Covid-19 Pandemic – Claims and Resolutions for Quantity Surveyors

Time:
Thursday, 27th August 2020 (5.00 pm GMT+8)

Organised by

Presented by
Sr ONG HOCK TEK
Arbitrator/Adjudicator/Mediator/Reg.QS
Cert.Constr.PM/VM Practitioner/Master Trainer
BSc(1st Hons) MSc MBA DipM DipICArb MMIM MIVMM MIVMA
FCIOB FRICS FCInstCES FCIArb FSIArb FMIArb FMSAdj FAIADR
FRISM ICECA
Director
BK Entrusty
COVID-19 Pandemic
~ Claims and Resolutions for Quantity Surveyors
~ Presentation Contents

1. Introduction
2. Is COVID-19 pandemic a Force Majeure event?
3. Can a Contractor claim for time extension and/or monetary compensation from such event?
4. What are the claim procedures and documentation and requirements for any contractual entitlements?
5. How should the Contract Administrator assess and evaluate such time and/or monetary claims, respectively?
6. What are the Parties’ obligations and liabilities under Covid-19?
7. Lockdown/Movement Control Order/State of Emergency Working – Key Elements & Prerequisites
8. Forecast For A Post COVID-19 World
9. Summary/Conclusion

Disclaimer/Notes:
This Webinar paper is based upon research and findings from various relevant materials/documents and forms of contract. Please consult your specialist consultant and/or seek legal advice prior to relying on any materials and/or any opinion expressed herein.
COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors

1: Introduction

30 Jan 2020 - World Health Organization (WHO) declared Coronavirus outbreak in Wuhan, China a Public Health Emergency of International Concern (PHEIC) and updated the Coronavirus (named as COVID-19 on 11 Feb 2020) in list of “Pandemic, epidemic diseases”, not since the H1N1 “swine flu” in 2009.

PHEIC is defined as “an extraordinary event which is determined to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response”. (International Health Regulations, 2005)

The magnitude of freeze or lockdown in operation, production and logistics, including residents quarantine, delays or failures to fulfil commercial and/or contractual obligations amongst many organisations, are apparent and have impacted the global supply chains, economies and people movement, extensively.

The Coronavirus outbreak, then an EPIDEMIC, defined as:
‘an outbreak or unusually high occurrence of a disease or illness in a population or area’ (The American Heritage Stedman’s Medical Dictionary, 2002), or
‘a widespread occurrence of an infectious disease in a community at a particular time’ (Oxford Dictionary).

WHO declared Coronavirus or COVID-19 outbreak as PANDEMIC (11 Mar 2020), which is more expansive than EPIDEMIC.

EPIDEMIC becomes a PANDEMIC, when it spreads over wider geographical areas and affects population at large, not only at national level but also globally.
COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors

Introduction – Malaysia

On 16th March 2020, Malaysian Government has announced of a partial lockdown or its Movement Control Order (“MCO”) under Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) Order 2020 and related Regulations (Measures within the Local Infected Areas) Regulations 2020, effective from 18th to 31st March 2020 (1st Phase) countrywide (further extended to 14th April 2020 (2nd Phase) & 12 May 2020 (3rd Phase), enforced under Prevention and Control of Infectious Diseases Act 2988 and Police Act 1967 (“PCIDA”);

- all government and private premises are required to be closed down with exception to those involve in essential services.
- All construction activities, except those affecting public safety or cause public hazards are also suspended.

On 4th May 2020, Conditional Movement Control Order (“CMCO”) from 4 May 2020 to 9 June 2020 was implemented with its main goal was to reopen the national economy in a controlled manner.

- most economic sectors and activities (including construction) are allowed to operate while observing business standard operation procedures (“SOP”) such as social distancing and recording names and telephone numbers of customers/visitors and dates of their visit;
- Limited sport, social, community and cultural events are allowed;
- Conditional interstate travel.

From 10 June 2020 to 31 Aug 2020, Recovery Movement Control Order (“RMCO”) was implemented with lesser restrictions imposed nationwide. Similar situation happening worldwide.

COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors
1: Introduction – Malaysia (MIER, 2020)
COVID-19 Pandemic: Claims and Resolutions for Quantity Surveyors by Sr. H.T. Ong 27 Aug 2020

1: Introduction – Malaysia (MIER, 2020)

How the Malaysian MCO has fared at the End of MCO-3, 28 April 2020?

This analysis uses the South Korean trajectory as the frontier-benchmark path.

At the end of MCO-3 or 41 days into the MCO, Malaysia’s prevention and control strategies were working very well. Active cases have been on a steady decline. Overall trajectory has been remarkably consistent with S. Korea. Further, Malaysia has been successful in preventing 77,742 cases (5,498 per 10K population) or 75.14% of projected total cases under the do nothing scenario.

Performance comparison between Malaysia and S. Korea: Malaysia has a much lower case rate per 10K population than S. Korea. Malaysia’s case rate per 10K population is lower than S. Korea. These paths remain commensurate with S. Korea for the past 31 days, indicating consistent comparable performance. Malaysia demonstrates comparable recovery rate to South Korea.

Note: 0.5 case per 10K population = 50 cases

These paths remain commensurate with S. Korea for the past 31 days, indicating consistent comparable performance.

Covid-19 Pandemic: Claims and Resolutions for Quantity Surveyors by Sr. H.T. Ong 27 Aug 2020

COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors

1: Introduction – Malaysia (MOH, 2020)
COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors

1: Introduction


• Force Majeure (“FM”) clause - protects parties from liabilities if a party being prevented from performing its contractual obligations by circumstances beyond their control.
• No implied default protection, usually distinctive or specific.
• No specific contractual clause/provision, no excuse from liability.
• Contract provision - broad or narrow scope, criteria and extent of applicable triggering events.
• FM effects and impacts rely on its wordings, often vary depending on contract forms.
• A party must be unable to perform its contractual obligations, either temporary or permanently impossible.
  - In temporary non-performance, usually an EOT may be considered and granted.
  - In permanent non-performance, contract may be frustrated and voidable (Contract Act 1950 S57(2) and S66).
• Generally, FM event usually entitles a party to be excused from performance liability by EOT entitlement, but not for loss and/or expense, often a neutral event where both contracting parties bear cost risk.
• FM broad definitions (Ong, 2009, p.90):
  - An inclusive definition sets out the criteria in which they must be satisfied together with a non-exhaustive list of examples of such event, leaving the parties free to interpret or add on events not included in the list.
  - An exclusive definition, on the other hand, sets out an exhaustive list of force majeure events. Only those listed events can be construed as force majeure events, which is not open to the parties to interpret or add on any events as force majeure events.
COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors
2: Is COVID-19 pandemic a Force Majeure Event?

• A sample of ‘Exclusive Definition’ for Force Majeure clause:

**PRIVATE SECTOR - PAM (2006/2018)**

**Clause 23.8 Extension of Time**

Clause 23.8 The following are the Relevant Event referred to in Clause 23.0:

23.8(a) **Force Majeure**

Article 7 (ad) ‘Force Majeure means any circumstances beyond the control of the Contractor caused by terrorist acts, governmental or regulatory action, epidemics and natural disasters.’

COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors
2: Is COVID-19 pandemic a Force Majeure Event?

• A sample of ‘Inclusive Definition’ for Force Majeure clause:

**FIDIC RED BOOK (2017)**

**Clause 8.5 Extension of Time for Completion**

Clause 8.5 (d) ‘Unforeseeable shortages in the availability of personnel or Goods (or Employer-Supplied Materials, if any) caused by epidemic or governmental actions’

**Clause 18 Exceptional Event**

Clause 18.1 - “Exceptional Event” means an event or circumstance which:

i. is beyond a Party’s control;
ii. the Party could not reasonably have provided against before entering into the Contract;
iii. having arisen, such Party could not reasonably have avoided or overcome, and
iv. which is not substantially attributable to the other Party.

