

BRIEFING NOTE

BCA Ex Gratia Payment for Public Sector Projects – Considerations for Main Contractors Prior to Wholesale Acceptance

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Introduction

Back in June 2020, the Building and Construction Authority (“**BCA**”) issued a circular on the co-sharing of prolongation costs between public authorities and main contractors on an ex-gratia basis. This is good news for main contractors, most of whom have been badly affected by the pandemic and the government’s response to the pandemic.

Yet, before accepting the ex gratia payment, main contractors should note the scope of this payment as well as the terms and conditions for receiving this payment. Main contractors should also note the alternatives and/or additional remedies available.

What is the Ex Gratia Payment?

Subject to certain limitations, government agencies shall co-share half of the prolongation costs for: (a) the suspension of construction works from the start of the Circuit Breaker up to the approval for restart; and (b) the loss of productivity after the approval for restart.

Cost Limitations

- The co-sharing of prolongation costs is limited to three types of costs. Costs to comply with the COVID-Safe Restart Criteria are excluded. Some compliance costs (for e.g., purchasing personal protective equipment)¹ may be small. Others (for e.g., variation orders and revising programmes necessitated by the compliance) can be significant.
- The co-sharing of prolongation costs is capped at a maximum of 1.8% of the contract sum. In practice, prolongation costs incurred are likely to exceed this cap.

Time Limitations

- The co-sharing for (a) is capped at a maximum of five months (between 7 April 2020 and 6 September 2020). Unless approval for restart was obtained after 6 September 2020, this five-months cap is unlikely to apply. As most main contractors obtained approval for restart in early July 2020, the maximum ex gratia co-sharing for (a) is limited to approximately three months (between 7 April 2020 and early July 2020).

¹ The government will chip in for some of these costs (see, BCA Circular on Construction Restart Booster to Support Firms and Workers for Sector Restarted dated 13 July 2020 (updated on 20 August 2020)).

- The co-sharing for (b) is capped at a maximum of four months from the approval for restart (not from the actual restart). The actual restart is often later, after dormitories have been cleared. After actual restart, most main contractors have estimated half a year to regain pre-pandemic productivity levels. Accordingly, the maximum ex gratia co-sharing for (b) may not cover the entire period of decreased productivity.

Are there Alternatives to the Ex Gratia Payment?

There are a number of contractual remedies for main contractors (which may be surprising given the pro-employer nature of public sector contracts).

Force Majeure. Main contractors must show that the occurrence of a force majeure event has impacted the performance of the contract. Once this is satisfied, main contractors may be entitled to loss and expense if one of the two grounds below are satisfied as well.

Suspension of Work during Circuit Breaker (and up to Approval for Restart). Main contractors may be entitled to the full *“loss, expense, costs or damages”* suffered (instead of half of the prolongation costs under the ex gratia payment).

Variation. Main contractors may be entitled to loss and expense for variations necessitated by compliance with statutory requirements or other requirements imposed by statutory bodies (such as the COVID-Safe Restart Criteria). These costs are not otherwise recoverable under the ex gratia payment. Contractual recovery may be an additional avenue for recovery.

Main contractors are encouraged to conduct a thorough analysis of their options to recover under the ex gratia payment and contractual provisions (potentially with a view of maximising recovery). Main contractors should also ensure that accepting the ex gratia payment does not preclude future claims (whether or not such claims are attributable to the pandemic).

How We May Assist

Our construction team is assisting main contractors on additional cost and time claims under public sector contracts. We are familiar with the contractual grounds for making such claims, as well as the considerations prior to accepting the ex gratia payment. Where necessary, we work with claims consultants to deliver the most optimal outcome for all our clients.

To find out how we may be of assistance to you, feel free to contact any member of our team.



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