

UPDATED AS OF 22 JUNE 2020

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

Generally...

Q1. What is the purpose of the 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 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 the 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 for up to one year.

Q4. How does the Act benefit the built environment sector?

A4. The 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 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).

The Act will help parties, such as contractors, who are unable to perform their contractual obligations due materially to COVID-19, by giving a moratorium on 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 during 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 during 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 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 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 during the prescribed period. These include commencing or continuing an action in court.

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

A6. The 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 Act and are unable to resolve the matter with the non-defaulting party (e.g. developers), to obtain relief under the 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 in adjudication (under the BCISOPA), arbitration or court proceedings between the relevant parties, separate from the regime under the 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 relief under the 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.

I am an owner/main contractor...

Q8. Can I call on the performance bond for my contractor's non-performance which is not due to COVID-19?

A8. Yes, you can still call on the performance bond for such matters. The 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**.

Q9. Can I call on an Advance Payment bond?

A9. The Act does not prohibit you from calling on an Advance Payment Bond.

Q10. My contractor did not serve me a Notification for Relief. Can I call on the performance bond?

A10. An owner/main contractor is only prohibited from calling on the performance bond under the Act after the contractor serves a Notification for Relief on him in accordance with the Act.

Q11. I engaged a contractor to carry out some construction works. However, he was unable to do so because of COVID-19. Can I sue my contractor for damages?

A11. If the contractor has served a Notification for Relief, you cannot commence or continue court or insolvency proceedings against the contractor during the relief period.

The Act also gives the contractor a defence against any claims for breach of contract or damages (e.g. liquidated damages) if the breach was materially caused by COVID-19.

Q12. I engaged a contractor to carry out some construction works. However, he was unable to do so because of COVID-19. Can I terminate the construction contract and get my deposit and advance payments back?

A12. The contractor is only entitled to the relief under the Act after he has served a Notification for Relief on you.

If the contractor serves a Notification for Relief on you, the Act would provide him with a defence against any claims for breach of contract or damages (e.g. liquidated damages) if he is able to show that the breach was caused materially by COVID-19. Accordingly, if you wish to terminate the agreement or make any claims against the contractor on the ground of that breach of contract, you may not be entitled to do so under the Act if the contractor is able to prove his defence. In addition, once the Notification for Relief is served on you, you are prohibited from commencing any court, arbitration or insolvency proceedings to claim any sums against the contractor during the relief period under the Act.

Instead of resorting to legal proceedings, we encourage you to use the relief period to work out a mutually acceptable arrangement with your contractor.

If the contract provides you with other grounds for termination of the contract or the return of the deposit or advance payments, the Act would not change these terms.

Q13. My contractor has obtained an adjudication determination under BCISOPA against me. I am unable to make payment of the adjudicated sum because of cashflow issues arising from COVID-19. Can I obtain relief under the Act?

A13. If you are unable to make payment **under the contract** and your inability is caused to a material extent by COVID-19, and your payment obligation arose between 1 February 2020 and 19 October 2020, the Act would prohibit your contractor from enforcing an adjudication determination arising from that payment obligation against you, during the prescribed period (i.e. up till 1 October 2020).

You are only entitled to the relief under the Act after you have served a Notification for Relief on your contractor.

Q14. I am unable to make payment of the adjudicated sum in an adjudication determination under BCISOPA because of COVID-19, and I have served a Notification for Relief on the claimant-contractor. I wish to apply for a review of the adjudication determination under BCISOPA and would have to place the adjudicated sum with the Singapore Mediation Centre for the application. Can I stop the payment of the adjudicated sum to the claimant at the conclusion of the adjudication review proceedings?

A14. The Act does not prohibit the commencement or continuation of adjudication proceedings under BCISOPA (including adjudication review proceedings) even after a Notification for Relief is served.

What is prohibited, after a Notification for Relief is served, is the enforcement of an adjudication determination – see section 5(3)(n) of the Act.

Q15. I am unable to make payment of the adjudicated sum in an adjudication determination under BCISOPA because of COVID-19, and I have served a Notification for Relief on the claimant-contractor. I wish to apply to Court to set aside the adjudication determination and would have to pay the adjudicated sum into Court. Can I stop the payment of the adjudicated sum to the claimant at the conclusion of the setting aside proceedings?

A15. Under section 5 of the Act, if you serve a Notification for Relief on the claimant, any ongoing Court proceedings **commenced by the claimant** (including any enforcement proceedings) would be stayed upon the lodgement of the Notification for Relief in Court.