An Exceptional Event may comprise but is not limited to any of the following events or circumstances provided that conditions (i) to (iv) above are satisfied:

a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;
b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war;
c) riot, commotion, disorder by persons other than the Contractor’s Personnel and other employees of the Contractor and Subcontractors;
d) Strike or lockout not solely involving the Contractor’s Personnel and other employees of the Contractor and Subcontractors;
e) encountering munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor’s use of such munitions, explosives, radiation or radio-activity, and
f) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.’
Grounds for EOT and/or Monetary Claims Compensation

- Force Majeure
- Statutory Requirements/Compliance
- S.O.’s Instruction – Suspension of Works
- Variation – Change in Statutory Requirement/Law/Regulation/Rule/By-law
- Epidemic
- Government Related Act/Reliefs

Possible Ground/s?

COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors
3: Time Extension and/or Monetary Compensation from COVID-19 Pandemic

3.1: Force Majeure

COVID-19 under Force Majeure event (EOT provision) likely to succeed under PAM (2006/2018), not JKR/PWD 203A Form, unless pursued under other relevant provisions and/or by government/authority regulations/rules.

FIDIC Red Book (2017), cost claim is allowed for specific Force Majeure/Exceptional Event, as stated under cl. 18.4(b):

a) “If the Contractor is the affected Party and suffers delay and/or incurs Cost by reason of the Exceptional Event of which he/she gave a Notice under Sub-Clause 18.2 [Notice of an Exceptional Event], the Contractor shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to:

b) EOT; and/or

c) if the Exceptional Event is of the kind described in sub-paragraphs (a) to (e) of Sub-Clause 18.1 [Exceptional Events] and, in the case of sub-paragraphs (b) to (e) of that Sub-Clause, occurs in the Country, payment of such Cost.

FIDIC Red Book (2017), both EOT (cl 8.5) and Exceptional Event (cl. 18.1) provisions can be relied on, but preference would depend on contractual and commercial considerations and priority by the party relying on them.
COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors

3.1: Force Majeure

In NEC4 User Guide (2017), Force Majeure is dealt with, under Cl. 19 (Prevention) and Cl. 60.1(19) (Compensation Event).

Unlike Malaysian Standard Construction Forms, FIDIC and NEC4 do not specify any specific event as Force Majeure.

NEC4 User Guide (2017) refers Force Majeure event as “significant, unexpected events causing major problems to a project that prevent it from being completed on time or at all”.

2 tests are required to define as prevention event, as follows (NEC4 User Guide (2017):

- Neither party could prevent; and
- It would have been unreasonable for an experienced contractor to have allowed for the event.

Once the event is recognized as Prevention Event, it is a Compensation Event.

- PM has the authority to manage the consequences;
- It is Client’s risk for both time and cost;
- Client has option to terminate the Contractor’s employment if said event will prevent the Works Completion or is forecast to delay it by more than 13 weeks.

3.2: Statutory Requirements/Compliance

Compliance to any changes of law and/or Authorities requirement due to COVID-19 pandemic is compulsory for Contractor as it is one of his core contractual obligations under the most construction contracts.


Compliance with any changes to any law, regulations, by-law or terms and conditions of any Appropriate Authority and Service Provider is one of EOT Relevant Events (PAM (2018) cl. 23.8(q)).

Any change or amendment in any written law, regulations and by-laws which necessitates any variation to the Works (JKR/PWD 203A (2010) cl. 21.2).

FIDIC Red Book (2017) cl. 8.6 – any delay caused by the Authorities is considered as a cause of delay which entitled to EOT. Further, contractor is entitled for EOT and/ Cost for changes in law as per cl. 13.6 (Adjustment for Changes in Law).

NEC4 (2017) Option X2 - A change in the law of the country in which the Site is located is a compensation event if it occurs after the Contract Date. Project Manager is to assess and value the compensation event for EOT and/or monetary compensation.
COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors

3.3: S.O.'s Instruction – Suspension of Works

**S.O. may issue an instruction to suspend the works** (PAM 2018 cl. 21.4, JKR/PWD 203A (2010) cl. 50.1, NEC4 cl. 34.1 and FIDIC Red Book (2017) cl. 8.9).

**Such instruction is a valid delay event and contractor entitled for EOT contractually** (PAM 2018 cl. 23.8(h), JKR/PWD 203A (2010) cl. 50.2, NEC4 cl. 60.1(4) and FIDIC Red Book (2017) cl. 8.10).

**Contractor also contractually entitled for monetary compensation from such suspension** (PAM 2018 cl. 24.3(d), JKR/PWD 203A (2010) cl. 50.2, NEC4 cl. 60.1(4) and FIDIC Red Book (2017) cl. 8.10).

---

**COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors**

3.4: Variation – Change in Statutory Requirement/Law/Regulation/Rule/By-law

Under JKR/PWD 203A (2010) cl. 21.2:

“If after the Date of tender (as specified in Appendix), there is any change or amendment in any written law, regulations and by-laws which necessitates any variation to the Works, the Contractor shall, before making such variation, give to the S.O. a written notice specifying and giving the reason for such variation and apply for the S.O. instruction in respect of the matter.”

If S.O. issued a variation instruction under PWD 203A (2010) cl. 5, **contractor entitled to both EOT and Loss/Expense (JKR/PWD 203A (2010) cl. 43.1(e)) and Sub-Clause 13.3.2 [Variation by Request for Proposal].**

Under FIDIC Red Book cl. 13.6 (Adjustment for Changes in Laws):

“If any adjustment to the execution of the Works becomes necessary as a result of any change in Laws:

i. the Contractor shall promptly give a Notice to the Engineer, or

ii. the Engineer shall promptly give a Notice to the Contractor (with detailed supporting particulars).

Thereafter, the Engineer shall either instruct a Variation under Sub-Clause 13.3.1 [Variation by Instruction] or request a proposal under Sub-Clause 13.3.2 [Variation by Request for Proposal].”
COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors

3.5: Epidemic

JKR/PWD 203A (2010) has a specific provision in addressing outbreak of illness of an epidemic nature under cl. 77:

“The Contractor shall maintain the Site in clean and sanitary condition and shall comply with all requirements of the Government Health and Sanitary Authorities. In the event of any outbreak of illness of an epidemic nature, the Contractor shall comply with and carry out such regulations, orders and requirements as may be made by the Government or the local medical or health authorities for the purpose of dealing with and overcoming the same.”

It is noted that under JKR/PWD 203A (2010) Contract, Force Majeure has an “Exclusive Definition” and epidemic is not listed under “Event of Force Majeure” (cl. 58.1)

Cl. 77 above can be used as a basis for Contractor’s claim for EOT

FIDIC Red Book (2017) cl. 8.5 (d) provide EOT entitlement for “Unforeseeable shortages in the availability of personnel or Goods (or Employer-Supplied Materials, if any) caused by epidemic or governmental actions”.

COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors

3.6: Government related Reliefs - China

China issues Force Majeure certificate to enterprises affected and unable to perform due to COVID-19 outbreak since 2nd February 2020. by China Council for the Promotion of International Trade (CCPIT), as follows:

“The Deputy Director-General of CCPIT Commercial Certification Center said that force majeure certificates have been recognized by governments, customs, chambers of commerce and enterprises in more than 200 countries and regions around the world, and it is widely accepted overseas.” (CCPIT, Feb 2020)]

The certificate is a factual and documentary proof to enable those enterprises to safeguarding contractual rights and interests by minimizing liabilities in contracts which they are unable to fulfill accordingly due to outbreak.
**COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors**

3.6: Government related Act/Reliefs - Singapore

**Building and Construction Authority (BCA) on 1 Feb 2020 invited affected public sector contractors to submit EOT claims and S.O. to consider the claim on ex-gratia basis subject to notification, substantiation and mitigation.**

"You’re looking at economic devastation. Businesses destroyed, people’s lives ruined, and in such a situation, you don’t talk contract. You talk equity, you talk justice, you talk about what is the right thing to do."

