

Covid-19 – The Impact of the Movement Control Order on Building Sites

The imposition of the Movement Control Order (“MCO”) has brought building projects to a standstill. We look at several Frequently Asked Questions (“FAQs”) from the standpoint of the oft-used PAM Conditions of Contract 2006. These discussions are also applicable to the corresponding provisions of the PAM Conditions of Contract 2018 (“Pam Conditions”).

FAQ (1): Does the MCO entitle the contractor to an Extension of Time (“EOT”)?

Yes. The contractor is entitled to EOT in the event Covid-19 is a “Relevant Event” under **clause 23.8**, provided the mechanism for an EOT application are complied with.

FAQ (2): Which “Relevant Event” under PAM Conditions is applicable to the MCO?

There are a few.

- (a) **Clause 23.8(a)**: Is this a *force majeure* event?

23.8(a) “Force Majeure”

Article 7(ad) defines a *force majeure* event as “*any circumstances beyond the control of the Contractor caused by terrorist acts, governmental or regulatory action, epidemics and natural disaster.*”

Governmental or regulatory action would include the 14-day MCO from 18.3.2020 to 31.3.2020 imposed by the Government of Malaysia on 16.3.2020. [**Regulation 1 of Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020 (PCID Regulations)**]

Where the MCO affects progress of works of the contractor, contractor would be entitled to an EOT under **Clause 23.8(a)**.

- (b) **Clause 23.8(d)**: Is it a “lockout”?

23.8(d) *civil commotion, strike or lockout affecting any of the trades employed upon the Works or any of the trades engaged in the preparation, manufacture or transportation of any materials and goods required for the Works*

A “lockout” is not defined in the PAM Contract 2006.

PAM 2006 Standard Form of Building Contract by Sundra Rajoo, Dato' WSW Davidson, Ir. Harbans Singh K.S. referred to A Dictionary of Law (2nd Edn) by Curzon which 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."

The MCO is applicable to all construction and maintenance works except for critical works. Critical works are works that, if put to a stop can cause harm to employees, the public or the environment. Examples of critical works are set out at item 4 of the FAQs issued by the Ministry of Works. However, one can apply for exemption if the exemption comes from project superintendent/project director for government projects; resident engineer/principal submitting person for private projects. (see the FAQs issued by the Ministry of Works at <https://www.pmo.gov.my/2020/03/soalan-lazim-faqs-berkaitan-perintah-kawalan-pergerakan-kementerian-kerja-raya-malaysia-kkr/>)

As such, where the MCO results in a lockout at the construction site, the contractor would be entitled to an EOT under **clause 23.8(d)**.

- (c) **Clause 23.8(w):** Is this a suspension by order of an *Appropriate Authority*?

23.8(w) suspension of the whole or part of the Works by order of an Appropriate Authority provided the same is not due to any negligence, omission, default and/or breach of contract by the Contractor and/or Nominated Sub-Contractors

This delaying event requires there to be no fault of the contractor or nominated sub-contractor.

Article 7(b) defines Appropriate Authority as "*any statutory authority having jurisdiction over the Works.*" **Article 7(bf)** defines Works as "*works described in the Articles of Agreement and referred to in the Contract Documents and includes any changes made to these works in accordance with the Contract.*"

The MCO as announced by The Prime Minister on 16 March 2020 is applicable to all States and Federal Territories in Malaysia. The Minister of Works under the Prime Minister Department clearly has jurisdiction over the Works and thus falls under the description of Appropriate Authority. Therefore, MCO is a suspension order issued by the Minister of Works as a measure to prevent the spread of Covid-19. As the MCO was not issued due to negligence, omission, default and/or breach of contract by a contractor, the contractor would be entitled to an EOT under **clause 23.8(w)** if he has had to stop his works.

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

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

Clause 23.1(a) requires notification of an intention to claim EOT together with an estimate of the EOT required and particulars of the MCO. This must be made within 28 days from the commencement of the relevant event, that is the announcement of the MCO.

Clause 23.1(b) then requires a final claim for EOT to be sent to the employer within 28 days of the end of the delaying event, that is when the MCO is lifted by the federal government. This must also be supported by particulars as how the MCO has affected the progress of works.

These requirements are critical and are contractual requirements to be complied with, notwithstanding that the effect of the MCO may be obvious to all concerned.

FAQ (4): How about loss and expense arising from the MCO?

Not all delaying events entitle the contractor to loss and expense claims. The contractor's entitlement to loss and expense is governed by **Clause 24**.

The circumstances in Clause 24.3 concern delaying events which, in one way or the other, is attributable to the employer, architect or consultants. Given that the MCO is not an event attributable to the employer, architect or consultants, none of the Clause 24.3 circumstances allow the contractor to claim loss and expense due to delays by reason of the MCO.

Contractors should therefore be mindful of cost control measures during the enforcement of the MCO.

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