

I. INTRODUCTION

1. To cushion the impact of COVID-19 on the Built Environment sector, it was announced in the Building and Construction Authority's ("**BCA's**") [media release on 27 June 2020](#) that a \$1.36 billion Construction Support Package would be extended to firms in the construction sector. One of the assistance schemes outlined under this support package is the co-sharing of prolongation costs for public sector projects.
2. However, as the Built Environment sector is proving to be one of the industries hardest hit by COVID-19, further governmental intervention, especially in private projects, has been proposed in order to ensure that the built environment value chain – from builders to contractors to sub-contractors, co-share additional costs due to delays in the project caused by COVID-19.
3. The [Covid-19 Temporary Measures \(Amendment No. 3\) Bill](#) ("**Bill**") passed on 3 November 2020 aims to provide a universal provision in the COVID-19 (Temporary Measures) Act 2020 (the "**Act**") for cost-sharing in public and private construction projects alike. In particular, a new Part 8B on Temporary Measures for Cost-Sharing in Construction Contracts proposed in the Bill, which models after the ex-gratia co-sharing scheme announced under the construction support package by the BCA for public sector projects, seeks to give the contractors new additional rights, beyond those in the contract.
4. This update takes a closer look at:
 - (a) the BCA's ex-gratia co-sharing scheme; and

- (b) the recent costs-sharing provisions introduced by the Bill.

II. BCA CIRCULARS ON THE EX-GRATIA CO-SHARING OF PROLONGATION COSTS DUE TO COVID-19

5. Under the co-sharing scheme announced in [BCA's circular dated 29 June 2020](#), the co-sharing of prolongation costs apply only to public sector constructions with on-going main contracts for which tenders closed on or before 1 June 2020.
6. The amount of prolongation costs co-shared by the Government is 50% of the total prolongation costs, up to 0.2% of the awarded contract sum per month of prolongation, starting from 7 April 2020, and is capped at 1.8% of the contract sum.
7. The prolongation period to which the co-sharing is assessed is based on the extension of time certified by the project Superintending Officer.
8. To facilitate faster disbursement of payments to contractors, adjustments to the co-sharing scheme were announced in [BCA's circular dated 25 September 2020](#):
 - (a) the co-sharing of costs is only subjected to a single overall cap of 9 months for the period of prolongation, and
 - (b) the project Superintending Officer in public sector projects have been instructed to grant a default¹ 4-month extension of time to contractors for the common period of delay from the start of Circuit Breaker on 7 April 2020 until the date when all dormitories are cleared on 6 August 2020. This is without the

¹ Unless the project had not stopped during the Circuit Breaker or the project had restarted substantially on site before 6 August 2020

need for the contractor to meet the requirements for extension of time under the Public Sector Standard Conditions of Contract (“PSSCOC”).

9. The qualifying prolongation costs for ex-gratia co-sharing include:

- (a) Plant and equipment costs;
- (b) Site maintenance costs.
- (c) Other costs such as extension of project insurance and performance bonds and storage etc; and

they exclude:

- (d) Manpower costs (i.e. salaries, accommodation and transportation of employees, workers and foreign worker levy);
- (e) Compliance costs for Restart (i.e. safe management measures such as segregating workers or cohorting of workers); and
- (f) Other costs covered by government relief measures (e.g. rental waivers).

III. THE COVID-19 TEMPORARY MEASURES (AMENDMENT NO. 3) BILL – NEW PART 8B: TEMPORARY MEASURES FOR COST-SHARING IN CONSTRUCTION CONTRACTS

10. With the introduction of the new Part 8B which is scheduled to come into effect in end November 2020, the construction contracts that will be eligible for costs-sharing under the Act will include private sector projects as well.

Applicable contracts

11. To be eligible for costs-sharing under Part 8B, the construction contract (whether private or public

sector contracts), has to be one where:

- (a) it was entered into before 25 March 2020²
- (b) it remains in force on 2 November 2020;
- (c) where the party for whom the construction works are performed is not an individual, other than an individual acting as a sole proprietor in the course of business of the sole proprietorship; and
- (d) as at 7 April 2020, there are construction works (within the meaning of section 3(1) of the Building and Construction Industry Security of Payment Act (“SOP Act”)) required to be performed, that have not been certified as completed under the construction contract.