(Singapore Minister for Law, K Shanmugam SC, Interview with CNBC, 7 April 2020)

**New COVID-19 (Temporary Measures) Act (‘Act”) gazetted on 9 Apr 2020**

- Contractor entitled for temporary relief if they are:
  - a party to a scheduled contract is or will be unable to perform an obligation in the contract during an obligation that is to be performed on or after 1 February 2020 (Section 5(1)(a));
  - inability is to a material extent caused by a COVID-19 event (Section 5(1)(b))

- Liquidated Damages – Section 6(5) states: “Despite anything in the contract, for the purposes of calculating the liquidated damages payable under the contract or assessing other damages in respect of the subject inability, where the subject inability occurs on or after 1 February 2020 but before the expiry of the prescribed period, any period for which the subject inability subsists and falling within that period is to be disregarded in determining the period of delay in performance by A. (i.e. Contractor).”

- No monetary entitlement (e.g. Loss and Expense, prolongation costs or other) provided under the Act.

- The party seeking relief must, within a prescribed time frame, serve a notification for relief (‘Notification’) on the other party.

**Appointed Assessor** must seek to achieve an outcome that is just and equitable in the circumstances of the case and "may take into account the ability and financial capacity of the party concerned (i.e. Contractor) to perform the obligation" (Section 13(2)).

- In the proceedings:
  1) No party may be represented by a lawyer;
  2) Each party will bear their own costs;
  3) Assessor’s determination is binding on all parties to the application; and
  4) There is no right of appeal against Assessor’s determination.

- Assessor would generally not determine extent of delay attributable to COVID-19, which can be complex or LAD payable and differences on such matters would be resolved through the contractual dispute resolution route (Arcadis, 2020).

---

**New COVID-19 (Temporary Measures) Act (‘Act’) gazetted on 9 Apr 2020**

- Contractor entitled for temporary relief if they are:
  - a party to a scheduled contract is or will be unable to perform an obligation in the contract during an obligation that is to be performed on or after 1 February 2020 (Section 5(1)(a));
  - inability is to a material extent caused by a COVID-19 event (Section 5(1)(b))

- Liquidated Damages – Section 6(5) states: “Despite anything in the contract, for the purposes of calculating the liquidated damages payable under the contract or assessing other damages in respect of the subject inability, where the subject inability occurs on or after 1 February 2020 but before the expiry of the prescribed period, any period for which the subject inability subsists and falling within that period is to be disregarded in determining the period of delay in performance by A. (i.e. Contractor).”

- No monetary entitlement (e.g. Loss and Expense, prolongation costs or other) provided under the Act.

- The party seeking relief must, within a prescribed time frame, serve a notification for relief (‘Notification’) on the other party.

**COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors**

3.6: Government related Reliefs - Singapore

- Construction Restart Booster ($525.8 million) - to help construction firms, which have to incur additional compliance costs to resume works safely. This funding will co-share contractors’ costs in procuring additional material/equipment to comply with COVID-Safe Worksite requirements (e.g. additional portable toilets, PPEs, masks, barricades).

- Co-funding salaries of Safe Management Officers (SMOs) ($48 million) - Contractors are required to deploy SMOs to ensure that safe management measures are implemented at construction worksites.

- Extension of Advance Payment for public sector projects - GPEs will extend advance payment subject to a total advance payment cap of 5% of the project’s awarded contract sum or $10M, whichever is lower.

- Construction Restart Booster ($525.8 million) - to help construction firms, which have to incur additional compliance costs to resume works safely. This funding will co-share contractors’ costs in procuring additional material/equipment to comply with COVID-Safe Worksite requirements (e.g. additional portable toilets, PPEs, masks, barricades).

- Co-funding salaries of Safe Management Officers (SMOs) ($48 million) - Contractors are required to deploy SMOs to ensure that safe management measures are implemented at construction worksites.

- Extension of Advance Payment for public sector projects - GPEs will extend advance payment subject to a total advance payment cap of 5% of the project’s awarded contract sum or $10M, whichever is lower.

- Construction Restart Booster ($525.8 million) - to help construction firms, which have to incur additional compliance costs to resume works safely. This funding will co-share contractors’ costs in procuring additional material/equipment to comply with COVID-Safe Worksite requirements (e.g. additional portable toilets, PPEs, masks, barricades).

- Co-funding salaries of Safe Management Officers (SMOs) ($48 million) - Contractors are required to deploy SMOs to ensure that safe management measures are implemented at construction worksites.

- Extension of Advance Payment for public sector projects - GPEs will extend advance payment subject to a total advance payment cap of 5% of the project’s awarded contract sum or $10M, whichever is lower.

- Construction Restart Booster ($525.8 million) - to help construction firms, which have to incur additional compliance costs to resume works safely. This funding will co-share contractors’ costs in procuring additional material/equipment to comply with COVID-Safe Worksite requirements (e.g. additional portable toilets, PPEs, masks, barricades).

- Co-funding salaries of Safe Management Officers (SMOs) ($48 million) - Contractors are required to deploy SMOs to ensure that safe management measures are implemented at construction worksites.

- Extension of Advance Payment for public sector projects - GPEs will extend advance payment subject to a total advance payment cap of 5% of the project’s awarded contract sum or $10M, whichever is lower.

- Construction Restart Booster ($525.8 million) - to help construction firms, which have to incur additional compliance costs to resume works safely. This funding will co-share contractors’ costs in procuring additional material/equipment to comply with COVID-Safe Worksite requirements (e.g. additional portable toilets, PPEs, masks, barricades).

- Co-funding salaries of Safe Management Officers (SMOs) ($48 million) - Contractors are required to deploy SMOs to ensure that safe management measures are implemented at construction worksites.

- Extension of Advance Payment for public sector projects - GPEs will extend advance payment subject to a total advance payment cap of 5% of the project’s awarded contract sum or $10M, whichever is lower.
COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors

3.6: Government related Reliefs – Singapore (BCA, 2020)

Ex-Gratia Co-Sharing of Prolongation Costs due to COVID-19 (for public sector projects)

Govt agencies will co-pay 50% of prolongation costs, up to a total of 1.8% of contract sum

Before Circuit Breaker (CB)

CB & Extended CB Period

Preparing to Restart

Project has restarted, working at a slower pace

7 Apr 2020

1 Jun 2020

Obtain approval to restart Works

* of awarded contract sum

Important Notes

- On-going main contracts and tenders closed on or before 1 June 2020 are eligible
- Prolongation period is based on EOT certified by the project Superintending Officer
- Co-sharing of prolongation costs due to CB periods & Restart is till approval to restart works is obtained from BCA or 6 Sept 2020, whichever is earlier
- Contractors can contact your Government agency clients regarding the co-sharing arrangement for prolongation costs

Malaysia Treasury Circular PK 2.4 - Government agreed to grant EOT to affected public projects without loss and/or expense due to the Movement Control Order (MCO) due to COVID-19 Pandemic

Government Representative is required to make assessment and decide on the EOT duration.

Such assessment to factor in:
- MCO’s duration;
- Mobilisation and demobilisation of workers, machineries and equipment; and
- Site readiness.

Pertubuhan Akitek Malaysia (PAM) or Malaysian Institute of Architects issued a circular on 19 March 2020, advised the Architect:
- to notify Contractor to adhere with MCO;
- to remind Contractor to suspend their works in complying with MCO;
- is entitled under contract to instruct Contractor to revise Works Programme due to MCO;
- ensure that any submission of EOT and/or loss and expense claim arising from MCO, need to be wholly in accordance with the terms of the Contract and assessed fairly.

