



# KEY MEASURES FOR EPC CONTRACTORS | COVID-19 PANDEMIC

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The global Covid-19 pandemic has caused severe disruptions in the world economy. In India, while the early lockout action taken by the government has been significantly effective in containing the rapid spread of the disease, the economic downtime has caused a heavy dent on the purse and losses are aggregating each passing day.

The issues, challenges and uncertainties posed by the pandemic for contractors in the Projects and Engineering, Procurement & Construction (EPC) sector are multifold. The lockdown orders, disruptions in supply chains, manpower and material scarcity, etc., will inevitably cause delays in execution of works and affect performance. Claims and disputes are likely to arise across the board, taking the shape of unforeseen additional liabilities, which may get difficult to ward off in case necessary steps are not taken at the appropriate time.

While ascertaining the total eventual impact may not be possible at this stage, as the situation further unfolds, it is essential to assess the risks and issues from an early stage, so as to be able to implement timely mitigation measures to contain the adverse impact on business as far as feasible.

## REVIEW CONTRACTS

The pandemic situation is an unforeseen and unexpected event which has created circumstances which are beyond the control of contractors. Standard EPC contracts mostly contain provisions addressing such unforeseen and uncontrollable circumstances and the concessions/waivers the parties are entitled to. The contracts ought to

be carefully reviewed to identify the relevant provisions and the rights available to the contractor in current scenario.

A '**FORCE MAJUERE**' clause, is usually present in standard construction contracts. The provision defines various events or circumstances which prevents or hinders the discharge of obligations by the parties and therefore, affording the affected party the *right of excused performance or suspension of contract* during the time the force majeure circumstance remains in force.

The question **whether the Covid-19 pandemic would qualify as a Force Majeure Event is entirely a subjective matter and would depend on the exact terms provided in a particular contract.**

The Courts in India in various judgments have construed the scope of Force Majeure clause to be strictly narrow so as to only include the events which have expressly provided in the clause or can be reasonable and logically implied therefrom. Accordingly, it is important to check whether events such as epidemic, disease etc. are covered in the definition of *Force Majeure* provided in contract. In view of the lockout orders issued by government, the inclusion of government orders, regulations, restrictions.; quarantine restrictions etc. within the definition of a *Force Majeure* event would be relevant.

It must be noted that the mere presence of the aforesaid events in the contract would not automatically entitle the benefit of excused performance to contractors in the current situation. **The entitlement to the relief would be subject to the factual determination that whether the operation of the Force Majeure event actually rendered the contractual obligations impossible to performed.**

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*Force Majeure* provisions *inter alia* provide for suspension of works, entitling the contractor to obtain reasonable extension of time and furthermore in some cases even compensation for the additional overhead expenditure incurred. Further most standard clauses include the option of termination of contract to parties, in case the *Force Majeure* event continues to operate beyond a certain time period.

**The *Force Majeure* provision may contain strict notice requirements, which are advisable to be complied, to avoid unnecessary objections. The *Force Majeure* notice would serve as the bedrock and a critical piece of evidence in litigation, in case employers take coercive steps of termination of contracts or invocation of bank guarantee's/ security or imposition of liquidated damages for delay.** The reasons and assertions put forth in the invocation notice explaining the circumstances constraining the contractor to invoke the *Force Majeure* provision would be extremely important to make out a contractually valid and sustainable case of *Force Majeure*. Therefore, the notices and all correspondences exchanged with employers must be drafted meticulously and must be reviewed from a legal lens.

Since at this stage, it is difficult to predict or assess the complete impact which the pandemic situation would eventually cause to the contract execution, the invocation notice must, aim to suggest a plausible prediction of impact, while highlighting the elemental factors causing the disruption (for e.g. stoppage of work, orders due to lockout; shortage of labor; unavailability of manpower, equipment, material; travel restrictions, etc.), along with all available details and documents in order to establish that the performance of obligations stood impossible in the circumstances. **Please note that as per law, the burden of proof in relation to claims of *Force Majeure* lies on the claimant, therefore the details**

**enclosed in the communication exchanged with employers would be vital.**

**Contractors may consider initiating discussions on the chances of re-negotiation of terms with employers and bid for amendments, waivers etc. in the existing contracts.** In a scenario where the employer itself initiates such endeavors and proposes alterations, it is imperative that such communications be responded to carefully after assessing whether the proposals are commercially functional. Rejecting the proposal should be accompanied with detailed reasons in writing. Please note that employers may take advantage and argue that the contractor is not entitled to relief under the *Force Majeure* provision stating that alternative viable options enabling performance were proposed by the employer which were rejected by the contractor without showing sufficient cause. On the other hand, in case the employer participates in such discussions and in the process accepts the disruptive circumstances, the same may qualify as *admission* and act as *estoppel* against employer in case of dispute.

Since, the Covid-19 pandemic is a completely unique and unprecedented event, it is reasonable to expect that employers, especially government authorities and PSUs, would relax their rigorous terms and extend cooperation by providing needful concessions, waivers, etc.

