

## CLIENT PRACTICE NOTE

# POSTPONEMENT OR SUSPENSION OF WORKS

## – THINK BEFORE YOU LEAP!

***A Client Practice Note***

***by Eugenie Lip, Contracts Director and Head of KPK Contracts Support Group***

### INTRODUCTION

*“Ask not what postponement or suspension can do for you; ask what you can do with postponement or suspension!”*

Paraphrasing a quote of John F Kennedy

‘Economic downturn’, ‘credit crunch’, ‘financial turmoil’, ‘wobbly banks’ – what have these in common? Whilst any glimpse in the horizon of a bottoming of the economic maelstrom or signs of a start of a recovery are certainly welcome, the brunt of the global recession has without a doubt seen a declining demand in the property market.

As a temporary measure to review liquidity and financial arrangements, some Employers are exploring the possibility of a postponement or suspension of the whole or specific portions of their projects, or certain activities relating to the project.

This practice note examines the contractual regime in the commonly used standard forms, the financial consequences that are triggered and the follow-up actions in the event of postponement or suspension of the works, and also discusses the other options available as an alternative to putting the project on hold.

### TERMS DISTINGUISHED

The terms ‘postponement’ and ‘suspension’ tend to be used interchangeably but there is a close distinction between the two concepts.

Postponement refers to a situation where the works are deferred or put off to a later date and work is expected to resume after this date. In suspension, the works are put off usually for a short time without a specific fixed date in mind. The parties have to state whether the works are to continue after the period of suspension lapses.

It must be noted that postponement or suspension is not tantamount to termination of the contract or termination of the employment of the Contractor (for convenience) unless the parties have by mutual agreement decided on this course of action.

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## CONTRACTUAL REGIME

### SIA Form

#### ***Postponement of part of works and suspension of work***

Clause 12.(2)(i) of the Singapore Institute of Architects (SIA) contract form treats '*postponement of any part of the works desired by the Employer*' as a variation in the original contract work. The Architect is empowered pursuant to Clauses 1.(4) and 12.(1) to give an instruction requiring such a variation to be made. There is however no express mention of suspension of progress of the works by the Employer albeit the Architect can give instructions under Clause 1.(4)(c) to '*suspend work and carry out investigations*' arising from matters not within the responsibilities of the Contractor.

Whilst any additional preliminaries where a time extension has been given due to a variation in the works itself can be valued in accordance with the rules under Clause 12.(4) by adjustment at the discretion of the Architect of the prices of the preliminary items indicated with the Letters T or Q, for any loss and expense incurred arising from any act of prevention or breach of contract by the Employer and this may include any financial entitlements arising from postponement or suspension of progress of the works, pursuant to Clause 31.(14), the Architect has no power to decide or certify through the contractual process albeit he is entitled to extend time under Clause 23.(1)(p) for '*any act of prevention or breach of contract by the Employer*'.

In respect of such claims for loss and expense, the Contractor has to pursue an action for general damages under common law.

### REDAS Design and Build Form

#### ***Postponement and suspension of works***

Under Clause 15.1 of the Real Estate Developers' Association of Singapore Design and Build Conditions of Contract (REDAS D&B), the Employer is empowered to issue instructions for postponement of any design or execution of construction work. Where progress of the works is to be suspended, the Employer's Representative is entitled to instruct the Contractor to that effect pursuant to Clause 15.2.

'Postponement' and 'suspension' are not expressly mentioned as grounds for extension of time under Clause 16.1. However, it is submitted that the ground '*Any act of prevention, breach of contract, delay or impediment caused by the Employer*' under Clause 16.1.3 is sufficiently wide to cover any instructions on postponement and/or suspension of progress of the works.

Claims for additional payment arising from any instructions requiring postponement and/or suspension of the progress of the works are dealt with under Clause 29. If the Contractor wishes to make a claim, he has to notify the Employer's Representative of his intention to do so within 28 days from the date of the event justifying the claim to be made.

### PSSCOC Form

#### ***Suspension of works***

The Superintending Officer (SO) can issue instructions for progress of the works, or any phase or part of the works to be suspended under Clause 13 of the Public Sector Standard Conditions of Contract for Construction Works (PSSCOC). The SO is also empowered under Clause 13.1(2) to certify any loss and expense incurred by the Contractor and grant an extension of time provided it was not attributed to some default of the Contractor or an event for which the Contractor is responsible, or was necessary for the proper execution of the works or for safety reasons.

