

# The impact of COVID-19 on projects in India: a FIDIC perspective

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## Measures imposed by the Indian Government

India recorded its first case of COVID-19 on 30 January 2020. On the same day, the WHO declared COVID-19 an international public health emergency<sup>1</sup>.

The Indian government imposed nationwide lockdown measures from 22 March 2020, initially for 21 days under section 6(2)(i) of the Disaster Management Act 2005. Local state authorities were given powers under Section 2 of the Epidemic Diseases Act 1897 to enforce temporary restrictions on the movement of people and non-essential businesses to prevent the spread of COVID-19. Air, road and rail transport systems were also suspended. On 24 March 2020, the Ministry of Home Affairs issued an order setting out guidelines for the lockdown and restrictions on movement of people and the closure of non-essential businesses<sup>2</sup>.

Lockdown measures were extended on 14 April 2020 and again on 18 May 2020, but India has since seen a gradual relaxation of restrictions across national districts. Construction activity has been permitted since 20 April 2020<sup>3</sup>, although with some important qualifications. Government guidelines state that all construction activities in rural areas can resume, however, projects within the limits of a municipal area can resume only if labour is readily available on site. Workers cannot be brought in from elsewhere. The movement of materials by road is allowed, however, local authorities may still impose restrictions.

## Claims for extensions of time and cost under FIDIC Contracts

As a result of COVID-19 related restrictions imposed by national and local governments, projects in India, as elsewhere, have faced issues such as labour, materials and plant unavailability, disruption of international supply chains and severe financial pressure. Parties will eventually need to resolve disputes arising out of these issues under the terms of their contracts. The focus for contractors will be on claims for extensions of time and additional costs.

### Does COVID-19 qualify as Force Majeure or an Exceptional Event?

The 2017 edition of the FIDIC Rainbow Suite replaced the term “force majeure” with “exceptional event”. A “Force Majeure” event under the previous Clause 19 or “Exceptional Event” under the new Clause 18 must be an event or circumstance which:

1. <https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19>
2. Ministry of Home Affairs Order No.40-3/2020-D dated 24 March 2020
3. <https://www.bloomberqqint.com/coronavirus-outbreak/government-allows-construction-sector-to-resume-work-with-caveats>

- is beyond a Party's control;
- the Party could not reasonably have provided against before entering into the Contract;
- having arisen, such Party could not reasonably have avoided or overcome; and
- is not substantially attributable to the other Party.

The FIDIC Conditions of Contract set out a non-exhaustive list of events or circumstances which may be classed as force majeure. Pandemics or epidemics are not specifically included, however, COVID-19 is likely to be classed as a force majeure or exceptional event because it arguably still falls into the above four criteria.

A contractor may be able to claim relief under the Exceptional Event / Force Majeure provisions for as long as it can show that measures put in place by the Indian government made it impossible for it to carry out the works. This would be the case for as long as there was a ban on construction activities. It will be harder to argue that carrying out the works is impossible after restrictions were eased to allow work to continue with certain caveats. Maintaining an uninterrupted Exceptional Event or Force Majeure claim after 20 April 2020 might be problematic because whilst the caveats make carrying out work more difficult, it may not be impossible.

### **How can a contractor claim its costs?**

A successful claim under the above provisions allows for the suspension of both parties' obligations for as long as the force majeure or exceptional event persists. Provided a contractor has used all reasonable endeavours to mitigate any delay caused by the impact of COVID-19 and complied with relevant notice obligations, it will be entitled to an extension of time. Entitlement to additional cost, however, is less straightforward. Under both the 1999 and 2017 forms, a contractor can only claim costs for man-made events such as war and hostilities, rebellion and terrorism, riot or strike and "munitions of war", and not for natural disaster or epidemics.

However, alternatively, under Sub-Clause 8.5(d) of the 2017 form and 8.4(d) of the 1999 form, the contractor is entitled to an extension of time for unforeseeable shortages in the availability of personnel or goods caused by an epidemic. India's COVID-19 measures led to the shutdown of construction sites and even where measures have now been eased, restrictions on labour remain. A contractor must be able to prove that the shortages were unforeseen and that they caused delay. There is no allowance for cost directly under these sub-clauses either, but it would be prudent for a contractor to submit a claim for prolongation costs at the same time as submitting its EOT claim under Sub-Clause 20.1.

Another option under the Red Book may be a claim under Sub-Clause 8.5 of the 1999 form or Sub-Clause 8.6 of the 2017 version. A contractor can claim an extension of time for delays caused by public authorities. It is arguable that the temporary restrictions imposed by local and national authorities in India will have caused delay or disruption. A contractor must have diligently followed any procedures laid down and show that the delay or disruption was unforeseeable.

Finally, under Sub-Clause 13.6 of the 2017 forms and 13.7 of the 1999 forms, a contractor can seek an adjustment of the Contract Price if there has been a change of law which has affected the performance of the works and led to an increase in the Contract Price. As noted above, the Indian government has enacted specific legislation and local authorities have issued official guidance in response to COVID-19. The definition of a change in law in these sub-clauses is a wide one and would likely encompass statutes and official guidance. These provisions may also allow a contractor to claim costs after the easing of restrictions if the applicable legislation or guidance still contained caveats that directly affected a contractor's ability to carry out its works.

## Conclusion

The recent easing of restrictions in India has unfortunately led to a spike in cases, which has meant the reintroduction of lockdown measures in certain states. Going forward, it is likely that national and local governments in India will continue to reimpose restrictions in areas where infections rise and that consequently, contractors will continue to face uncertainty for the foreseeable future. In these difficult times, it is of paramount importance that contractors continue to submit relevant notices and claims on time and in accordance with their contracts.