Under Second Stimulus package - two billion ringgit (US$457 million) is allocated for domestic, small-scale infrastructure projects to help local small grade construction companies.

COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors

3.6: Government related Act - Malaysia

Temporary Measures For Reducing The Impact of Coronavirus Disease 2019 (Covid-19) Bill 2020:

- Includes construction work contract, consultancy contract & related supply of material, equipment and worker contract

Contractual Obligation:

The inability of any parties to perform any contractual obligation arising from any of the categories of contracts specified in the Schedule to this Part of the Act due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 (Act 342) to control or prevent the spread of COVID-19 shall not give rise to the other party or parties exercising his or their rights under the contract.

Defect Liability Period (DLP) – period between 18 March to 31 August 2020 is excluded from DLP calculation and time for developer to carry out rectification works.

Special COVID-19 Mediation Centre (Centre) set up:

- To resolve any dispute due to inability of any parties to perform any contractual obligation arising from any categories of contracts specified in Bill.
- Government bear mediation cost conducted in Centre from 1 Oct 2020 to 30 Sep 2021.
- Minister may determine the mediation process.
- Settlement agreement is binding on parties.

Section 10 - during the period commencing from 18 March 2020 until the date of publication of the Act:

- Termination of any contract is valid;
- Forfeiture of any deposit or performance bond is valid;
- Any damages received is valid;
- Commencement of any legal proceedings, arbitration or mediation is valid;
- Any judgment or award granted is valid;
- Any execution carried out is valid.

Parties’ rights are not affected if action is taken now until publication of the Act.

COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors

3.6: Government related Reliefs (TMF Group, 2020)

Australia:

- Fast funding for Sydney Metro – Western Sydney Airport Rail Link ($5.25bil)
- $471mil (fourth stimulus economic package) for eligible resident to build or significantly renovate their homes.

Hong Kong:

- Subsidies for construction workers - $1.2 billion in subsidies was disbursed to about 160,000 construction workers under the second round of the Anti-epidemic Fund.
- Salary subsidies ($5,610 per month) to employers who hire graduates and assistant professionals of the engineering, architectural, surveying, town planning and landscape sectors.
- Set up International Online Dispute Resolution Centre, to provide speedy and cost effective online dispute resolution services to the general public and businesses.

Philippines:

- An economic stimulus package is being prepared that will include major funding for infrastructure.
- The government is reviewing 4 trillion-pesos ($79.5 billion) worth of projects it earlier listed as priorities to include those with high and immediate economic impact (Aljazeera, 2020).
COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors
4: Claim Procedures and Documentation – Typical Private Sector Contract

Lockdown/MCO/State of Emergency Regulation

Contractor’s claim based on:

A. Force Majeure (cl. 23.8(a))
   - Yes
   - Refer Procedure A
   - EOT entitlement under cl. 23.8(a)
   - No Loss and Expense entitlement

B. Works suspended by Architect (cl. 21.4)
   - Yes
   - Refer Procedure A
   - EOT entitlement under cl. 23.8(h)

C. Compliance to Statutory Requirements (cl. 4.1)
   - Yes
   - Refer Procedure B
   - Any changes deemed as Variation (cl. 4.3)
   - Further suspension by Authority, EOT entitlement under cl. 23.8(a)

Procedure A (cl. 23.1)
Contractor to:
   i. Give written notice within 28 days of the event (condition precedent) with initial estimate of EOT supported by particular of delay cause.
   ii. Within 28 days of end of delay event, submit his EOT final claim with all particulars.
   iii. Use best endeavor to prevent delay.

Procedure B (cl. 4.2 & 4.3), Contractor to:
   i. Immediately give written notice to Architect;
   ii. Proceed with the works to conform with any laws, regulations, by-laws, term and conditions of any Appropriate Authority and Service Provider, if Architect did not issue any AI within 7 days.

Copyright ® BK Entrusty

---

COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors
4: Claim Procedures and Documentation – Typical Public Sector Contract

Lockdown/MCO/State of Emergency Regulation

Contractor to comply with and carry out such regulations, orders and requirements as may be made by the Government or the local medical or health authorities in the event of any outbreak of illness of an epidemic nature (Cl. 77)

If such compliance necessitates any variation to the Works, Contractor to give S.O. a written notice specifying the reason and apply for S.O.’s Instruction (Cl. 21.1).

The S.O. may at any time instruct the Contractor to suspend part or all of the Works (Cl. 50.1(a))

Any matter in respect of which the S.O. is expressly empowered by this Contract to issue instructions (Cl. 5.1(i))

S.O. may issue instruction under (Cl. 5.1):

- Variation as referred to in clause 24 hereof (Cl. 5.1(a))

Procedure 1 (43.1 – EOT)
Contractor to:
   i. give written notice as soon as delay becomes apparent;
   ii. identify causes of delay and relevant information;
   iii. use best endeavour to prevent delay;
   iv. do all reasonably required to S.O. satisfaction.

Procedure 2 (44.1 – L/E)
Contractor to:
   i. give written notice intention to claim together with an estimated amount within 30 days of the occurrence.
   ii. Send a complete particulars of L/E claim with all relevant documents as soon as is practicable but not later than 3 months after practical completion.

Copyright ® BK Entrusty

Reference: PAM Contract 2018

COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors

4: Claim Procedures and Documentation

- Formal written notice to be served upon becomes aware of a potential Force Majeure event or other relevant clause/s such as an Authority Order, provided not default of the claiming party.
- Claiming party has a duty to mitigate or minimize the event impact before exclusion from contract liabilities.
- Procedural compliance is pertinent, otherwise can jeopardise the claim and its entitlement.
- Example, Force Majeure under relevant standard form clauses, below.

<table>
<thead>
<tr>
<th>Description</th>
<th>Relevant Contract Clauses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notice of Claim</td>
<td>23.1  58.3  61  18.2</td>
</tr>
<tr>
<td>Duty to Mitigate/ Minimize</td>
<td>23.6  43.1  Not expressly stated  18.3</td>
</tr>
</tbody>
</table>

- If COVID-19 is the triggering event, need to satisfy Force Majeure criteria and demonstrate its causation and effect/s.
- Claims and entitlement dependent on Force Majeure provision wording, read in conjunction with other related contractual provisions, as a whole.

The Oxford Dictionary of Law defines “mitigation” as:

- “the reduction in the loss or injury resulting from a tort or breach of contract and the injured party is under a duty to take all reasonable steps to mitigate his loss when claiming damages”.

Mitigation is recognized in common law.

In construction terms, mitigation of delay simply means doing things differently or rescheduling the Works, reallocating resources, with little or no cost implication to Contractor, thereby minimizing the delay due to the changed conditions.

Mitigation is not to increase in manpower, incentivisation, etc.

Contractor is usually contractually obliged to mitigate any delays and/or losses so as to ensure Works be completed soonest possible and accordingly.

Contractor’s duty to mitigate its loss has two aspects (SCL, 2017):

- Contractor must take reasonable steps to minimise its loss; and
- Contractor must not take unreasonable steps that increase its loss.

Failure or refusal to mitigate delays may jeopardize any EOT and/or Loss/Expense due.
Disruptions and delay due to COVID-19 pandemic affecting:

- workforce significantly strained due to tightening immigration controls and closing of borders to foreign personnel/workers.
- construction materials/equipment shortage and/or disruption/delay as many producing countries are having problems in producing and exporting/importing materials/goods.
- project cash flow due to lack/no work progress, but idling staff, labour, equipment, etc still require payment.

Additional costs resulting from:

- demobilization/remobilization costs;
- suspension of works; and
- protection and securing works.

