

UPDATED AS OF 22 APRIL 2020

PROVISIONS IN THE COVID-19 (TEMPORARY MEASURES) ACT (COVID-19 ACT) RELATING TO TEMPORARY RELIEFS - FREQUENTLY ASKED QUESTIONS (FAQS) FOR THE BUILT ENVIRONMENT SECTOR

Q1. What is the purpose of the COVID-19 Act?

- A1. The COVID-19 pandemic and associated public health measures imposed by governments around the world have had unprecedented and unforeseeable social and economic impact. There have been supply chain disruptions and manpower shortages, among other consequences. In many cases, this has undermined the ability of individuals and businesses to fulfil contractual obligations, and it would be unfair to hold them strictly liable for their failure to do so.

The COVID-19 Act provides temporary and targeted protection for businesses and individuals who are unable to perform certain contractual obligations, where such inability is materially caused by COVID-19. The Act imposes a moratorium on certain legal actions, so that parties have time to negotiate and work out their differences without the threat or uncertainty of legal proceedings. The Act also temporarily increases the monetary thresholds and time periods to satisfy a statutory demand for bankruptcy and insolvency. This will offer temporary relief to financially distressed individuals and businesses during this difficult period.

Q2. Does the relief apply retrospectively?

- A2. Yes. The relief covers contractual obligations to be performed on or after 1 February 2020, and only for contracts that were entered into before 25 March 2020.

Q3. How long will be relief measures last for?

- A3. The relief will be for a prescribed period of six months from 20 April 2020 to 19 October 2020. This may be extended by the Minister for Law to up to one year.

Q4. How does the COVID-19 Act benefit the built environment sector?

- A4. The COVID-19 Act covers construction contracts and supply contracts as defined under section 2 of the Building and Construction Industry Security of Payment Act (“BCISOPA”). For the avoidance of doubt, the COVID-19 Act covers contracts which are excluded from the application of the BCISOPA pursuant to section 4 of the BCISOPA (e.g. renovation contracts for private residential property), except contracts to the extent that a party carries out construction work or supply goods or services as an employee (within the meaning of the Employment Act).

It will help parties, such as contractors, who are unable to perform their contractual obligations due materially to COVID-19, by giving a moratorium from court or arbitration proceedings. However, parties are still permitted to commence or continue adjudication proceedings under BCISOPA.

Additionally, parties in construction and supply contracts are entitled to the relief mentioned below if they are unable to supply goods or services due to COVID-19.

First, the call on a performance bond (or equivalent) by the non-defaulting party will be prohibited for the prescribed period of 6 months (until 19 October 2020). Second, any liquidated damages or other damages payable under the contract due to delays sustained in the period starting from 1 February 2020 to 19 October 2020 caused materially by COVID-19 are to be disregarded. Third, the fact that a party was unable to perform an obligation to supply goods or materials due materially to COVID-19 is a defence to a claim for a breach of contract.

Q5. How do parties obtain/seek relief under the COVID-19 Act, e.g. in order to obtain relief from paying liquidated damages due to delay caused by COVID-19?

A5. Parties who are unable to perform their contractual obligations are encouraged to negotiate with the other party to reach a compromise.

If the parties are unable to resolve the matter themselves, the defaulting party seeking relief under the COVID-19 Act (e.g. contractor) will have to **serve a Notification for Relief during the prescribed period** on the non-defaulting party (e.g. developer), the guarantor or surety of the contractual obligation and the issuer of a related performance bond (if any). The Notification for Relief sets out the obligation that is or was supposed to be performed, how the inability to perform the obligation was materially caused by COVID-19 and other information prescribed in the COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020. For more information on the Notification for Relief, please refer to <http://www.mlaw.gov.sg/covid19-relief>.

Once the Notification for Relief is served, the non-defaulting party is prohibited from taking certain types of legal actions to enforce the obligation for the prescribed period. These include commencing or continuing an action in court.

Q6. How does the COVID-19 Act affect the Building and Construction Industry Security of Payment Act (BCISOPA)?

A6. The COVID-19 Act will work concurrently with the BCISOPA to preserve and facilitate cash-flow relief in the construction industry. Adjudication proceedings under the BCISOPA will remain available to the relevant parties during the prescribed period and adjudicators under the BCISOPA can have regard to any matters that the adjudicator reasonably considers to be relevant to the adjudication.

For firms (e.g. contractors), who wish to seek relief under the COVID-19 Act and are unable to resolve the matter with the non-defaulting party (e.g. developers), to obtain relief under the COVID-19 Act, they have to **serve the Notification for Relief** on the non-defaulting party, the guarantor or surety of the contractual obligation and the issuer of a related performance bond (if any).

If the non-defaulting party does not agree that the defaulting party is entitled to relief, the parties should first try to reach a mutual agreement. If the parties are still unable to reach a compromise, either party may make an application to the Panel of Assessors for COVID-19 Temporary Relief (**PACT**) for an Assessor's determination of whether the reliefs in the Act apply to the case. Details of the application process are available on the Ministry of Law's website (<http://www.mlaw.gov.sg/covid19-relief>).

After a determination is made by the Assessor, the parties may rely on the Assessor's determination in adjudication proceedings under the BCISOPA.

Q7. When a Notification for Relief is served and there is a dispute on whether there was an inability to perform the contractual obligation caused by COVID-19, is it mandatory to apply for an Assessor's Determination?

A7 No. It is not mandatory to make an application for an Assessor's determination.

For construction contracts and supply contracts, **the Assessor's determination is limited to (a) whether the party to the construction or supply contract is unable to perform an obligation; and (b) whether the inability is to a material extent caused by COVID-19**. The Assessor would not assess or determine the extent of delay that is attributable to COVID-19, and the amount of liquidated damages or damages payable.

The substantial merits and defences will be decided separately in legal or other dispute resolution proceedings – either adjudication (under the BCISOPA), arbitration or court proceedings between the relevant parties, separate from the regime under the COVID-19 Act.

It is therefore not mandatory for the non-defaulting party who receives the Notification for Relief to file an application for an Assessor's determination in order to dispute the defence unless he is of the view that the reliefs under the COVID-19 Act clearly does not apply to the defaulting party (e.g. contract is made on or after 25 March 2020 or the obligation arises before 1 February 2020).

In adjudication proceedings under the BCISOPA, or in court or arbitration proceedings after the prescribed period (as the case may be), the party who served the Notification for Relief would have to demonstrate to the adjudicator, the court or the arbitral tribunal (as the case may be), that the delay or breach was in fact caused to a material extent by COVID-19, and the non-defaulting party would similarly have the opportunity to dispute the defence that is raised.

Q8. Do Contractors need to request for Extension of Time from their clients, if they anticipate that they may fail to complete the project within the contract period?

A8. The COVID-19 Act provides a contractor who is unable to supply goods or services under a construction or supply contract due to COVID-19 with a defence such that any resulting delay from 1 February 2020 until 19 October 2020 will be disregarded in determining the period of delay, for the purposes of calculating the liquidated damages payable. This is despite anything in the contract between the parties. However, in the event a party is entitled to apply for an extension of time under the contract, the party should do so, in which case there will be no delay and the COVID-19 Act will not be triggered.

Q9. Can Employers call on the performance bond for Contractor's non-performance which is not due to COVID-19?

A9. Yes. The COVID-19 Act only provides temporary relief from the consequences arising from a party's inability to perform his contractual obligations **due materially to a COVID-19 event**.
