

23 September 2021

Dear Sir/Madam,

## **CIRCULAR ON ADOPTING PANDEMIC RESILIENT CONTRACTING PRACTICES FOR PUBLIC SECTOR CONSTRUCTION CONTRACTS**

This circular informs the Built Environment (“BE”) sector that the public sector will be adopting the following contracting practices for pandemic resilient contracting:

- (a) Amendments to the Public Sector Conditions of Contract (“PSSCOC”) 8<sup>th</sup> edition to allow pandemic as a relevant ground for claiming Extension of Time (“EOT”) and Loss and Expense (“L&E”); and
- (b) Providing provisional sums for cost items that can be anticipated due to a pandemic, but the extent or cost is unknown at the point of tender.

### **Background**

2 The COVID-19 pandemic is an unprecedented event. The standard construction contracts used in both private and public sectors currently do not have adequate provisions to assess contractors’ claims for EOT and L&E due to a pandemic event. Industry stakeholders had also provided feedback on the uncertainties in pricing the costs and risk for new construction tenders. These factors could result in unnecessary increase in tender prices or contractors under-pricing their risks, leading to potential project failure. To address these issues, the New Contracts Workgroup<sup>1</sup> (“Workgroup”) involving private and public sector stakeholders was convened in February 2021, to look into appropriate strategies to effect equitable risk sharing among project parties for pandemic events in new construction and consultancy<sup>2</sup> tenders.

### **Pandemic resilient standard construction contracts**

3 The Workgroup suggested the following key provisions to be incorporated into standard construction contracts commonly used in Singapore’s BE sector to be pandemic resilient:

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<sup>1</sup> The Workgroup is co-led by BCA, Real Estate Developers’ Association of Singapore (“REDAS”) and Singapore Contractors Association Limited (“SCAL”) and comprises representatives from JTC Corporation (“JTC”), Land Transport Authority (“LTA”), Ministry of Law (“MinLaw”), Surbana Jurong Private Limited (“SJ”), Singapore Institute of Architects (“SIA”), Singapore Institute of Surveyors and Valuers (“SISV”), and WongPartnership LLP (“WP”).

<sup>2</sup> The Workgroup is reviewing standard consultancy contracts and will announce more information when ready.

Scope of risk	Key provisions
<p><b>Time-related risk</b> i.e. delays caused by pandemic events</p>	<p>Local standard Conditions of Contracts (“COCs”) should include grounds entitling contractors to claim for EOT for delays caused by pandemic events.</p>
<p><b>Cost-related risk</b></p> <p>The Workgroup has identified 2 groups of cost-related risk:</p> <p>(a) Known-unknown costs i.e. additional known cost items anticipated due to pandemic, but the extent or costs are unknown at the point of tender. Such costs could include but not limited to mandatory Polymerase Chain Reaction (“PCR”) tests and Antigen Rapid Test (“ART”), arising from the current pandemic where the period for which such tests would be required, and whether government subsidies would be extended are unknown</p> <p>(b) Unknown-unknown costs i.e. additional costs incurred arising from pandemic which both the client and contractor are unable to identify at the point of tender. For example, new measures that could be formulated or implemented to manage or control the pandemic.</p>	<p>The developer should provide a provisional sum so that the contractor is not required to price for the risk of known-unknown costs. The provisional sum should exclude costs incurred as a result of any default of the contractor. For example, additional swab tests required if contractor fails to observe Safe Management Measure (“SMM”) that leads to COVID-19 outbreak on site.</p> <p>The standard COCs should include provisions for contract parties to co-share equally the additional direct relevant costs of labour, plant and equipment, materials or goods and site overheads incurred due to the pandemic (but excluding profits and overheads that are not related to the project), after taking into consideration any government or statutory relief or subsidy.</p> <p>To balance the risks between developer and contractor, the amount for which the contractor is entitled to claim will be capped at a percentage of the awarded contract sum. The developer might review the cap and/or other considerations if the additional costs have escalated beyond the initial cap.</p>

### Approach for Public Sector Construction Tenders

4 The public sector will incorporate the above provisions in future public sector construction tenders:

- (a) Amendments to the PSSCOC to allow pandemic as a ground for claiming EOT and L&E; and
- (b) Provide provisional sums for known-unknown costs that are anticipated during a pandemic.

## Amendments to the PSSCOC 8th edition

5 Relevant amendments have been made to the PSSCOC 8<sup>th</sup> edition to reflect the suggested provisions for standard COCs.

