

CONTRACT ADMINISTRATION IN THE POST COVID-19 ERA – SINGAPORE CHAPTER



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INTRODUCTION

The COVID-19 pandemic in Singapore was part of the worldwide pandemic spanning from 23 January 2020 to 13 February 2023. During this period, various measures were implemented, and among others, the COVID-19 (Temporary Measures) Act 2020 and Control Order Regulations 2020 were brought into force. We have seen unprecedented relief (in the construction industry) such as co-shared prolongation costs, ex-gratia extensions of time and relief for construction contracts affected by increase in foreign manpower salary costs. A pandemic of this nature could affect the project in various manners – works disruption, delay in certain work activity, cost fluctuation, etc.

In this article, we will look into the revolution of Public Sector Standard Conditions of Contract (PSSCOC) after the COVID-19 pandemic.

PUBLIC SECTOR STANDARD CONDITIONS OF CONTRACT

Clause 14.2 of the Public Sector Standard Conditions of Contract sets out the grounds for the Contractor’s entitlement to an extension of time.. With effect from 01 November 2021, Clause 14.2(q) and new Clause 14.2(qa) were amended as follows:



14.2 (q) Pandemic or an outbreak of infectious disease occurring over a wide geographical area crossing international boundaries, usually affecting a large number of people, declared by –

(i) the World Health Organisation or any international health related authority; or

(ii) the health-related authority in the geographical area where the pandemic or infectious disease is occurring; or

(iii) the Ministry of Health of Singapore, (“Pandemic Outbreak”) resulting in shortages of the labour, goods, materials or Construction Equipment required for the Works or inability to proceed with any part of the Works.

14.2 (qa) Measures that the government or any other statutory or public authority of Singapore requires the Contractor to implement in respect of the Works arising from any Pandemic Outbreak.

New Clause 14.2(q) and 14.2(qa) specifically defines the parameter of pandemics which may entitle the Contractor for certain time extension, subject to compliance with the notice requirements.

Furthermore, with effect from 01 November 2021, the amended Clause 22.1(j) and Clause 22.1(ja) addressed the parameters for Loss and / or Expense claims arising from the pandemic, as follows:

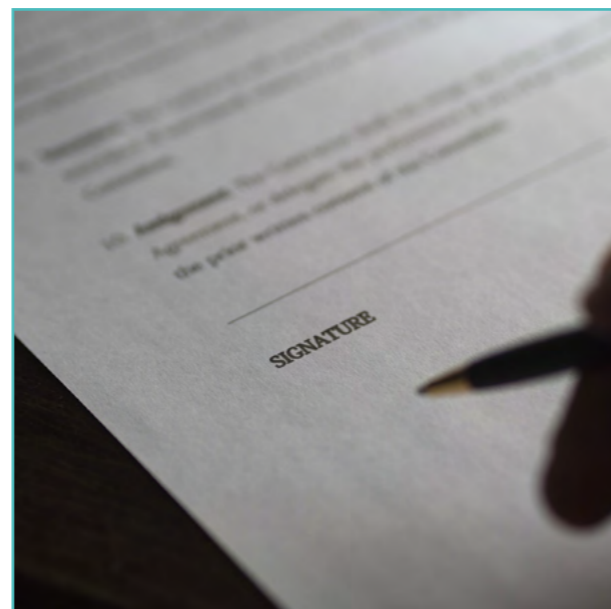
22.1 (j) any **Pandemic Outbreak** provided that –

(i) the Contractor shall only be entitled to recover 50% of such Loss and Expense excluding the relevant costs as provided in Clause 1.1(q)(iii);

(ii) the Contractor shall only be entitled under this Clause 22.1(j) to recover Loss and Expense for which the Contractor has not received any government or statutory relief or subsidy; and

(iii) the **aggregate amount** of Loss and Expense that the Contractor is entitled to recover under this Clause 22.1(j) **shall not exceed 5% of the Contract Sum set out in the Letter of Acceptance.** To avoid doubt, the aggregate amount of Loss and Expense that the Contractor is entitled to **recover under both this Clause 22.1(j) and Clause 22.1(ja) shall not exceed 5% of the Contract Sum set out in the Letter of Acceptance.**