The period of suspension is capped at 90 days. If it continues for more than 90 days, the Contractor may notify the SO requiring his permission within 30 days to re-commence the suspended part of the works. If permission is not given within the 30-day period, that part shall be treated as an omission from the works (that is, as a variation under Clause 19.1). Where the suspension affects the whole of the works, it will be treated as if the Employer has at the expiry of the 30-day period given a Notice of Termination (without default) under Clause 31.4 with the consequential loss and expense entitlements payable to the Contractor.

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## Postponement and suspension matrix

The contractual regime under the various contract forms is illustrated in the matrix below:

Option	SIA	REDAS D&B		PSSCOC
	Postponement or Suspension	Postponement	Suspension	Suspension
Action	Architect issues Instruction	Employer issues Instruction	E Rep issues Instruction	SO issues Instruction
Time	Architect gives Extension of time	E Rep determines Extension of time	E Rep determines Extension of time	SO grants Extension of time
Costs	Loss and expense <ul style="list-style-type: none"> <li>▪ No certifying power</li> <li>▪ Contractor claims general damages</li> </ul>	Additional payment <ul style="list-style-type: none"> <li>Contractor: <ul style="list-style-type: none"> <li>▪ Notifies E Rep of intention to claim within 28 days</li> <li>▪ Provides claim details within 28 days of notice</li> <li>▪ If continuing effect, submits interim accounts at intervals</li> <li>▪ Submits final accounts of claim within 28 days of cessation of claim event</li> </ul> </li> </ul>	Loss and expense <ul style="list-style-type: none"> <li>Contractor: <ul style="list-style-type: none"> <li>▪ Notifies SO of intention to claim within 60 days</li> <li>▪ Sends claim details within 30 days of notice</li> <li>▪ If continuing effect, sends interim accounts at intervals</li> <li>▪ Sends final account of claims within 30 days of end of effects of claim event</li> </ul> </li> </ul>	

E Rep: Employer's Representative; SO: Superintending Officer

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## FOLLOW-UP ACTIONS AFTER POSTPONEMENT OR SUSPENSION

After a postponement or suspension order, it is imperative that the Contractor and the Employer (in conjunction with his Consultants) agree on the actions to be followed up by the respective parties. Some of the key matters that need to be dealt with (which are of course not exhaustive) are set out below.

### Action tasklist for Contractor

1. Discontinue any further work and ensure incomplete portions and components of the works are properly protected and in a safe and stable condition to prevent accidents and collapse due to deterioration and exposure to the weather.
2. Stop issuing further purchase orders for materials and equipment and/or for sub-contracts and supply contracts.
3. Withdraw orders and sub-contracts placed but not acted upon or fulfilled.
4. Consider any alternative use of the materials and equipment ordered and about to be delivered, for example, re-selling to another buyer.
5. Ship the materials and equipment to a local warehouse as opposed to warehousing them overseas.

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6. Secure the site with additional hoardings and deploy 24-hour security personnel to prevent theft, vandalism and entry of unauthorised people to the site.
7. Protect temporary buildings, stores, unfixed goods and materials and partially completed portions of the works until such time work resumes.
8. Implement and maintain comprehensive vector control programme to prevent the unoccupied site from becoming favourable to the breeding of mosquitoes, rodents and other vectors.

### **Action tasklist for Employer**

1. As a joint-insured, notify the insurer of the situation and arrange for additional cover (if required) for the temporary buildings, plant, tools and construction equipment left on the site which are normally excluded from the Contractors' All Risks policy.
2. For evidential purposes (especially if the postponement or suspension is prolonged), take inventories of the materials, goods and plant, and also on the condition and extent of the completed work. Photographic records and detailed notes should be taken to supplement the inventory records.
3. Carry out a defects survey of the completed work to record any patent defects requiring rectification when work re-commences.
4. Monitor the expiry date of the performance bond provided by the Contractor and consider whether a fresh bond or an extension is required upon resumption of work.

### **POTENTIAL COMPENSATORY HEADS OF CLAIM**

All contract forms entitle the Contractor to be reimbursed for loss and/or expense. The potential compensatory heads of claim payable to the Contractor may include the following:

1. Loss of contribution to head office overheads and management costs.
2. Protection of the completed portions of the works, emergency work, site security and comprehensive vector control measures.
3. Disruption expenses to site operations, plant and equipment.
4. Withdrawal of labour including compensation to the Contractor's staff for premature termination of their employment contracts (where the postponement or suspension is prolonged).
5. Charges, costs and expenses for storage and transportation of goods, materials and fabricated components.
6. Cancellation charges for purchase orders, sub-contracts and supply contracts which are yet to be fulfilled.

