

Covid-19 and the FIDIC Form of Contracts – The Impact of the Movement Control Order or Lockdown Order on Building Sites

Malaysia has imposed a Movement Control Order (MCO) effective from 18th to 31st March 2020 as a measure to curb the spread of Covid-19 in the country. The MCO applies to building projects, save for critical works essential to safety. We have on 22nd March 2020 written on the impact of the MCO on building projects that adopt the *Pertubuhan Arkitek Malaysia (PAM) Conditions of Contracts 2006/2018*.

In this article, we consider Frequently Asked Questions (FAQs) from the standpoint of the FIDIC Yellow Book (First Edition 1999). These discussions are also applicable to the corresponding provisions of the FIDIC Yellow Book (Second Edition 2017).

Any projects (undertaken locally or internationally) governed by the FIDIC Conditions of Contract entered into between Malaysian companies or between Malaysian and foreign companies or between foreign companies may find this article useful. Local laws must however be considered as they may have an impact on the interpretation of these forms.

INTRODUCTION

The FIDIC Forms of Contract are designated by colour codes. The commonly used are:

- (a) **FIDIC Green Book**
Short Form of Contract for engineering and building work of small/simple projects.
- (b) **FIDIC Red Book**
Conditions of Contract for Construction for building and engineering works where the design is by the employer.
- (c) **FIDIC Yellow Book**
Conditions of Contract for Plant and Design-Build for electrical and mechanical plant and for building works where the design is by the contractor.
- (d) **FIDIC Silver Book**
Conditions of Contract for EPC/Turnkey Projects where the design and execution of a project is by the contractor.

FAQ (1): Does the MCO or a Lockdown Order entitle the contractor to an extension of time (EOT)?

Yes. There are provisions within the **FIDIC Yellow Book** which recognise the time impact of an incident, such as the MCO or a Lockdown Order. The contractor's rights to an EOT are governed by these provisions.

FAQ (2): Which are the provisions governing EOT under the FIDIC Yellow Book?

There are a few provisions.

(a) Clause 8.4(d): Is there unforeseeable shortages in the availability of personnel or Goods?

8.4(d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions.

There are 2 broad elements to this provision. There must be (i) unforeseeable shortages of either “personnel” or “Goods” and (ii) this must be due to an epidemic or governmental action.

As “personnel” is not defined in the FIDIC Yellow Book (First Edition 1999), it may encompass a shortage of personnel of consultants, or even arguably personnel of any public authorities and private utility companies that may be required for the works.

What are “Goods”?

- **Clause 1.1.5.2** defines “Goods” as “**Contractor’s Equipment, Materials, Plant and Temporary Works, or any of them as appropriate**”. Each of the term referred to is further defined below:
 - **Clause 1.1.5.1** defines “Contractor’s Equipment” as “*all apparatus, machinery, vehicles and other things required for the execution and completion of the Works and the remedying of any defects. However, Contractor’s Equipment excludes Temporary Works, Employer’s Equipment (if any), Plant, Materials and any other things intended to form or forming part of the Permanent Works.*” “Temporary Works” is defined in **Clause 1.1.5.7** as “*all temporary works of every kind (other than Contractor’s Equipment) required on Site for the execution and completion of the Permanent Works and the remedying of any defects.*” “Permanent Works” is defined in **Clause 1.1.5.4** as “*permanent works to be executed by the Contractor under the Contract.*”
 - **Clause 1.1.5.3** defines “Materials” as “*things of all kinds (other than Plant) intended to form or forming part of the Permanent Works, including the supply-only materials (if any) to be supplied by the Contractor under the Contract.*”
 - **Clause 1.1.5.5** defines “Plant” as “*apparatus, machinery and vehicles intended to form or forming part of the Permanent Works.*”

The MCO is clearly a governmental action, whilst the Covid-19 outbreak is an epidemic. Either way, the second element of **Clause 8.4(d)** is present.

Thus, if the MCO or a lockdown order imposed by a government results in an unforeseeable shortage of personnel or Goods, the contractor would be entitled to an EOT under **Clause 8.4(d)**, if such unforeseeable shortage caused a delay in the completion of the works.

(b) Clause 8.5: Is this a delay caused by authorities?

8.5 If the following conditions apply, namely:

- (a) the Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the Country,*
- (b) these authorities delay or disrupt the Contractor's work, and*
- (c) the delay or disruption was Unforeseeable,*

then this delay or disruption will be considered as a cause of delay under subparagraph (b) of Sub-Clause 8.4 [Extension of Time for Completion].

- **Clause 1.1.6.2** defines "Country" as "country in which the Site (or most of it) is located, where the Permanent Works are to be executed." **Clause 1.1.6.7** defines "Site" as "places where the Permanent Works are to be executed and to which Plant and Materials are to be delivered, and any other places as may be specified in the Contract as forming part of the Site."
- **Clause 1.1.6.8** defines "Unforeseeable" as "not reasonably foreseeable by an experienced contractor by the date for submission of the Tender." **Clause 1.1.1.8** defines "Tender" as "Letter of Tender and all other documents which the Contractor submitted with the Letter of Tender, as included in the Contract."

In the event a contractor's compliance with the MCO or a Lockdown Order imposed by the relevant Country's government/authority has delayed or disrupted the contractor's works in a manner that could not have been reasonably foreseeable by an experienced contractor at the time of submission of the tender, then the resulting delay or disruption would entitle a contractor to an EOT under **Clause 8(4)(b)**.

