

Law and policy update

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Force Majeure in government contracts and Public Private Partnerships

Ministry of Finance issues office memorandum for force majeure

The Government of India, through the Procurement Policy Division, Department of Expenditure at the Ministry of Finance (**MoF**), has recently issued an office memorandum on May 13, 2020 (O.M. No. F. 18/4/2020-PDD) pertaining to force majeure (**MoF Memorandum**). The MoF Memorandum seeks to provide relief to parties who have contracted with the Government under and in accordance with Manual for Procurement of Goods, 2017 (**Goods Procurement Manual**); Manual for Procurement of Works, 2019 (**Works Procurement Manual**); Manual for Procurement of Consultancy and other services, 2017 (**Consultancy Procurement Manual**) (collectively **Procurement Manuals**); and public private partnership (**PPP**) contracts.

Notably, the MoF had earlier issued another office memorandum on February 19, 2020 (**February Memorandum**), stating that disruption of supply chain due to corona virus in China or any other country would be regarded as a natural calamity and the force majeure clause, as provided under the Goods Procurement Manual, may be invoked '*wherever considered appropriate*'. The February Memorandum was issued prior to Covid-19 affecting operations in India and recognized hardship faced by contractors with regard to import of equipment and goods from other countries which were impacted by the pandemic.

The MoF Memorandum goes a step further from the February Memorandum and provides clarity on the applicability of force majeure on account of disruption in transportation, manufacturing and distribution of goods and services in India and the restrictions placed by directives of the Ministry of Home Affairs under the Disaster Management Act, 2005, as well as those placed by the respective State Governments and Union Territories. Consequently, the MoF Memorandum seeks to remedy the effects of '*extraordinary events or circumstances beyond human control leading to delays in or non-fulfilment of contractual obligations*' for parties contracting under the aegis of Procurement Manuals.

Applicability and extension to PPP projects

There being no unified legislation for PPP projects, these are governed by plethora of guidelines, policies, manuals, and sectoral legislations and, most importantly, the terms of the contract executed between parties. It is noteworthy that the MoF Memorandum finds mention of PPP projects and states that '*period of the contract may have become unremunerative*' with respect to PPP contracts.

Restrictions imposed by the Government on economic activity during the lockdown have impacted the transportation, manufacturing and distribution of goods and services throughout the country, which have caused unforeseen delays to ongoing projects. The MoF Memorandum is a welcome step by the Government and provides relief to contractors and concessionaires who have been impacted by Covid-19 but did not have adequate relief factored into their contracts with government agencies.

While the settled law is that a contract becoming onerous does not lead to frustration, however, the MoF Memorandum seeks to address the extraordinary exigencies owing to the pandemic. Per the MoF Memorandum, under contracts for construction/works, goods and services and PPP with Government Agencies, parties can invoke the force majeure clause 'after fulfilling due procedure' and 'wherever applicable'. This position of giving primacy to the contractual terms appears to be in sync with the position taken by the MoF under the February Memorandum.

The MoF Memorandum supplements the contractual agreement between the parties and not supersede it. However, this would apply only to agreements which do not have adequate provision for force majeure events. Having said that, it will not aid parties who have signed contracts with restrictive covenants. The settled legal position is that relief or excuse from performance on account of force majeure would be governed as per the wording of the contract. Notably, concession agreements based on the model concession agreements (MCA) provide for a robust mechanism for force majeure, which are unforeseen circumstances beyond reasonable control of the parties. The MCA's further classify them into non-political, indirect-political and political force majeure events, with separate treatment and consequences for each. Therefore, a critical analysis of the underlying contract is imperative and sole reliance upon the MoF Memorandum in seeking relief may not be prudent.

Extension of timelines

The MoF Memorandum also provides that for such contracts, obligations which were required to be fulfilled on or after February 20, 2020 under PPP contracts would be extended for a minimum period of three months and not exceeding six months, without any cost or penalty on the contractors or concessionaires. Interestingly, the cut-off date is one day after the February Memorandum. The term of concession agreements for PPP projects is also stated to be extended by a similar period (three to six months), depending on specific circumstances of the case and for the period affected by the force majeure event.

No default pre-requisite for availing relief

The MoF Memorandum goes on to provide that a party would only be entitled to seek relief for force majeure if they were not in default as on February 19, 2020 (date of the February Memorandum). However, it does not specify if a single breach, which may not be material or cause impediment to completion of the project, would recuse the concessionaire or the contractor for claiming relief under force majeure. A non-material breach which is incidental to the performance of the concessionaire or contractor should not preclude them from claiming relief due to force majeure event. There needs to be greater clarity by the Government to avoid any ambiguity in interpretation.

Applicability limited to affected obligations

Lastly, the MoF Memorandum also states that invoking force majeure would only apply in respect of non-performance attributable to the lockdown situation or restrictions imposed by legislation or executive orders of the Government on account of COVID-19 and that obligations of parties would resume upon expiry of the period specified in the MoF Memorandum.

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