### **ANY OTHER OPTIONS?**

#### ***Terminate for convenience***

Most contract forms provide for the Employer to terminate the employment of the Contractor for convenience (or without cause or default) at any time and for whatsoever reason. Examples of such clauses can be found in SIA Clause 32.(1), REDAS D&B Clause 30.1 and PSSCOC Clause 31.4.

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Following such termination, the Contractor is entitled to compensation for all loss, damage and/or expenses suffered including any losses of profit on the uncompleted parts of the works.

### **Omit works**

Provided the works are not nearly complete, the Employer may wish to consider omission of certain parts of the works to be carried out at a later stage under a fresh contract.

However, if the reason for the omission is to have the works done by others at a lower and possibly more attractive cost, it may entitle the Contractor to a claim for damages unless there are reasonably clear words in the contract to that effect allowing the Employer to do so.

It is a principle of law that once a party has contracted to execute work, it has the right not only to carry out the work but to complete it. The work may be omitted if it is no longer required but not to have it taken away so that it can be done by someone else without the Employer incurring liability.

The power to omit work is best encapsulated by the judge in *Abbey Developments Ltd v PP Brickwork Ltd [2003] EWHC 1987*. He said:

*“The basic bargain struck between the employer and the contractor has to be honoured, and an employer who finds that it has entered into what he might regard as a bad bargain is not allowed to escape from it by the use of the omissions clause so as to enable it then to try and get a better bargain by having the work done by somebody else at a lower cost ...”*

### **CONCLUSION**

Any postponement or suspension of work or termination of the employment of the Contractor will almost certainly translate into additional costs. It would therefore be prudent for the Employer to weigh out the financial implications of the available options.

By way of preliminary indicators and to provide an informed basis on the financial compensation expected to be paid, it is suggested that the Contractor be notified about the possible postponement (or suspension) and invite him to prepare an estimate of the costs and compensatory amounts likely to be payable not only to himself but also to the myriad of sub-contractors, manufacturers and suppliers affected by the postponement or suspension order.

Postponement, suspension or termination is a serious step and an Employer must think carefully of the attendant consequences, both contractual and financial, before making that critical decision.

### **CONTACTS**



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KPK Research Pte Ltd undertakes research on a myriad of topics ranging from construction costs, procurement strategy to contract forms and conditions, hybrid procurement approaches, professional practice and contract administration essentials. Some of the research findings are reflected and consolidated in various publications, conference papers and published articles.

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# CONSTRUCTION COST SNAPSHOT

by KPK Research Group

		1 <sup>st</sup> Quarter 2009		
		Unit Cost per Gross Floor Area (\$ per m <sup>2</sup> GFA)		
<b>Retail and Commercial</b>	Offices	Standard	3,000	- 4,000
		Prestige	4,000	- 5,000
	Shopping Centres	Standard	2,500	- 3,500
		Prestige	3,500	- 5,500
<b>Hotels</b>	Hotels and Service Apartments	3-Star	3,500	- 4,500
		4-Star	4,500	- 5,500
		5-Star	5,500	- 7,000
		Resort Hotels	5,000	- 7,000
		Service Apartments	3,500	- 4,500
<b>Industrial</b>	Factories and Warehouses	Standard Factories	1,800	- 2,500
		Standard Warehouses	1,600	- 2,500
<b>Institutional</b>	Schools and Tertiary Institutions	Primary	1,400	- 1,800
		Secondary	2,000	- 2,500
		Tertiary	2,500	- 3,500
<b>Residential</b>	Landed Homes	Terraced Homes	2,800	- 3,500
		Semi-Detached Homes	3,500	- 4,500
		Bungalows	4,500	- 5,500
		Cluster Homes	3,300	- 4,000
	Condominiums	Standard	2,000	- 2,500
		Prime	2,800	- 3,800
		Prestige	4,000	- 5,500
<b>Special Category</b>	Offices Fit-Out	Standard (comprising partitions, floor, wall and ceiling finishes and minor adaptations to existing property)	800	- 2,000

## NOTES

This Construction Cost Snapshot provides a concise reference guide on the construction cost for a variety of building types based on information current as of 1<sup>st</sup> Quarter 2009. It is published solely for information purposes and should not be used as a basis for investment strategy decisions or as a substitute to carry out detailed cost estimates and feasibility studies.

KPK makes no representation on the accuracy and/or completeness of the construction cost information set out herein which is subject to changes.

The rate per square metre of Gross Floor Area (GFA) includes piled foundation works, sub-structure works and M&E services. No allowances have been made for professional fees | land costs | financing charges | legal charges and authority fees | development charges | green mark certification and award provisions | furniture, fittings and equipment | infrastructure works | services diversions and connection fees | fluctuations | goods and services tax.

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