Resources checklist (labour, materials, and machineries) pertinent for claims preparation and submission.

Record of actual costs (including receipt, invoices and etc.) for claims and costs evaluation.

Specialist/Claims consultant is likely required to prepare for such claims.

Claim preparation should aims to make claim document self-sufficient so that it can be understood by Consultant/s for assessment/evaluation, accordingly.

Architect/SO makes genuine endeavour/attempt to ascertain Contractor’s claim entitlement under contract.

A successful claim fulfils following criteria:
- correctly notifying claim;
- keeping full and accurate records; and
- presenting the claim in detailed and professional manner

Three most important things in claiming and assessment/evaluation are:
- Good records;
- Good records; and
- Good records.

Essential records are:
- Variation orders;
- Daywork records;
- Work Programme;
- Progress/status of works photographs; and
- Joint Works measurement of works in progress, completed & protected.
COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors
4: Claim Procedures and Documentation – Formal Claims Document

1) Introduction
   - Background details, e.g.:
     o Names of the parties and consultants;
     o Conditions of contract;
     o Tender date;
     o Original contract sum;
     o Possession and Completion Dates;
     o Certificate of Practical Completion Dates;
     o Details of Extension of Time claim granted;
     o Details and amount of money claimed valued;
     o Other relevant details.

2) Basis of Claim
   - Set out contractual and/or legal basis of claim i.e. for Extension of Time and/or Loss and Expense under contract.
   - Events giving rise to the claim should be specified.
   - Notifications given to SO.
   - Claim particulars and substantiation.

3) Details of Claim
   - Summarize all correspondences and documents pertaining to the claims.
   - Details of any delays and/or loss and expense occurred with reasons and effects on works progress and completion.
   - Attach relevant correspondence, programme, etc.
   - Claim linkage between cause and its effect.

4) Summary of Claims

5) Appendices of relevant/supporting correspondences/documents
   i. Additional Preliminaries
   ii. Standby, idling and disruption costs
   iii. Demobilisation cost
   iv. Re-mobilisation cost
   v. Acceleration cost
   vi. Increased costs of labour, plant and/or materials
   vii. NOP costs
   viii. Head office overhead
   ix. Loss of profit
   x. Finance charges
   xi. Attendance on nominated sub-contractors/suppliers
   xii. Claims from nominated and domestic sub-contractors/suppliers

Typical/common Heads of claim under Loss and Expense under COVID-19 Pandemic:

COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors
5: Assessment/Evaluation – Time Claim

- In assessing any EOT entitlement, S.O. should take into account:
  - Contractor’s Works Programme/s
  - Relevant Contract provisions
  - Effect/extent of variation works (if any)
  - Effect/extent of work;
  - Mitigations of delays by the Contractor;
  - Other contractual and/or commercial requirements.
  - Any concurrent delays with delaying event/s, including Contractor’s acts or defaults.

- After assessment, S.O. to form opinion on fair and reasonable EOT.

- Judge Roger Toulson Q.C. in John Barker Construction Ltd. V London Portamn Hotel Ltd. (1996) 83 BLR 31 suggests what constitutes the basis of a fair and reasonable EOT, i.e. where S.O. must:
  - apply the rules of the contract;
  - recognises the effects of constructive change;
  - make a logical analysis of the effect of all relevant events on the work programme;
  - calculate the time taken up by the events.
COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors
5: Assessment/Evaluation – Monetary Claim (Typical Contractual Procedures)

FLOWCHART:
Typical Private Sector Contract
Loss and/or Expense Claim and Evaluation
– S.O.’s/Contractor’s Duties
Copyright © BK Entrusty

FLOWCHART:
NEC4 (2017)
Clause 60 - 66: COMPENSATION EVENTS
Copyright © BK Entrusty
Akenhead J has laid down a few key decisions, as follows:

- Where Contractor’s delay to completion occurs concurrently with Employer’s delay to completion, Contractor’s concurrent delay should not reduce any EOT due.
- Entitlement to claim loss and expense will not be lost where some details are not provided. E.g. you will not lose a right to claim a £1 million loss because £10 of loss is not adequately detailed.
- In providing “details and necessary all supporting documents” for ascertained of loss and expense does not necessarily require contractor to provide all backup accounting information.
- The clause only requires contractor to submit “reasonably necessary” details but it does not say how they are to be provided, so if contractor offers QS/Architect to inspect its records in his office, that may suffice as submission of details of loss and expense.
- Arguably, L&E of preliminaries could be valued by reference to contract rates or prices on basis that those rates or prices represent loss (if not expense) to contractor having staff or other preliminary activities on project for longer than anticipated.
- Court agreed with London Borough of Merton v Leach (1985) where QS/Architect are not strangers to project and this has a bearing on degree of information needed.
- Ultimate tribunal will decide any litigation or arbitration on a balance of probabilities and at that stage, tribunal will (only) have to be satisfied that contractor probably incurred L&E based on valid delay events. Similarly, QS/Architect only need to be “satisfied that all or some of loss and expense claimed is likely to be or has been incurred”, i.e. they do not have to be certain.

6: Contracting Parties Related Obligations and Liabilities (Typical Contract)

<table>
<thead>
<tr>
<th>Obligations</th>
<th>Power</th>
<th>Liabilities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Honours payment certificate within stated period.</td>
<td>- Agrees to changes in contract terms and assign his interest.</td>
<td>+ Ensures care is taken to other third parties.</td>
</tr>
<tr>
<td>- Refrains from interference.</td>
<td>- Employs another Contractor to execute AI when original Contractor refuses.</td>
<td>+ For wilful or negligent acts on part of Employer or his agents or direct employees for Contractor.</td>
</tr>
<tr>
<td>- Insures against loss and/or damage to property &amp; persons.</td>
<td>- Deducts LAD from certified amounts due to Contractor.</td>
<td>+ For other breaches of Contract to Contractor.</td>
</tr>
<tr>
<td>- Refers disputes to alternative dispute resolution.</td>
<td>- Pays NSCs direct when Contractor fails to pay.</td>
<td>+ For compliance to regulations to building control authority.</td>
</tr>
<tr>
<td>S.O.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Acts impartially.</td>
<td>- Effects on successor of predecessor’s certificate and valuation.</td>
<td>+ To Employer for ensuring proper carrying out of the works and compliance of the contract.</td>
</tr>
<tr>
<td>- Certifies in good faith and exercise due skill and care.</td>
<td>- Investigates suspected or patent defects.</td>
<td>+ To exercise reasonable skill and care in carrying out his supervisory duties.</td>
</tr>
<tr>
<td>- Specifies on request the contractual provision which empowers instruction.</td>
<td>- Orders dismissal of Contractor’s employees from the works.</td>
<td>+ To Employer for due performance of contract.</td>
</tr>
<tr>
<td>- Confirms instructions in writing on request.</td>
<td>- Confirms direction of Clerk-of-Works.</td>
<td>+ To third parties, for damage to property and personal injuries.</td>
</tr>
<tr>
<td>- Provides reason of his/her rejection on EOT application.</td>
<td>- Gives instruction requiring variation of design.</td>
<td>+ To Employer for delay in completion.</td>
</tr>
<tr>
<td>Contractor</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Carries out and complete works.</td>
<td>- Refuses consent for removal of plant, materials or goods from site.</td>
<td>+ To Employer for loss or damage arising from default of sub-Contractor or supplier.</td>
</tr>
<tr>
<td>- Accepts Architect’s instructions.</td>
<td>- Demands rectification of defective works.</td>
<td>+ To Employer, for loss or damage to works.</td>
</tr>
<tr>
<td>- Complies with statutory obligations.</td>
<td>- Ensures care is taken to third parties.</td>
<td>+ To authority for compliance with regulations.</td>
</tr>
<tr>
<td>- Makes good defects.</td>
<td>- Ensures care is taken to other third parties.</td>
<td>+ To Employer for due performance of contract.</td>
</tr>
<tr>
<td>- Insures Employer’s risks.</td>
<td>- Insures third party risks.</td>
<td>+ To Employer for delay in completion.</td>
</tr>
<tr>
<td>- Insures works.</td>
<td>- Insures third party risks.</td>
<td>+ To Employer for loss or damage arising from default of sub-Contractor or supplier.</td>
</tr>
<tr>
<td>- Restores fire and other damage.</td>
<td>- Pays NSCs and NSs.</td>
<td>+ To Employer, for loss or damage to works.</td>
</tr>
<tr>
<td>- Pays NSCs and NISs.</td>
<td>- Refers disputes to alternative dispute resolution.</td>
<td>+ To authority for compliance with regulations.</td>
</tr>
</tbody>
</table>
COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyors

7: Lockdown/MCO/State of Emergency Working – Key Elements & Prerequisites

<table>
<thead>
<tr>
<th>Pre Lockdown/Movement Control Order (MCO)/State of Emergency</th>
<th>Lockdown/Movement Control Order (MCO)/State of Emergency</th>
<th>Post Lockdown/Movement Control Order (MCO)/State of Emergency</th>
</tr>
</thead>
<tbody>
<tr>
<td>• China related companies &amp; supplies</td>
<td>• Notification, instruction and documentation</td>
<td>• Notification, instructions and documentation</td>
</tr>
<tr>
<td>• Notification, instruction and documentation</td>
<td>• Mitigation</td>
<td>• Remobilization</td>
</tr>
<tr>
<td>• China related companies &amp; supplies</td>
<td>• insurance &amp; performance bond extension</td>
<td>• health, safety &amp; welfare compliance (see SOPs)</td>
</tr>
<tr>
<td>• Demobilization</td>
<td>• maintain protection, security &amp; safety of works,</td>
<td>• work conditions</td>
</tr>
<tr>
<td>• Demobilization</td>
<td>• materials and equipment (e.g. tower crane)</td>
<td>• unprotect</td>
</tr>
<tr>
<td>• Demobilization</td>
<td>• statutory compliance/order/approval</td>
<td>• deterioration &amp; make good</td>
</tr>
<tr>
<td>• Demobilization</td>
<td>• progress payment claims, valuation and certification</td>
<td>• Factories and Machineries Act compliance</td>
</tr>
<tr>
<td>• Demobilization</td>
<td>• payments - works, staff &amp; workers</td>
<td>• equipment maintenance &amp; repair/keep</td>
</tr>
<tr>
<td>• Demobilization</td>
<td>• finance/advance payment</td>
<td>• temporary works</td>
</tr>
<tr>
<td>• Demobilization</td>
<td>• disruption &amp; delay claims</td>
<td>• Resources Management</td>
</tr>
<tr>
<td>• Demobilization</td>
<td>• Loss &amp; Expense</td>
<td>• Risk Management</td>
</tr>
<tr>
<td>• Demobilization</td>
<td>• records, records, records</td>
<td>• Materials cost increases</td>
</tr>
<tr>
<td>• Demobilization</td>
<td>• Risks monitoring &amp; control</td>
<td>• Acceleration proposal/ costs</td>
</tr>
<tr>
<td>• Remobilization</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Resources Management</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Risk Management</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Materials cost increases</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Risk Appraisal</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Lockdown/MCO/State of Emergency Working – Key Elements & Prerequisites

- Change in work methods?
- Original Norm - when?

Copyright © BK Entrusty
COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyor

9: Summary/Conclusion

- COVID-19 declared pandemic disease worldwide by WHO on 11 Mar 20, is exceptional, unprecedented event and beyond parties reasonable control.
- Lockdown and restricted movement measures adversely impacted on global supply chains, every business industries including construction industry affected millions of workforce and caused thousands in death toll.
- Both Employer and Contractor (including subcontractors and suppliers) need to comply with Authority Order and regulations.

- Force Majeure event admissibility are those contract provisions stating ‘epidemic’, ‘acts of government’ and/or criteria compliance e.g. event beyond the party’s control.
- Other relevant provisions e.g. Authority Order, Statutory Requirements, Architect/SO Instruction, Variation.

- Combination of relevant provisions necessary for both extension of time and loss/expense claims.
- Compliance to contractual claim procedures, mitigation efforts and document substantiation to prove a direct causal link between causal event and its effect/s are pertinent for such claim and its entitlement.
- Good records are essential elements for any contractual claims and assessment/evaluation.
COVID-19 Pandemic - Claims and Resolutions for Quantity Surveyor

9: Summary/Conclusion

• Consultant/s responsible to assess/evaluate such claims must exercise their professionalism and fairness in determining a fair and reasonable outcome for the contracting parties so as to avoid any unnecessary dispute resolution reference.

• If no agreement, Alternative Dispute Resolution (“ADR”) methods can be adopted for settlement of claims.

• Summarised recommendation/encouragement from FIDIC COVID-19 Guidance Memorandum (2020):
  - Contracting parties to seek, practical and realistic solutions to COVID-19 challenges, through cooperation, negotiation and open dialogue with affected parties.
  - Contracting parties need to familiarise with their contract and understand specific nature of local government policy and action.
  - Sailing through COVID-19 crisis, contracting parties need to consider long-term business interests, social responsibility, long-term health of supply chains and of societies at large rather totally focusing on contractual and legal matters of the project.
  - Keep an objective view, this crisis calls for specific/fit-for-purpose remedies and a rather lenient and open-minded approach, causation is as always critical.
  - Contracting party may need to consider similar COVID-19 pandemic situation in their future project and opt to price a premium for these, if necessary.

Thank You.

Sr HT Ong
htong@entrusty.com / htong@bkasiapacific.com
www.entrusty.com / www.bkasiapacific.com
References

1. Aljazeera (2020, “Philippines plans to build its way out of coronavirus downturn”, 13 May 2020
10. Malaysia Treasury (2020), "PK 2.4 - Roles on Extension of Time for Effected Public Contract due to Movement Control Order", Treasury of Malaysia, Malaysia
12. MERS (2020) "What is the Movement Control Order (MCO) that has Ended the End of MCO 3.0, 28 April 2020?”, Malaysian Institute of Economic Research, Malaysia.
Sr Ong Hock Tek (“HT”) is a Fellow of nine professional institutions, a well-qualified multi-disciplinary and specialist consultant, over 30 years of working experience with architects, quantity surveyors, project managers, civil engineering/building contractors and specialist consultants. He has been a Mediator, Arbitrator and current Panel Adjudicator of AIAC, SIArb Panel Arbitrator, Accredited Mediator, Value Manager and Certified Construction Project Manager of CIDB, past Deputy President of CIOB Malaysia, Past President of Lighthouse Club, past 1st Treasurer-General and current ADR Chair (QS Div.) of Royal Institution of Surveyors Malaysia.

His specific experience/expertise include construction project /contracts management, quantity surveying, risks/value management, claims preparation /defense, alternative dispute resolution (ADR), particularly in advisory, support services, documentation and proceedings. He also acts as an Arbitrator, Mediator, Negotiator, Expert (quantum) and Party Counsel/Representative on technical, commercial and contractual disputes/ differences between the contracting parties, at both main and sub-contract levels.

Being a Master Trainer, HT has organised and delivered many public and in-house conferences, seminars and workshops for professional institutions and private/public listed companies, in particular on construction contracts, ADR, risks and value management. He lectured part-time for bachelor and master degree programmes in the same areas for several years and has been a regular article contributor to the Master Builders Journal on construction contract and management issues since 2002 till todate. He is the speaker/trainer for the annual 6 to 12 one-day seminar sessions on Practical Construction Contract Administration/Management organised by Master Builders Journal on construction contract and management issues since 2002 till todate. He is the speaker/trainer for the annual 6 to 12 one-day seminar sessions on Practical Construction Contract Administration/Management organised by Master Builders Journal on construction contract and management issues since 2002 till todate. Recently, he also conducts similar 15-half day webinar module courses for Pertubuhan Akitek Malaysia and Royal Institution of Surveyors Malaysia in collaboration with BK Entrusty.