22.1 (ja) **any measures that the government** or any other statutory or public authority of Singapore requires the Contractor to implement in respect of the Works arising from any Pandemic Outbreak provided that–



(i) the Contractor shall only be entitled to recover 50% of such Loss and Expense excluding the relevant costs as provided in Clause 1.1(q)(iii);

(ii) the Contractor shall only be entitled under this Clause 22.1(ja) to recover Loss and Expense for which the Contractor has not received any government or statutory relief or subsidy; and

(iii) **the aggregate amount** of Loss and Expense that the Contractor is entitled to recover under this Clause 22.1(ja) **shall not exceed 5% of the Contract Sum set out in the Letter of Acceptance.** To avoid doubt, the aggregate amount of Loss and Expense that the Contractor is entitled to **recover under both this Clause 22.1(ja) and Clause 22.1(j) shall not exceed 5% of the Contract Sum set out in the Letter of Acceptance.**

With these amendments, the Loss and / or Expenses claim which relates to a pandemic and / or compliance of any government measures is no longer limited to the below common understanding of ‘Loss and Expense’:

- (i) The direct relevant costs of labour, Plant, Construction Equipment, materials, or goods actually incurred; and
- (ii) Costs of an overhead nature actually and necessarily incurred on the Site but in either case only in so far, they would not otherwise have been incurred and which were not and should not have been provided for by the Contractor; and
- (iii) 15% of any such costs, such 15% to be inclusive of and in lieu of any profits, head office or other administrative overheads, financing charges (including foreign exchange losses) and any other costs, loss or expense of whatsoever nature and howsoever arising

DECISION ON CASE LAW

In *Ser Kim Koi v GTMS Construction Pte Ltd [2022] SGHC(A) 34*, the Court gives a glimpse on the term ‘Force Majeure’ as follows:

[77] In our view, the essence of a force majeure event is a radical event that prevents the performance of the relevant obligation (and not merely making it more onerous), and which is due to circumstances beyond the parties’ control. The CA observed in *Sato Kogyo* at [57] that **“force majeure clauses would – in the ordinary course of events – be triggered only where there was a radical external event that supervened and that was not due to the fault of either of the contracting parties”**. The use of the words “radical” and “external” by the CA suggests that the phrase “force majeure” would cover only those events or circumstances which were generally not, **at the time the**

contract was entered into, contemplated, or expected to or which might reasonably have been foreseen to occur during the performance of the contract.

Furthermore, at [81] we see that the Court had considered and defined the COVID-19 pandemic as a radical external event which falls under the category of Force Majeure, as cited below:

..... have stated above in [77], radical external events and circumstances that prevent the performance of the relevant obligations and which are due to circumstances beyond the parties' control – for example, the COVID-19 pandemic and the “lock down” that followed over much of 2020 and 2021, the shortage of labour and materials due to the COVID-19 pandemic lock-downs, the prohibition of travel between countries and the ensuing disruption of supplies and manufacture of goods and material.....

CONCLUSION

During the pandemic, the Government granted universal extensions of time to all projects procured by government entities to help with the delay.

Following COVID-19, with the lesson learned during the pandemic, the government has since updated PSSCOC, to better capture the position and risk allocation in the standard form of contract. Since similar events will unlikely be “unprecedented” in the future, we can expect similar universal EOT may not be given.

Therefore, it is vital for contractors to provide and prove the productivity loss, by establishing a clear planned productivity rate to form part of the performance measurement baseline. During the work, it is also important to track the actual productivity, to enable future substantiation of productivity loss.

Aside from final as-built records, it is also equally important to have interim records.

For programme, it is important to obtain an accepted programme to serve as an agreed baseline for tracking. It is ideal to have updated programme at least once a month, to record the interim progress data and other changes to the programme as the project is delivered.

Aside from the programme, other documents including reports, inspection forms, minutes, etc. can also help to record interim data. For complex projects, the frequency of such records is usually once per week or even daily (i.e.. Daily site dairy). It is important that any record used as a reference in any claim be something owned by both parties, this will increase the credibility of records and ultimately assist contractors with proving its entitlement to claims under the new clauses in the PSSCOC.

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