As for new contracts currently being negotiated or entered in the midst of the Covid-19 outbreak or after the announcement of the MCO or lockdown order, it is arguable that an experienced contractor could reasonably foresee, and ought to have foreseen, the effect of the Covid-19 and MCO or lockdown order.

(c) Clause 13.7: Is this a change in legislation?

13.7 [...]

*If the Contractor suffers (or will suffer) delay... as a result of these changes in the Laws or in such interpretations, made after the Base Date...
[...]*

- **Clause 1.1.6.5** defines "Laws" as "all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority." **Clause 1.1.3.1** defines "Base Date" as "the date 28 days prior to the latest date for submission of the Tender."

- “Tender” is defined in **Clause 1.1.1.8** as “*Letter of Tender and all other documents which the Contractor submitted with the Letter of Tender, as included in the Contract.*”

If the issuance of the MCO or Lockdown Order amounts locally to a regulation or “other laws”, then where the performance of a contractor is delayed by the said order, the contractor would be entitled to an EOT under **Clause 13.7**. This provision is only applicable where the Lockdown Order is issued within 28 days of the latest Tender submission.

(d) Clause 19.1: Is this a *force majeure* event?

19.1 In this Clause “Force Majeure” means an exceptional event or circumstance:

- (a) which is beyond a Party’s control,*
- (b) which such Party could not reasonably have provided against before entering into the Contract,*
- (c) which, having arisen, such Party could not reasonably have avoided or overcome, and*
- (d) which is not substantially attributable to the other Party*

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

- (i) ...*
- (ii) ...*
- (iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor’s Personnel and other employees of the Contractor and Subcontractors,*
- (iv) ...*
- (v) ...*

[Note: See Clause 18 – Exceptional Events, FIDIC Yellow Book, 2017 edition]

All the 4 conditions set out in (a) to (d) of **Clause 19.1** must be satisfied to be treated as *force majeure*. **Clause 1.1.2.1** defines “Party” as “*Employer or Contractor, as the context requires.*” The spread of Covid-19 is beyond the control of the Contractor. It follows that the Contractor did not foresee the pandemic and thus could not have reasonably provided for the MCO or a Lockdown Order before entering into the contract. Having arisen, nothing could have been done by the Contractor and thus the situation could not have been reasonably avoided or overcome. Further, this situation is not caused by the Employer. Where all the 4 conditions set out in **Clause 19.1** are satisfied, the Contractor would be entitled to an EOT under **Clause 19.1**.

Clause 19.1 further provides situations which are deemed as *force majeure* which includes “lockout”. **A Dictionary of Law (2nd Edn) by Curzon** defines “lockout” as “*the closing of a place of employment or suspension of work, or the refusal by the employer to continue to employ any number of persons employed by him in consequence of a dispute.*” As such, where the MCO or a Lockdown Order results in a lockout at the site not due to the Contractor’s Personnel defined at **Clause 1.1.2.7** and other employees of the Contractor and subcontractors, the Contractor would be entitled to an EOT under **Clause 19.1**.

FAQ (3): What must the contractor do to claim the EOT?

The 2 main requirements are – **notification and particulars**.

Clause 20.1 requires notification to the Engineer of the MCO or a Lockdown Order giving rise to the EOT claim within 28 days of becoming aware or should have been aware of the MCO or the Lockdown Order, that is the announcement of the said order. Thereafter, within 42 days after the announcement of the MCO or the Lockdown Order, the contractor is to submit a fully detailed claim supported with full particulars.

As for an EOT claim under **Clause 19.1** (*force majeure*), the notice of claim under **Clause 20.1** will be ineffective unless the notice under **Clause 19.2** is given. **Clause 19.2** requires notice to be given to the Employer, specifying the obligations and/or performance which is or will be prevented due to the MCO or the Lockdown Order (“**Notice of Force Majeure**”). The Notice of *Force Majeure* must be given within 14 days of becoming aware or should have been aware of the MCO or Lockdown Order, that is the announcement of the said order.

FAQ (4): What if the MCO or Lockdown Order is extended?

If the MCO or a Lockdown Order is extended, **Clause 20.1** requires monthly interim claims which particularise the accumulated delays and/or EOT claimed to be submitted. Once the situation is over, a final claim is to be sent within 28 days after the expiry of the MCO or the Lockdown Order.

FAQ (5): What is the extent of the EOT entitlement?

Would the EOT period mirror the MCO or a Lockdown Order period?

Arguably not. There would be knock-on effects from the MCO or a Lockdown Order. There would be supply issues – both of materials and labour – if supplies emanate from a country with a longer period of a lockdown. These may be compounded if all sites in a particular country remobilises at the same time. Hence, the extent of EOT granted will be fact dependent.

FAQ (6): How about (Additional) Cost/Loss and Expense arising from the MCO or Lockdown Order?

Clause 1.1.4.3 defines “Cost” as “*all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit.*”

Changes in Legislation under Clause 13.7

Clause 13.7 allows for claims to be made for additional costs arising from the changes in the Laws [see FAQ (2) above]. Where such a claim is made under **Clause 13.7**, the contractor will have to meet the requirement for notification and particulars under **Clause 20.1**, as discussed at FAQ (3).

Force Majeure under Clause 19

For Cost/loss and expense claim under **Clause 19.4**, provided the MCO or a Lockdown Order results in a lockout, the contractor may be entitled to such claim if the requirements for notification and particulars in **Clause 20.1** are complied with [see FAQ (3) above].

Not all delaying events entitle the contractor to Additional Cost/Loss and Expense claims. Contractors should nevertheless be mindful of cost control measures during the enforcement of the MCO or a Lockdown Order.

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