### Amendments to PSSCOC 8<sup>th</sup> edition in *italic*

#### 14.2 Extension of the Time for Completion

The time within which the Works or any phase or part of the Works is to be completed may be extended by the Superintending Officer either prospectively or retrospectively and before or after the Time for Completion by such further period or periods of time as may reasonably reflect delay in completion of the Works which, notwithstanding due diligence and the taking of all reasonable steps by the Contractor to avoid or reduce such delay, will or has been caused by any of the following events:

- (q) ~~*Epidemics or pandemics resulting in shortages of the labour, goods, materials or Construction Equipment required for the Works or inability to proceed with any part of the Works.*~~ *Pandemic or an outbreak of infectious disease occurring over a wide geographical area crossing international boundaries, usually affecting a large number of people, declared by —*
- (i) the World Health Organisation or any international health related authority; or*
  - (ii) the health-related authority in the geographical area where the pandemic or infectious disease is occurring; or*
  - (iii) the Ministry of Health of Singapore,*  
*(“Pandemic Outbreak”)*  
*resulting in shortages of the labour, goods, materials or Construction Equipment required for the Works or inability to proceed with any part of the Works.*
- (qa) Measures that the government or any other statutory or public authority of Singapore requires the Contractor to implement in respect of the Works arising from any Pandemic Outbreak.*

Provided always that the Contractor shall not be entitled to any extension of time where the instructions, or acts of the Employer or the Superintending Officer are necessitated by or intended to cure any default of or breach of Contract by the Contractor and such disentitlement shall not set the Time for Completion at large.

**Rationale:** Clause 14.2(q) is amended to provide clarity that the infectious disease outbreak event that qualifies as a ground of EOT would be a pandemic event with wide-ranging impacts. The new Clause 14.2(qa) also extends the grounds for EOT to include delays arising from measures that the government or any other statutory or public authority of Singapore requires the Contractor to implement in respect of the Works to curb the spread of the pandemic. For example, Safe Management Measures (SMM) to be implemented on site.

## 22.1 Reasons for Loss and Expense

The Contractor shall be entitled to recover as Loss and Expense sustained or incurred by him and for which he would not be reimbursed by any other provision of the Contract, all loss, expense, costs or damages of whatsoever nature and howsoever arising as a result of the regular progress and/or completion of the Works or any phase or part of the Works having been disrupted, prolonged or otherwise materially affected by:

...

- (j) any Pandemic Outbreak provided that —*
  - (i) the Contractor shall only be entitled to recover 50% of such Loss and Expense excluding the relevant costs as provided in Clause 1.1(q)(iii)<sup>3</sup>;*
  - (ii) the Contractor shall only be entitled under this Clause 22.1(j) to recover Loss and Expense for which the Contractor has not received any government or statutory relief or subsidy; and*
  - (iii) the aggregate amount of Loss and Expense that the Contractor is entitled to recover under this Clause 22.1(j) shall not exceed 5% of the Contract Sum set out in the Letter of Acceptance. To avoid doubt, the aggregate amount of Loss and Expense that the Contractor is entitled to recover under both this Clause 22.1(j) and Clause 22.1(ja) shall not exceed 5% of the Contract Sum set out in the Letter of Acceptance;*
  
- (ja) any measures that the government or any other statutory or public authority of Singapore requires the Contractor to implement in respect of the Works arising from any Pandemic Outbreak provided that—*
  - (i) the Contractor shall only be entitled to recover 50% of such Loss and Expense excluding the relevant costs as provided in Clause 1.1(q)(iii)<sup>3</sup>;*
  - (ii) the Contractor shall only be entitled under this Clause 22.1(ja) to recover Loss and Expense for which the Contractor has not received any government or statutory relief or subsidy; and*
  - (iii) the aggregate amount of Loss and Expense that the Contractor is entitled to recover under this Clause 22.1(ja) shall not exceed 5% of the Contract Sum set out in the Letter of Acceptance. To avoid doubt, the aggregate amount of Loss and Expense that the Contractor is entitled to recover under both this Clause 22.1(ja) and Clause 22.1(j) shall not exceed 5% of the Contract Sum set out in the Letter of Acceptance;*

Provided always that the Contractor shall not be entitled to any such Loss and Expense where it arises from or is necessitated by or is intended to cure any default or breach of contract by the Contractor.

**Rationale:** The new Clause 22.1(j)/(ja) sets out the co-sharing principles for Loss and Expense arising from a pandemic or measures introduced by the Singapore government to curb the spread of a pandemic, capped at 5% of the awarded contract sum.

<sup>3</sup> Clause 1.1 (t)(iii) under PSSCOC for Design & Build

## Provisional sum for known-unknown costs

6 Government agencies shall include a provisional sum for known-unknown costs for pandemic and indicate the scope and process to reimburse contractors when calling construction tenders.

7 **Government agencies will adopt the contracting practices in para 5 and 6 above for construction tenders called on or after 1 November 2021.** Government agencies that are ready may implement these practices with immediate effect. For ongoing construction tenders, Government agencies which are ready can issue a corrigendum to include the latest amendments. The latest PSSCOC editions and List of Amendments are available for download from <https://www1.bca.gov.sg/procurement/post-tender-stage/public-sector-standard-conditions-of-contract-psscoc>.

## **Approach for Private Sector Construction Tenders**

8 REDAS D&B contract and SIA COC are two commonly adopted standard COCs in private sector projects. BE sector could look forward to SIA and REDAS incorporating some of Workgroup's suggested principles in para 3 into their respective standard contracts when ready **Meanwhile, private sector contract parties (including subcontracts) are encouraged to adopt workgroup's suggested principles in para 3 to provide more price and risk certainty in new tenders.**

## **Clarification**

9 For clarification on this circular, please direct your queries to <https://www.bca.gov.sg/feedbackform/>.

Thank you.

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(Transmitted via email)