12. Public sector projects that were entered into after 25 March 2020 but for which tender closed on or before 1 June 2020 would appear to be still eligible for co-sharing under the ex-gratia co-sharing scheme announced by BCA, albeit not under Part 8B.

13. Under the new Part 8B Section 39D(1), cost-sharing will be applicable where:

- (a) the contractor required to perform the construction work is or will be unable to complete the construction work by the completion date provided in the contract;
- (b) the contractor’s inability to perform his work is to a material extent caused by a COVID-19 event³; and
- (c) as a result of the contractor’s inability, the contractor has incurred or incurs any **qualifying costs** for the purpose of or in connection with the construction works, in relation to the period from 7 April 2020 to the

² Contracts that are renewed on or after 25 March 2020, other than automatically, will not be covered.

³ See Section 2 of the Act for the definition of a COVID-19 event.

last day of the prescribed period⁴ for the description of contracts to which the construction contract belongs (both days inclusive).

The prolongation costs that can be co-shared

14. The qualifying costs introduced under the Bill largely mirrors the qualifying prolongation costs stipulated in the BCA ex-gratia co-sharing scheme. The new Section 39D (9) introduced by the Bill provides that qualifying costs mean:

- (a) any rent or hire-purchase instalment for any plant or equipment or equipment required to perform the construction works that the contractor is or will unable to complete;
- (b) any costs for maintaining the construction site at which those construction works are performed, by any person engaged by the contractor;
- (c) any costs to extend the validity period of any insurance obtained and any performance bond issued in respect of the construction contract, because of the inability to perform;
- (d) any rent or other fee for the use of premises in Singapore to store any materials or equipment required to perform those construction works; and
- (e) such other costs as may be prescribed

The qualifying costs do not include:

- (f) manpower costs, including salaries, workers' accommodation and transport costs, foreign worker levy;
- (g) costs incurred in respect of any additional steps or efforts to accelerate the performance of the construction works so that they may be

completed by the completion date;

- (h) any costs incurred in adopting any safe management measures or other measures to prevent, protect against or otherwise control the incidence of transmission of COVID-19, including measures issued by any public authority;
- (i) costs for which the contractor has received
 - (i) relief from the government or any public authority,
 - (ii) relief under Part 2A or 8 of the Act; or
 - (iii) such other relief as may be prescribed.

New additional rights granted to the eligible contractor

15. Significantly, Section 39D gives the affected contractor the **statutory entitlement** to claim from the counter party of the relevant construction contract, (referred to as "A"), and A is liable to pay the contractor, the lesser of the following amounts for each specified period:

- (a) 50% of the total qualifying costs in the specified period;
- (b) 0.2% of the contract sum.

16. If not for this statutorily entrenched right to payment of qualifying prolongation costs due to COVID-19, contractors will not typically be entitled to any payment of the expenses or costs incurred due to events not attributable to A. This entitlement to payment is notwithstanding any provision or prohibition in the construction contract.⁵

17. Section 39D(2) provides that the total amount that the contractor may claim is not to exceed 1.8% of

⁴ As at the date of writing this update, the prescribed period for Part 8B has not been announced.

⁵ Section 39D(4) provides that "[w]here subsection (1) is inconsistent with any provision in the construction contract for the

costs-sharing of any qualifying costs, then subsection (1) applies to the exclusion of that provision, to the extent of the inconsistency".

the contract sum.

18. While the percentage amount of co-sharing and maximum co-sharing amount introduced by Section 39D appear to be equivalent to that provided under the BCA's ex-gratia co-sharing, ascertaining the claimable qualifying costs under Section 39D may not be as straightforward.

19. Unlike the general guide for co-sharing to be subjected to an overall cap of 9 months under the BCA's ex-gratia scheme, Section 39D (9) appears to introduce greater regulation on the periods during which the qualifying costs are to be calculated. The "specified period" which a contractor can claim 50% of the total qualifying costs (up to 0.2% of the contract sum) is defined to mean each of the following:

- (a) the period from 7 April 2020 to 30 April 2020 (both dates inclusive);
- (b) the period that is a month or less and that begins on the first day of a month and ends on the last day of the prescribed period;
- (c) each month in between the periods in paragraphs (a) and (b).

