapore Government, through the BCA, has sought to aid and assist those contractors performing Public Projects, hence why the BCA Cost Circular and Prolongation Cost Template appear to be on an *ex-gratia* basis.

Additionally, in the Prolongation Cost Template, the Singapore Government, per the BCA, agreed to 'waive a contractor's obligation under Clause 14.3(1) of the PSSCOC regarding the submission of notice and substantiation of their EOT claim'. Also, the BCA has granted contractors a default period of four months EOT for the common periods of delay, i.e. from the Circuit Breaker's activation (07 April 2020) to the date on which all foreign worker dormitories were cleared of COVID-19 (06 August 2020). The default EOT would not be applicable should a project have continued during the Circuit Breaker, or if works had resumed "*substantially on site before 6 Aug 2020*".

#### VALUING PROLONGATION COSTS PER THE BCA COST CIRCULAR

On Public Projects, the Bills of Quantities ("BOQ") are both set out and priced differently from private projects, in particular the 'Preliminaries and General' bill ("Preliminaries") where items are predominately priced as lump sums. In these instances, it is natural to wonder how a contractor can identify the time-related items and prepare its prolongation cost claim per the BCA Cost Circular.

Some solace can be sought from the BCA Cost Circular, where broad guidance is provided on certain cost headings where it states:

- "Prolongation costs will include:
  - a) Plant and equipment costs;
  - b) Site maintenance costs. Manpower cost incurred by the contractor's own manpower for site maintenance is excluded;
  - c) Other costs such as extension of project insurance and performance bonds and storage etc;
- and exclude:
  - a) Manpower costs (i.e. salaries, accommodation and transportation of employees

and workers and foreign worker Levy (FWL) as these are already covered by other government relief measures such as Job Support Scheme and FWL waiver/rebate); and

- b) Compliance costs for Restart (i.e. safe management measures such as segregating workers or cohorting of workers by projects at their places of accommodation, etc).
- c) Other costs covered by government relief measures (e.g. rental waivers)."

Further guidance is provided within the Prolongation Cost Template, where the BCA provides a template document and example of how to calculate these prolongation costs, with instructions that "contractors can adopt and modify the template as necessary".

Using the Prolongation Cost Template as guidance, some examples of how to calculate and substantiate prolongation costs, per the categories in the BCA Cost Circular, are set out below.

### PLANT AND EQUIPMENT ("P&E") COSTS

Where P&E costs are included in the Preliminaries, and a contractor was paid these on a monthly basis, then a contractor could use this monthly sum from the previous payment certificates to calculate the P&E costs for the EOT period; adjusted for those days outside the EOT period, e.g. those days between the start of April 2020 and the Circuit Breaker's activation date.

Given the likelihood that this sum may not represent the actual costs incurred during the Circuit Breaker, it may not be a suitable method to value P&E costs.

Where a contractor had hired items of P&E present on the project site during the Circuit Breaker period, these costs could be demonstrated by providing purchase orders, invoices, proof of payment (e.g. cheque, bank remittance), inventory lists, photographs, etc; with appropriate cost adjustments for non-EOT periods.

Where a contractor has their own items of P&E present on the project site during the Circuit Breaker period, a contractor would need to calculate and demonstrate the depreciation costs for such P&E. A contractor could use the P&E identification number (e.g. number plate), inventory lists, photographs, etc. to match the item of P&E to the annual audited accounts, demonstrating both ownership and the value of yearly depreciation. The value of yearly depreciation can be adjusted to reflect the proportional value of EOT period within the annual depreciation value.



The operational and maintenance costs of P&E during the Circuit Breaker, e.g. fuel, spare parts, repair, etc., would follow the same advice as above, namely provision of purchase orders, invoices, proof of payment (e.g. cheque, bank remittance), inventory lists, maintenance logs, photographs, etc; with appropriate cost adjustments for non-EOT periods.

Insufficiencies in the BCA Cost Circular and the Prolongation Cost Template make it unclear whether aspects of these costs will be subject to challenge from the Superintending Officer (“SO”). The challenge being, whether a contractor should have, or at least attempted to, demobilised some if not all P&E on site prior to the Circuit Breaker’s activation to minimise the costs incurred.

Whilst some contractors might attempt to include the cost of tools in their prolongation cost claim, Public Projects typically include a provision whereby the cost of tools is included in the unit rates of measurable components to the BOQ, and would therefore be considered non-time-related costs.

### SITE MAINTENANCE COSTS

The Prolongation Cost Template identifies five sub-categories that a contractor may seek to recover costs against:



- Vector and pest control;
- Site security;
- Utilities;
- Housekeeping; and
- Additional works performed to secure the site for the absence during the Circuit Breaker.

As highlighted above, one possible method of valuing these costs could be to use the monthly sum paid from previous payment certificates to calculate the cost of these items for the EOT period; with appropriate cost adjustments for non-EOT periods.

Given the likelihood that this sum may not represent the actual costs incurred during the Circuit Breaker, it may not be a suitable method to value the site maintenance costs.

