

## **Briefing Note**

**23 March 2020**

### **The COVID-19 Virus and FIDIC Standard Form Contracts – A Rock and a Hard Place: The Courses of Action Available to Contractors**

#### **Introduction**

The COVID-19 virus, and the steps being taken in response, are having a profound impact on the construction industry. Given staffing issues and possible supply shortages, many Contractors may face a tough choice: to continue with the project or cease performance. This briefing note discusses the implications of the courses of action available to contractors pursuant to the International Federation of Consulting Engineers (“**FIDIC**”) standard form contracts in use throughout the construction industry, as well as the legal concept of frustration that is adopted by both English and Singapore law.

#### **FIDIC**

FIDIC standard form contracts are commonly used in the construction industry. This briefing note will reference provisions in: (a) the FIDIC Red Book of 1999 containing the Conditions of Contract for building and design works designed by the Employer (the “**FIDIC Red Book**”); and (b) the FIDIC Yellow Book of 1999 containing the Conditions of Contract for electrical and mechanical plant and for building and engineering works designed by the Contractor (the “**FIDIC Yellow Book**”).

Such provisions, however, are not unique to FIDIC standard form contracts and similar provisions may be found in other standard form and bespoke construction contracts.

#### **What to Do?**

Contractors deciding to continue with the performance of the works may look to provisions in both the FIDIC Red and Yellow Books to seek more time to perform the remaining obligations. But should the Contractor decide to cease work, it may need to fall back on the common law principle of frustration (available under both Singapore and English law) to discharge itself from further performance.

#### **Continued Performance**

Contractors who decide to continue may consider seeking an extension of time (“**EOT**”) within which to complete the works. Both the FIDIC Red and Yellow Books provide that Contractors may seek an EOT when there is a delay in the completion of the works caused by: (a) a force majeure event; or (b) unforeseeable shortages in personnel or goods caused by an epidemic or governmental action. But either course presents unique difficulties.

Contractors relying on a force majeure event should note that there is no common law definition as to what constitutes a force majeure event. Further, the standard wording of the FIDIC Red and Yellow Books do not include the occurrence of a contagious or infectious disease, or an epidemic or pandemic, within the list of possible force majeure events. Absent any amendment to the standard wording, Contractors may face difficulties in claiming force majeure.

Contractors relying on unforeseeable shortages may have better chances of successfully claiming an EOT. There is an arguable, albeit fact sensitive, case that staffing issues and supply shortages were unforeseeable and resulted from governmental actions in response to COVID-19. Whilst the Contractor will be obliged to minimise disruption, a claim for EOT would likely attract sympathy from a Court or Tribunal if the claim can be supported by the facts.

When seeking to make a claim for an EOT, a Contractor should pay attention to the strict timelines imposed by both the FIDIC Red and Yellow Books. If a Contractor is working off an unamended version of the FIDIC Red or Yellow Book, it would be required to notify the engineer of its claim within 28 days after becoming aware of (or when it should have become aware of) the grounds giving rise to the claim. Failure to do so could forfeit a valid claim for an EOT. Identifying when the Contractor became aware or should have become aware of potential staffing issues and supply shortages may be difficult. Some employers could contest notices on the basis that the Contractor should have been aware of the likely implications of COVID-19 more than 28 days before the notification was submitted. In this regard, it will be important for Contractors to document their internal decision-making processes and record the particular event, circumstance or government announcement that made the Contractor decide to submit its EOT request.

### **Cease Performance**

The FIDIC Red and Yellow Books include no clear contractual provisions for Contractors looking to terminate the contract for disruption caused by events such as COVID-19. As such, the Contractor may need to fall back on the common law concept of frustration, which may be available even if the contract contains extension of time provisions.

Frustration excuses the performance of contractual obligations if a serious event occurs that is both unexpected and beyond the control of the parties, which renders it physically or commercially impossible to fulfil the contract, or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract.

However, Contractors wishing to excuse further performance must overcome very stringent requirements. It is not sufficient to show that the response to COVID-19 has made it more expensive or onerous to fulfil contractual obligations; commercial performance must be made impossible. If it was within the limits of the contract to extend time for performance and complete the works later than originally planned, then this will make a successful claim for frustration more unlikely.

## **Summary**

The onset of COVID-19 may place some Contractors between a rock and a hard place: they may need to decide whether to continue to perform the contract and claim an EOT or cease performance entirely. Electing which option to take will depend on the facts, the contract and its governing law.

Whichever course the Contractor elects to take, it will face headwinds. To assist in making that decision, Contractors are encouraged to consult our Construction Law team. We are qualified to advise under English, Singapore, New York and Western Australia laws and we also regularly work on projects governed by other laws in conjunction with local counsel.

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