Managing Director, BK Entrusty

The Entrusty Group includes and provides the following services:

- Entrusty Management Sdn Bhd* - Multidisciplinary Consultancy Services
- Entrusty Consultancy Sdn Bhd* - Project, Construction and Facilities Management
- BKAsiaPacific (Malaysia) Sdn Bhd (Subsidiary of BKAsiaPacific Group)** - International Project Management, Commercial & Contracts Management
- Pro-Value Management Sdn Bhd* - Quality and Value Management Services
- International Master Trainers Sdn Bhd* - Corporate Training & Development
- Agensi Pekerjaan Proforce Sdn Bhd* - Executive Search and Recruitment Services

Visit us at www.entrusty.com/www.bkasiapacific.com**

* Certified under ISO 9001:2015
BKAsiaPacific Limited

Visit us at [www.bkasiapacific.com](http://www.bkasiapacific.com)

* Certified under ISO 9001:2015 Companies
Speaker’s
Curriculum
Vitae
Sr. ONG HOCK TEK ("HT")

Arbitrator/Adjudicator/Mediator/Reg.QS/Cert.Constr.PM/VM Practitioner/Master Trainer
BSc(1st Hons) MSc MBA DipM DipICAarb MMIM MIVMM MIVMA
FCIOB FRICS FInstCES FClArb FSIArb FMIArb FMIArb FSAd FAIADR FRISM ICECA
Managing Director, BK Entrusty

Sr. Ong Hock Tek ("HT") is a Fellow of nine professional institutions. Being a Chartered Builder, Chartered Quantity Surveyor and Civil Engineering Surveyor, Registered Quantity Surveyor (BoQS) and Certified Construction Project Manager in Malaysia, he is a well-qualified multi-disciplinary and specialist consultant, experienced in pre and post contract quantity surveying duties, commercial and contractual administration/management of various types of construction projects, gained from over 30 years of working experience with architectural, quantity surveying and project management professional firms, civil engineering and building contractors and specialist consultants.

HT completed his formal arbitration training through the International Commercial Arbitration course at Keble College, Oxford University, UK, and was awarded the Diploma in International Commercial Arbitration in 1998, followed by admission as a Fellow of The Chartered Institute of Arbitrators, UK in 1999. He also completed his formal mediation training in 2000 through the Accredited Mediation course (Modules 1, 2 & 3) organised by CIDB and Global Mediation Services Ltd Australia and a further 6-day mediation course for litigation in 2010 by Pepperdine University, California, USA. In 2012, he completed the KLRCA (now AIAC) Adjudication Conversion Course, tailored for its experienced panel arbitrators admission to the first batch of panel adjudicators.

His specific experience and expertise include contracts management/administration, claims preparation/defense, dispute resolution, risks and value management, specializing in alternative dispute resolution, particularly in arbitration advisory and support services, documentation and proceedings. He also acts as an arbitrator, mediator, negotiator, expert (quantum), party counsel/representative and contract/commercial consultant/advisor on various commercial and contractual disputes/differences between the contracting parties, at both main and sub-contract levels on diverse construction and engineering projects.

HT has been a Mediator, Arbitrator and current Panel Adjudicator of AIAC, a Panel Arbitrator of Pertubuhan Akitek Malaysia and Singapore Institute of Arbitrators, an Accredited Mediator, Value Manager and Certified Construction Project Manager with Construction Industry Development Board Malaysia, a Regional Convenor of Institution of Value Management, Australia, past Deputy President of Chartered Institute of Building Malaysia, Ist Treasurer-General and current ADR Chair (QS Div.) of Royal Institution of Surveyors Malaysia.

Being a Master Trainer (Master Trainers, New York), he has organised as Chair, jointly and/or delivered as speaker/trainer in many public and in-house conferences, seminars and workshops for professional institutions and private/public listed companies in several subject areas, particularly construction contracts, ADR, risks and value management. He lectured part-time for bachelor and master degree programmes in similar areas for several years and has been the speaker/trainer for the annual 6 to 12 one-day seminar/workshop sessions on Practical Construction Contract Administration/Management organised by Master Builders Association Malaysia in collaboration with BK Entrusty since 2015 till to-date. Recently, he also conducts similar 15-half day webinar module courses for Pertubuhan Akitek Malaysia and Royal Institution of Surveyors Malaysia in collaboration with BK Entrusty.

HT is supportive and active in social and charitable organizations since 2000, which include Ti-Ratana Welfare Society and Lighthouse Club, the latter being the Past President of Lighthouse Club, Kuala Lumpur. He has been a regular quarterly article contributor to the Master Builders Journal on construction contract and management issues since 2002 till to-date.

Note: Detailed Curriculum Vitae (including academic and professional qualifications, work experience, seminars, conferences, training materials, papers, articles, etc.) can be provided, by request via email to htong@entrusty.com / htong@bkasiapacific.com or visit www.entrusty.com / www.bkasiapacific.com for sample of published articles or further details on BK Entrusty.
“Your professional partner in managing and maximising value of projects and their facilities”
The Company
Entrusty Consultancy Sdn Bhd (formerly known as JD Kingsfield (M) Sdn Bhd) is a member of Entrusty Group of Companies, specialises in providing project, construction and facilities management and consultancy services to organisations engaged in construction, engineering and petrochemical activities.

Our Services
We provide comprehensive management and consultancy services encompassing the whole spectrum of the development/construction process, from project inception to occupancy. Our management team and other personnel who undertake each task are experienced, skilled and professional in their own field.

Project Management

<table>
<thead>
<tr>
<th>Inception Phase</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Project Scope &amp; Brief Development</td>
<td>E</td>
</tr>
<tr>
<td>• Feasibility Studies/Appraisal</td>
<td>V</td>
</tr>
<tr>
<td>• Construction Procurement Development &amp; Selection</td>
<td>E</td>
</tr>
<tr>
<td>• Value Management</td>
<td>L</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Tender/Pre-Contract Phase</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Cost &amp; Value Management</td>
<td>O</td>
</tr>
<tr>
<td>• Budgeting Formulation</td>
<td>P</td>
</tr>
<tr>
<td>• Communication Management</td>
<td>M</td>
</tr>
<tr>
<td>• Tender Management</td>
<td>E</td>
</tr>
<tr>
<td>• Tender Package Development</td>
<td></td>
</tr>
<tr>
<td>• Tender Preparation &amp; Submissions</td>
<td>N</td>
</tr>
<tr>
<td>• Tender Reporting</td>
<td></td>
</tr>
<tr>
<td>• Tender/Contract Documentation</td>
<td>T</td>
</tr>
</tbody>
</table>

Construction Management

| • Design and Built Management                                                  | C |
| • Commercial & Contract Management                                            | O |
| • Planning/Scheduling/CPM                                                      | N |
| • Construction Inspection/Supervision                                          | S |
| • Quality & Value Management                                                   | T |
| • Buildability/Viability Review                                                | T |
| • Human Resource Management                                                    | R |
| • Risk Management                                                              | U |
| • Sub-Contracts Management                                                     | C |
| • Resource Procurement Management                                              |  |
| • Procedures/Manuals Development                                               |  |
| • Progress Tracking & Control                                                  | T |
| • Cost Monitoring & Control                                                    | I |
| • Claims & Variation Management                                                |  |
| • Post Construction and Maintenance Management                                 | O |
| • Defects Assessment                                                           | N |
| • Project Review/Audit                                                          |  |
Facilities Management
- Space Allocation Management
- Relocation Management
- Disposal Management
- Contract Management
- Maintenance Services
- Operation Services
- Energy Management
- Security Management
- Bench-Marking
- Quality & Value Management

Training and Development
- Seminars/Workshops
- Continuing Professional Development Programme
- In-house Training
- Skills Development
- Technical Research/Development

Why ECSB?
In searching for practical and cost effective solutions for our clients, we apply our professional knowledge, skills, experience, understanding and familiarity of engineering and construction management activities at every level, giving due consideration to local values, cultures, customs and practices. Our management team and personnel are “hands on” and we can provide our range of services to meet the needs of our clients.