20. While subsidiary legislation and details on the "prescribed period" applicable have not been formally published, the [BCA's circular dated 3 November 2020 \[Updated on 5 November 2020\]](#) provides that co-sharing will be until 31 March 2021. If so, the provisions on the "specified period" under the Bill (i.e. from 7 April 2020 till 31 March 2021) will translate to a longer period than the 9 months originally provided under the BCA's ex-gratia scheme.

21. In addition to the creation of a statutory right to costs-sharing (as opposed to mere ex-gratia payment), Part 8B gives the contractor the right

to include the claim for qualifying costs under Section 39D(1) in its payment claim under the SOP Act. Section 39E of Part 8B makes clear that the qualifying costs can be the subject matter of an adjudication under the SOP Act; under Section 39E (2), the provisions in respect of the adjudication of payment claim disputes (i.e. Part IV of the SOP Act) apply to a payment claim for qualifying costs as it applies to a payment claim for progress payment.

22. Where a claim for qualifying costs is claimed at adjudication, Section 39E(4) states that the adjudicator "must determine",

- (a) whether Part 8B applies to the contractor; and
- (b) the amount under Section 39D(1) which A is liable to pay the contractor.

23. Significantly, juxtaposed with the BCA ex-gratia co-sharing scheme, there is no requirement for the qualifying costs to flow from or for them to be assessed based on the extensions of time certified under the construction contract.

IV. CONCLUDING REMARKS

24. For contractors, the creation of a statutory entitlement to qualifying prolongation costs and the ability to recover these costs at adjudication proceedings in the new Part 8B will be highly welcomed. Not only does the new Part 8B grant new additional rights to payment, beyond those bargained for in the contract, Part 8B provides recourse to adjudication when the payments are not forthcoming.

25. For contractors in public sector projects, the recourse to adjudication is a significant development since there was little the contractor

can do to compel payment or challenge the project Superintending Officer's assessment under the BCA's ex-gratia co-sharing scheme. In that regard, Part 8B would arguably lessen the reliance and conclusiveness of the project Superintending Officer's extension of time and costs certification. Given that adjudicators empowered under the new Part 8B are not bound by any certification by the project Superintending Officer, contractors can more easily dispute any wrongful assessment or withholding of qualifying costs payable.

Mr Lawrence Tan, Founding Partner
DID: +65 6837 8108
M: +65 9749 2728
E: lawrencetan@eldanlaw.com

Ms Sandra Tan, Partner
DID: +65 6837 8109
M: +65 9759 8395
E: sandratan@eldanlaw.com

Ms Ming Ming Looi, Partner
DID: +65 6837 8113
M: +65 9848 3908
E: mingminglooi@eldanlaw.com

Mr Yong Boon On, Partner
DID: +65 6837 8119
M: +65 9745 7743
E: yongboonon@eldanlaw.com

Ms Jennifer Fong, Partner
DID: +65 6837 8176
M: +65 9787 6043
E: jenniferfong@eldanlaw.com

Ms Poonam Bai, Partner
DID: +65 68378101
M: +65 9147 7147
E: poonaam@eldanlaw.com

Ms Danna Er, Partner
DID: 6849 9564
M: +65 96434781
E: dannaer@eldanlaw.com

Authors:



Mr Edwin Lee, Founding Partner
DID: +65 6837 8102
M: +65 9667 6924
E: edwinlee@eldanlaw.com



Ms Amanda Koh, Senior Associate
DID: +65 6837 8159
M: +65 9644 5443
E: amandakoh@eldanlaw.com

If you have any questions on the above or any other area of law, or if we can assist you on any questions concerning COVID-19, please feel free to reach out to us or any of our other Partners:

Mr Daniel Koh, Founding Partner
DID: +65 6837 8107
M: +65 9688 8320
E: danielkoh@eldanlaw.com

17 November 2020