Where these works have been subcontracted, to demonstrate these costs a contractor could provide purchase orders, invoices, proof of payment (e.g. cheque, bank remittance), inventory lists, maintenance logs, photographs, etc.; with appropriate cost adjustments for non-EOT periods.

Where these works have been performed by the contractor, these costs could be demonstrated by providing invoices (for materials, fuel), proof of payment (e.g. cheque, bank remittance), inventory lists, maintenance logs, photographs; with appropriate cost adjustments for non-EOT periods. However, per the BCA Cost Circular, a contractor is precluded from recovering the cost of “the contractor’s own manpower” expended in performing these works, so such costs would need to be segregated and omitted.

Whilst the BCA Cost Circular precludes the recovery of **“Manpower cost[s] incurred by the contractor’s own manpower for site maintenance”**, the Prolongation Cost Template suggests that manpower costs of a third-party engaged to perform site maintenance works during the Circuit Breaker period may be recoverable, though this may be subject to challenge from the SO.

Whilst not finite, if incurred, some additional costs that could potentially be included in this cost category might be:

- Dewatering / generator maintenance (if not included in P&E costs);
- Traffic diversion;
- Hoarding / signs / lighting maintenance; or
- Ground settlement monitoring / maintenance (if not performed by the respective government agency).

#### OTHER COSTS

Under normal circumstances, the number of cost items that could be recovered within this category may be extensive. However, compliance with the Circuit Breaker means that a contractor will likely not have incurred some of these costs and therefore, they cannot be claimed, e.g. transportation, stationary, waste disposal, drinking water etc.

The Prolongation Cost Template identifies five sub-categories that a contractor may seek to recover costs against:

- Project insurance;
- Performance bond / Security deposit;
- Storage costs;
- Site office rental; and

- Temporary occupation licence (“TOL”) land licence.

A similar calculation approach could be adopted for these costs as was provided above for P&E and Site maintenance costs, where costs are paid on a pro-rata basis of the contract duration, for hired items or contractor owned items; with appropriate cost adjustments for non-EOT periods.

However, the BCA Cost Circular indicates that where a contractor has utilised **“government relief measures”** these costs are not recoverable. Whilst there are certain insufficiencies in the BCA Cost Circular, the Prolongation Cost Template suggests that a contractor may be able to claim the difference between the actual costs incurred and the sum paid through **“government relief measures”**, e.g. **“Site Office rental (after deducting other govt rental rebates)”**. In the absence of clarity regarding whether this would be applicable to all costs under this category, these costs may be subject to challenge from the SO.

An example of some additional costs that could potentially be included in this cost category might be:

- Site Management costs for those personnel the “government relief measures” did not cover;
- The difference between the actual cost of Site Management incurred and the sum paid through “government relief measures”;
- Site office equipment / air-conditioning units / kitchen goods (if not included in the “Site Office rental”);
- Mobile telephones / tablets / walkie-talkies (if not included in Site maintenance costs);
- Hoarding hire / depreciation;
- Temporary works, e.g. scaffolding;
- The difference between the actual cost of head office overheads and profit incurred, and the sum paid through “government relief measures”, adjusted to account for those involved in the project and likewise if involved in multiple projects;
- Loss of potential profit; or
- Extension of medical insurance / Visas (if provided for staff).

Should a contractor choose to pursue these costs, then along with a reasonable calculation of the cost, a contractor would need to substantiate the basis of its calculation. Such documentation might include signed timesheets, accounting records / ledgers, payslips, contract agreements, purchase orders, invoices, proof of payment (e.g. cheque, bank remittance) inventory lists, photographs, use of a recognised calculation formula (e.g. Eichleay formula, Emden formula, Hudson formula), etc.

However, as previously mentioned, the insufficiencies in the BCA Cost Circular and the Prolongation Cost Template, make it unclear whether the inclusion of these costs would be permissible or would be subject to challenge from the SO.

## CONCLUSION

Whilst the BCA Cost Circular and the Prolongation Cost Template offer guidance on costs that can be included in a contractor's ex-gratia prolongation cost claim, the insufficiencies in these circulars and inclusion of certain text, such as "contractors can adopt and modify the template as necessary" and "after deducting other govt rental rebates", suggests a contractor may still be able



recover certain costs that initially did not appear permissible.

However, in the absence of clear comprehensive guidance from the BCA on these matters, should a contractor attempt to recover costs for some of these less definitive matters, then it may well be the case that they are subject to the SO's

interpretation and could be challenged.

It is suggested that where possible, should a contractor intend to apply for the ex-gratia prolongation costs, they may want to consider substantiating all costs, showing where costs have been adjusted to account for non-EOT periods, potentially helping to avoid challenge by the SO, and ultimately delaying their payment.

Should assistance be required with the calculation of prolongation costs, DGA have numerous experienced professionals in Singapore and worldwide, who are both able and willing to help.

## MORE INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at [DGAGroup@dga-group.com](mailto:DGAGroup@dga-group.com)

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