The COVID-19 epidemic emerged prior to the start of Chinese Lunar New Year, the most celebrated time of the year in the People’s Republic of China (“PRC”), during which millions travel across the country to their hometowns.¹

Officials reported the first case of COVID-19 in Wuhan City in Hubei Province and the city was placed under lockdown by the Chinese Government on 23 January 2020, with other provinces following within days. The seven-day long Lunar New Year holiday was extended to 9 February 2020 in an attempt to contain the outbreak. There were 66 cities in China which were placed into lockdown for a period ranging from 50 to 76 days. Wuhan City, the epicenter of the pandemic, was the longest to be in lockdown.

How will construction projects be impacted?

The most reported impact arising from COVID-19 is the acute shortage of labour. China’s construction industry is heavily dependent on rural migrant workers, and according to the National Bureau of Statistics of China², 54 million rural migrant workers are working in the construction industry. Migrant workers who had returned to their hometowns for the Lunar New Year holiday were unable to return to worksites after the lockdown.

In a survey conducted by the China Construction Industry Association³ published on 15 April 2020, which 804 enterprises took part in, 90.55 percent of respondents said progress was negatively affected and 66.04 percent reported a shortage of labour.

http://www.mot.gov.cn/fenxigongbao/yunlifenxi/202001/t20200109_3323840.html

http://www.stats.gov.cn/tjjsfb/202004/t20200430_1742724.html

http://www.zgjzy.org.cn/menu20/newsDetail/8428.html
Can the effects of COVID-19 be deemed to be force majeure? What are the cost and time consequences?

The PRC is a civil law jurisdiction where the National People’s Congress has the power to revise the Constitution and create major legal codes.

On 20 February 2020, the Commission of Legislative Affairs of the National People’s Congress Standing Committee’s indication confirmed that COVID-19 is indeed an “unforeseeable, unavoidable and insurmountable” event that could exempt parties from performing contracts.4

With regards to the increase in wastages and costs arising from the suspension of works, 36.32 percent of respondents reported that the daily loss was less than RMB 100,000, while 9.45 percent of respondents reported that losses per day exceeded RMB 10 million.

On the preventive measures implemented at the construction sites, 96.27 percent of respondents have implemented temperature and health monitoring checks for staff working onsite, and 80.35 percent of respondents chose to resume works later on a number of work packages.

The Supreme People’s Court of the PRC5 published its first guiding principles on several issues concerning the proper trial of civil cases on 20 April relating to the COVID-19 pandemic, with the latest update on 16 June 2020.6 It stresses that when applying force majeure to relieve contracting parties from contract performance, the affected party must demonstrate causation between the pandemic and the party’s failure to perform contractual obligations and provide timely notice to other parties.7

With regards to the time and cost consequences arising from COVID-19, the Jiangsu Province branch of the Ministry of Housing and Urban-Rural Development (MOHURD)8, stated the following guiding principles:

— Extension of time should be allowed when the project is delayed or suspended due to COVID-19;
— The contractor bears the cost of machinery (idling and wear and tear), recurring materials, the increase in cost of temporary facilities required during the suspension and resumption periods; the employer bears the cost of site management and security teams which must remain on site;
The employer bears the increased cost of cleaning and repairs/reinstatement and/or maintenance arising from the suspension and resumption of works;

If acceleration is approved by the experts to mitigate delays arising from COVID-19, the employer is responsible for the cost of acceleration if the number of accelerated days exceeds 10 percent of the remaining/unfulfilled contract period;

The contractor is to submit a pandemic control plan and obtain approval from the employer. Upon approval, the employer bears the cost of pandemic prevention, which includes the wages payable to workers during the quarantine period; and

The parties are to administer the increased costs of labour, materials, plant and equipment arising from COVID-19 based on the provisions in the contract. If the terms in the contract are unclear, the parties are to agree on a reasonable price adjustment based on actual circumstances supplemented with a formal agreement.

Other branches in the MOHURD also issued guidance notes on the administration of claims arising from COVID-19. Some of the guiding principles are as follows:

The Beijing City branch of MOHURD states that if a contract does not contain a force majeure clause, the parties may refer to section 9.10 “Force Majeure” of GB50500-2013, “Code of bills of quantities and valuation for construction works.” The contractor is entitled to the actual cost incurred on the preventive measures stipulated by the Government and authorities.9

The Guangzhou City branch of MOHURD states that the Employer bears the extra over cost if the increase in materials prices exceeds 5 percent;

The Shenzhen City branch of MOHURD states that when projects have been delayed by COVID-19, an extension of time is to be granted from the date of when the first-level public health emergency response was activated (i.e. 26 January 2020) to the date of resumption of works11; and

The Shanxi province branch of MOHURD states that an item named “COVID-19 pandemic prevention measures” should be included in the Preliminaries cost section. The cost of pandemic prevention for levels 1 and 2 workers is at RMB 40 per day, and levels 3 and 4 workers at RMB 15 per day. The pandemic prevention measures include testing, quarantine costs, point-to-point workers transportation, pandemic prevention promotion and education, temperature monitoring, workplace disinfection, temperature monitoring equipment, face masks, goggles, disinfectants, pandemic monitoring and reporting and staggered breaks and dining arrangement.12

As can be seen from the above, China has taken proactive measures and given guidelines on cost and time entitlements, with a focus on mitigation of the adverse impacts on construction projects and potential disputes between the parties. The guiding principles are diverse and stipulated to suit the needs of the provinces in China.

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