The setting aside proceedings are however **commenced by you**, and would not be stayed under section 5 of the Act.

I am a contractor/subcontractor/supplier...

Q16. Do I need to request for extension of time from the owner/main contractor, if I anticipate that I may fail to complete the project within the contract period?

A16. The 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 you are entitled to apply for an extension of time under the contract, you should do so, in which case there will be no delay and the Act will not be triggered.

Q17. The owner/main contractor called on the performance bond before the Act commenced. Does the Act apply to me?

A17. Part 2 of the Act on Temporary Relief for Inability to Perform Contracts commenced on 20 April 2020. The Act does not provide relief for calls on performance bonds that occurred before that date. You should seek legal advice on your rights in relation to any call on a performance bond.

Q18. My owner/main contractor called on the performance bond before I served the Notification for Relief. Does the Act apply to me?

A18. The relief under section 6(2) of the Act applies only if a Notification for Relief has been served in respect of an existing or impending claim, **prior to the call on the performance bond.**

If the performance bond is called on before the Notification for Relief is served, and you wish to challenge the validity of the call, you may rely on your rights outside of the Act.

Q19. Does the Act provide me with a ground for extension of time for delays caused by COVID-19?

A19. The Act provides you with a defence that any delay materially caused by COVID-19 and which falls within 1 February 2020 to 19 October 2020 will be disregarded in calculating any liquidated damages or other damages payable. The Act does not provide the contractor with an additional ground to apply for extension of time.

If, however, you are entitled to apply for an extension of time under the contract, you should do so.

Q20. Does the Act provide relief for delays caused by COVID-19 if a delay certificate has been issued by an administrator (e.g. architect or employer's representative) and that certificate has accounted for delays arising from COVID-19 during the prescribed period?

A20. Section 6(5) of the Act states that where a Notification for Relief is served, **despite anything in the contract** (and, depending on the facts of the case, this may include delay certificates issued pursuant to the contract), for the purposes of calculating the liquidated damages or other damages payable under the contract, any period for which the subject inability subsists and falls on or after 1 February 2020 to 19 October 2020 is to be disregarded.

Hence, if there is a dispute over the correctness of the delay certificates, or on the quantum of liquidated damages or damages, these disputes may be decided through adjudication under BCISOPA, arbitration or court proceedings between the relevant

parties, as the case may be. The owner/main contractor may raise the delay certificates, and the contractor may raise section 6(5) of the Act at these proceedings.

Q21. I am unable to perform my contractual obligation to supply goods and services due to COVID-19 and have served a Notification for Relief on the owner/main contractor. Will the owner/main contractor be able to claim damages or liquidated damages from me after the prescribed period (i.e. after 19 October 2020)?

A21. The relief under sections 6(5) and 6(6) of the Act will remain available even after the prescribed period, provided a Notification for Relief was served during the prescribed period.

If a contractor serves a Notification for Relief during the prescribed period, he may raise the defence under section 6(6) of the Act in court or in arbitration proceedings, or in BCISOPA adjudication proceedings, even if such proceedings take place after the prescribed period, and the other party is entitled to dispute the defence at such proceedings.

Q22. Do I submit only one Notification for Relief to the owner/main contractor, or two Notification for Reliefs, one to the owner/main contractor, and one to the issuer of the performance bond?

A22. You should fill up one Notification for Relief at this link - SingPass (<https://go.gov.sg/notification-for-relief-singpass>) or CorpPass (<https://go.gov.sg/notification-for-relief-corppass>). In Part B of the form, please indicate both the particulars of the owner/main contractor, and the issuer of the performance bond. A copy of the same Notification for Relief should be served on both the owner/main contractor and the issuer of the performance bond.

Q23. I have already served a Notification for Relief in respect of my inability to perform an obligation due to a COVID-19 event. Subsequently, new COVID-19 events arose. Should I serve another Notification for Relief?

A23. Under section 5 of the Act read with the Regulations, the other party is prohibited from taking the actions in section 5(3) of the Act in relation to the subject obligation that is set out in the Notification for Relief. There is therefore no need to serve a new Notification for Relief if the new COVID-19 events still affect the subject obligation that has been set out in the Notification for Relief. Nevertheless, we encourage you to reach out to other party to inform the other party of the new COVID-19 events which affect your obligation to perform and to work out a mutually acceptable solution in view of the change in circumstances.

If, however, the new COVID-19 events affect your ability to perform other obligations in the contract which have not been specified in the Notification for Relief, a new Notification for Relief should be served for the other obligations.
