

Construction Industry Development Authority Directive for Construction Industry Stakeholders affected by the stoppage of work as a result of the action taken by the Government to curb spread of COVID 19

The outbreak of COVID-19 in Sri Lanka and the government's action to arrest the epidemic affected the construction work due to stoppage of work at construction sites. This directive is to clarify the event for the associated interpretation of CIDA contract documentation. The event that is of interest is defined as "the stoppage of work as a result of the action taken by the Government to curb spread of COVID 19" which created a situation that restricted work at construction sites. In reality, this event can be classified into three broad areas of "stoppage of work as result of the action taken by the Government to curb spread of COVID 19" as, "Complete Stoppage", "Lifting Stoppage under restrictions" and "Construction Work under Directives". In the above, "Restrictions" include both direct and indirect restrictions due to directives.

It is considered as fair to assume that the scenario had commenced from 16th March 2020 because the Ministry of Public Administration, Home Affairs and Provincial Councils & Local Government declared 16th, 17th, 18th and 19th March 2020 as public holidays by Gazette Notifications (2166/51 of 15th March 2020) and (2167/07 of 17th March 2020). Further, the Minister of Health and Indigenous Medical Services declared that COVID-19 can be considered as a quarantinable disease and enforced the Quarantine Regulations by Gazette Notification (2167/18 of 20th March 2020) and on 20th March 2020 Presidential Task Force on COVID-19 announced the island wide curfew with respect to identified risk scenarios. From 20th March to 19th April 2020 the curfew was effective for all districts. Thus, it is assumed that "Complete Stoppage", was in effect from 16th March to 19th April 2020 for Whole Island.

The "Lifting Stoppage under restrictions" was effective from 20th April to 10th May 2020, corresponding to the curfew notices released by the President's Media Division of 18th April 2020 and 01st May 2020. However, districts of Colombo, Gampaha, Kalutara and Puttalam endured a curfew till 10th May 2020. Further, districts of Colombo and Gampaha has undergone prolonged curfew till 26th May 2020, as per the directive issued by the President's Media Division on 10th May 2020. Therefore, for the said 04 districts, the stage applicable shall be "Complete Stoppage" till 10th May 2020. From 11th May 2020 recommencement of Public & Private entities was announced with restrictions, while the curfew was in force in the districts of Colombo, Gampaha, Kalutara and Puttalam, as per the directives issued by the President's Media Division on 01st May 2020 and 10th May 2020. Another directive from the President's Media Division released on 28th June 2020, announced the total lifting of island wide curfew from that day itself. Further, the inter district travel and transport restrictions prevailed, as per the directive issued by the President's Media Division of 18th April 2020, must be carefully considered when determining the time of application of "Lifting Stoppage under restrictions" for the said districts and all other districts. Thus, each effective project area must be considered according to the situation faced and then take steps to determine the specific date of ending the "Complete Stoppage" and commencement of the stage identified as "Lifting Stoppage under restrictions".

The adherence to guidelines issued by the CIDA and the Director General of Health Services to control the spread of COVID-19 viruses while carrying out their operations is considered as a prerequisite for "Construction Work under Directives". In case of the period applicable for "Construction Work under Directives", the lifting of island wide curfew from 28th June 2020 is felt as the most reasonable commencement date for entire Sri Lanka. The other districts and projects as the case may be must be considered according to applicable government directives resulting in stoppage of work. This circumstance where work is constrained because of health directives shall be considered as "Construction Work under Directives", and it is reasonable to consider the commencement date of such, for other districts as 11th May 2020.

Under the provisions of section 46 of Construction Industry Development Act.33 of 2014, Construction Industry Development Authority (CIDA) has published four Standard Bidding Documents (SBD); CIDA/SBD/01 - small & medium contracts, CIDA/SBD/02 - major contracts, CIDA/SBD/03 - minor contracts and CIDA/SBD/04 - design and build contracts.

With respect to the impact to the Construction Industry due to COVID 19 pandemic situation prevailing in the country, it may be considered that the consequences of the pandemic will delay and disrupt the projects. The government directives inadvertently led to restrict work on construction activities, may enable a party to seek redress under "Force Majeure" provision (i.e. an "Exceptional Event") as given in SBD of CIDA. Alternatively, it may be considered as a scenario that may be invoked in seeking redress, the "Change in Law/Legislation" provision in SBD of CIDA, with respect to performing effective construction work. Nevertheless, the events/circumstances may fall separately or together, in conjunction with the provisions of SBD published by CIDA. Therefore, the Engineer to the Contract, based on the facts presented on the project, shall endeavour a determination on the event, which shall be fair and reasonable for all parties.

In dealing with contractual provisions that may arise due to the stoppage of Construction Works as a result of the COVID-19 outbreak, the Engineer to the contract shall make his determinations eliminating any duplication of redress.

Upon inquiry CIDA was made aware by the industry stakeholders that the effects due to the said events include but not limited to, the stoppage of work, Limiting/Preventing access to sites, Progress Delays, Absenteeism of Labour, Shortage of Material, Material and Labour Price Escalation, Health and Safety, Suspension of work/Termination, Payments Delays, Notice on Disputes/Claims, Liquidity Damages, Coordination and Cooperation, Liquidation/Insolvency, Idling of Labour and Machinery, Material Wastage and deterioration, Insurance and Interrupted supply/delivery. The affected parties to contracts who are using SBDs of CIDA may explore whether entitlement can be established under the aforementioned "Force Majeure" and "Change in Law/Legislation" provisions.