The Department of Expenditure, Ministry of Finance, Government of India has already issued an Office Memorandum dated February 19, 2020 clarifying that the disruption of the supply chains due to spread of Corona Virus in China and any other country would be considered as a case of '*natural calamity*' under the *Force Majeure* Clause contained in para 9.7.7 of the 'Manual of Procurement of Goods, 2017 issued by the Department

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and accordingly advised stakeholders to invoke the *Force Majeure* clause.

#### Key actions and safeguards:

- **Review and analyze the contracts in detail to identify all relevant provisions applicable to the present circumstances. Apart from *Force Majeure*, the contract may contain other provisions such as Price Variation, Change in Circumstances, etc. which may also be effectively utilized.**
- **Issue requisite notice invoking *Force Majeure* clause, while adhering to the contractual requirements. Timelines provided for issuance of notice etc. must to be complied with to avoid unnecessary roadblocks.**
- **Provide prompt and cogent responses to letters, communications issued by employers.**
- **Collect all evidence forming the basis of the claim of *Force Majeure*. The same would come in handy in case of potential dispute in future. Evidence would include, (i) circulars, notices, orders, guidelines, etc. issued by central and state government, local administration etc. impeding performance of contract; (ii) travel booking cancellations of project personnel; (iii) news articles reports affirming the facts asserted in communication, etc.**
- **Gather information regarding the decisions taken by other employers, PSU's, government or private, in relation to other projects. Information sharing amongst the EPC contractor community in relation to the developments would be helpful.**

#### MAINTAIN A COMMUNICATION TRAIL

Needless to point out, communications exchanged between parties serves as an important category of evidence in litigation/ arbitration proceedings relating to EPC contracts. Given the unpredictable scenario and the inescapable possibility of disputes subsequent to the pandemic, creating a strong communication trail is critical.

Supply chain disruptions, travel restrictions, shipment/ transportation issues etc. are likely to persist for a considerable period even after the lockout orders are officially suspended. Issues related to material/ equipment availability, manpower, etc. will persist. In such a scenario, delays are an unavoidable consequence. Regular correspondence describing the nature and cause of the delays along with documentary evidence must be sent to the employer to keep the record straight.

Additional costs incurred must also be documented and intimated regularly. Such correspondence would be essential to defend for corroborating the case for entitlement of extension of time, compensation, price adjustment, variation etc.

Virtual meetings on internet-based platforms are gaining rapid popularity in the present scenario. Physical meetings with employer's personnel may be replaced with virtual meeting, where issues may be deliberated. The assurances and resolutions arrived at must be recorded in the minutes.

EPC contracts may generally contain provisions which casts obligations on the contractor to employ all reasonable efforts to mitigate the damages and perform obligations in case alternative remedies are available. Therefore, in case, alternative means of fulfilling contracts



are available, the contractor may be required to adopt the same. The non-compliance of such terms may disqualify the contractor from availing the maximum benefit. Therefore, the contractor must bring on record the various steps and measures taken for mitigating the extent of damages caused due to the unforeseeable circumstances.

## INSURANCE

Businesses usually avail various types of insurance facilities to cover for unforeseen risks and losses. Relevant insurance policies must be scanned thoroughly to assess whether the indemnification for loss of revenue and additional costs resulting from the pandemic can be claimed.

In India, traditionally, most businesses avail standard 'Fire & Special Perils' insurance policies. For civil construction sector, insurance companies have 'All Risks' policies. Many such policies provide for indemnification of losses caused on account of business interruption. The question whether such policies would cover the present Covid-19 pandemic can only be answered upon assessing the terms of the policy independently.

Various insurance companies have recently stated to the media that most of these policies are physical damage cover policies, which can be triggered only if some physical damage has been caused to the insured assets on account of various perils included in the policy, which are generally the common 'acts of god' such as *fire, flood, lightning, storm, tempest, flood, earthquakes* and other *catastrophic perils*. It is their argument that since no physical damage in the Covid-19 situation, insurance claims would not be sustainable. Further, insurance companies have claimed that epidemics etc. are not included in the policy and as such loss of earnings also

feature as a specific exclusion in the policies, so claim by insured for loss of revenue, profits etc. would not be entertained. **The terms and conditions of the insurance policies need to be reviewed in detail. Different policies have different terms and there always exists a scope of favorable construction and interpretation of the terms. Expert advice of lawyers in this regard would be useful.**

Favorable policies in the present situation are various kinds of '**Business Interruption Insurances**' which are **specifically designed to cover for loss of profit and fixed expenses in case of business disruption. Such policies provide indemnification for the entire duration till when the business activities are disrupted.** Such policies are expensive so therefore, are rare and generally availed only by larger businesses.

Industry has already requested the insurance regulatory authority, Insurance Regulatory and Development Authority of India (IRDAI) to consider extending insurance covers to Covid-19 situation. IRDAI in view of impact caused by the pandemic on the economy recently issued a Circular dated April 13, 2020 whereby IRDA has appealed to insurance companies to '*prepare strategies and action plans for business continuity to ensure enhanced protection to the policy holders*'. Further in the Circular, IRDAI has advised insurers to '*protect the interests of policy holders and provide necessary financial security*'. Considering the unprecedented situation and massive impact on business, favorable regulations can be expected from IRDAI.

For any queries, please feel free to contact us.

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