We strongly believe that for a project to be implemented successfully it is of paramount importance that effective management and control of both internal and external resources is made available. We are, therefore dedicated in providing our clients the essential services necessary to ensure the achievement of a successful projects conclusion and solutions.

“Your professional partner in managing and maximising value of projects and their facilities”

For further information and enquiry, please contact:

Entrusty Consultancy Sdn Bhd (120885-X)
22-1, Jalan 2/109E Desa Business Park Taman Desa 58100 Kuala Lumpur Malaysia
Tel: 603 7982 2123 Fax: 603 7982 3122 Email: ecsb@entrusty.com

Entrusty Group A multidisciplinary group of companies which includes Entrusty Management Sdn Bhd, Entrusty Consultancy Sdn Bhd (formerly known as J.D. Kingsfield (M) Sdn Bhd), BKAsiaPacific (Malaysia) Sdn. Bhd. (Formerly known as BK Burns & Ong Sdn. Bhd.), Pro-Value Management Sdn. Bhd., International Master Trainers Sdn Bhd, Proforce Management Services Sdn Bhd/Agenis Pekerjaan Proforce Sdn Bhd and Entrusty International Pte Ltd. The Group provides comprehensive consultancy and advisory services in project, commercial & contract, construction, facilities, risk, quality and value management, cost management, executive search/personnel recruitment as well as corporate training/seminars/workshops to various industries particularly in construction, petrochemical, manufacturing, IT, both locally and internationally. www.entrusty.com
“We aim to maximise your benefits and minimise your contract risk professionally and commercially”
The Company
BKAsiaPacific (Malaysia) Sdn. Bhd. (Formerly known as BK Burns & Ong Sdn. Bhd.) is the Malaysian office of BKAsiaPacific Limited Group (BKAPL) and also a member of Entrusty Group of Companies, providing comprehensive commercial & contractual management and consultancy services to the building/construction and petrochemical industry, both locally and internationally.

Project Experience
Our professional expertise have been applied to hundreds of project in Europe, Africa, the Middle East and South East Asia including sectors such as,

<table>
<thead>
<tr>
<th>Airports</th>
<th>Offshore Fabrication</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breweries</td>
<td>Petrochemical Complexes</td>
</tr>
<tr>
<td>Commercial Development</td>
<td>Pipelines</td>
</tr>
<tr>
<td>Earthworks</td>
<td>Ports and Jetties</td>
</tr>
<tr>
<td>Factories</td>
<td>Power Stations</td>
</tr>
<tr>
<td>High Rise Apartments</td>
<td>Pumping Stations</td>
</tr>
<tr>
<td>Hospitals</td>
<td>Railway Stations</td>
</tr>
<tr>
<td>Hotels</td>
<td>Refuse Transfer Stations</td>
</tr>
<tr>
<td>Industrial Buildings</td>
<td>Road and Bridge Works</td>
</tr>
<tr>
<td>Landfill Works</td>
<td>Sewage Treatment Plants</td>
</tr>
<tr>
<td>Light Rail Transit Systems</td>
<td>Universities</td>
</tr>
<tr>
<td>Mass Transit System</td>
<td>Water Treatment Plants</td>
</tr>
</tbody>
</table>

Our Services

Pre-contract
- Tender Preparation/Documentation/Submissions
- Tender Evaluation/Qualification Advice
- Contracts & Agreement Drafting
- Budgeting & Estimating
- Risk Identification & Evaluation
- Contractual & Tender Interpretation

Financial & Cost Management (for Contractors & Sub-Contractors)
- Cost Planning & Monitoring
- Estimation, Measurement & Re-measurement
- Evaluation/Preparation of Interim Payment Claims
- Preparation of Project Accounts/ Variations Claims and Re-rating

Commercial and Contract Management
- Project/Construction Management
- Contracts & Sub-contracts Drafting
- Joint Venture Agreements Drafting
- Negotiation of Agreements
- Risk Identification & Management
- Establishment of Contractual/Commercial Procedures
- Dispute & Claims Avoidance
- Commercial/Contractual Analysis and Advice
- Establishment of Commercial Strategies and Initiatives
- Preparation of Defence of Claims and Negotiate Settlements
- Independent Audits/Due Diligence of Construction Companies and Projects
- Progress and Performance Reviews
Dispute Resolution
- Contractual and Technical Assessment/Opinion Reports
- Drafting of Pleadings
- Claim and Defence Documentation and Bundling
- Management and Conduct of Mediations, Adjudication and Arbitration
- Litigation & ADR Support Services
- Expert Witness Services
- Advisor

Training and Development
- Seminars/Workshops
- Continuing Professional Development Programme
- In-house Training
- Skills Development
- Technical Research/Development

Construction Planning and Scheduling
- Construction planning
- Work programming
- Logistic plan
- Histogram and/or “S” Curves in term of financial, materials, machinery & equipment
- Monitoring and assessing the progress of the project
- Time Impact Analysis and Extension of Time Claim
- Contract Administration pertaining to Time related issues

Why BKBO?

Our clients are from both international and local establishments, which comprising of governmental, public and private employers, contractors, sub-contractors and their lawyers and consultants.

We bring with us the expertise gained through hard earned years of hands-on experience. That experience has proven time and again that ‘tomorrow is too late’. This principle has helped us earned the confidence of our clients who have entrusted us throughout the years with important consultancy services on some of the largest infrastructure, building and engineering projects in the world.

“We aim to maximise your benefits and minimise your contract risk professionally and commercially”

For further information and enquiry, please contact:

BKAsiaPacific (Malaysia) Sdn. Bhd. (130396-W)
(Formerly known as BK Burns & Ong Sdn Bhd)
22-2, Jalan 2/109E Desa Business Park, Taman Desa 58100 Kuala Lumpur Malaysia
Tel: 603 7987 2212 Fax: 603 7987 2218 Email: malaysia@bkasiapacific.com / bkbo@entrusty.com

BKAPL Group A group of companies incorporated in the Asia Pacific Region providing a comprehensive network of project management, commercial and contract management services to the international construction industry, with offices in Cambodia, China (Hong Kong, Shanghai), Malaysia, Philippines, Singapore, Thailand, Vietnam, United Kingdom and the United Arab Emirates. Website: www.bkasiapacific.com

Entrusty Group A multidisciplinary group of companies which includes Entrusty Management Sdn Bhd, Entrusty Consultancy Sdn Bhd (formerly known as J.D. Kingsfield (M) Sdn Bhd), BKAsiaPacific (Malaysia) Sdn. Bhd. (Formerly known as BK Burns & Ong Sdn. Bhd.), Pro-Value Management Sdn. Bhd., International Master Trainers Sdn Bhd, Proforce Management Services Sdn Bhd/Agensi Pekerjaan Proforce Sdn Bhd and Entrusty International Pte Ltd. The Group provides comprehensive consultancy and advisory services in project, commercial & contract, construction, facilities, risk, quality and value management, cost management, executive search/personnel recruitment as well as corporate training/seminars/workshops to various industries particularly in construction, petrochemical, manufacturing, IT, both locally and internationally. www.entrusty.com