

Impacts of the Corona Virus (COVID-19) Pandemic on the Construction Industry



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Addis Ababa, Ethiopia

May, 2020

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Impacts of the Corona Virus (COVID-19) Pandemic on the Construction Industry

I. Introduction

The novel corona virus was discovered on January 9th in Wuhan province in China. Ever since then until its declaration as a pandemic by WHO, it has sadly destroyed peoples' lives, devastated nations, disrupted businesses & our normal ways of lives.

Global ways of life, routine activities, travel, trade & interactions have been impeded in a manner never experienced in our immediate history.

In Ethiopia, where our economy is highly connected to the world economy, the disruptions are obvious in none other than the construction industry.

As one of the biggest employers in the Ethiopian economy as well as its biggest contributor to annual GDP, this disruption is affecting many clients and construction firms alike.

With these severe disruptions under its belt and impacts to our economy still to be felt, is its occurrence considered a FORCE MAJEURE in the Construction Industry? If not, what should the contracting parties and the Government do to mitigate the adverse impacts of this unexpected exceptional event? This paper is prepared with the aim of responding to the above questions and at the end recommends actions to be taken by the different stakeholders of the Construction Industry.

Briefly addressed below are the result of the assessment of the different Conditions of Contracts on the pandemic, Impacts of the current Corona Pandemic on the construction Industry, Actions required from the Project stake holders during the pandemic, Possibility of Claims from the Contractor's side, Impacts of the Pandemic on Consultants' Services and Conclusions & Recommendations.

II. Assessment of different Conditions of Contracts and the Civil Code

In order to know whether or not the current Corona (COVID-19) Pandemic is a Force Majeure or addressed in one of the following Clause or Sub-Clause titles, it is vital to search what the different Conditions of Contract depict about the event/ circumstance similar to the current Novel Corona Virus (COVID-19) Pandemic. With that objective, the different Clauses and Sub-Clauses which are at first sight, believed to include and address the impacts of the events similar to the current pandemic have been assessed in the different 5 Conditions of Contracts. Furthermore, the Civil Code of Ethiopia has been visited if it has any provision for cases of such event.

Although the assessment of the different Conditions of Contracts may help us to know what the assessed Conditions of Contract say about the event similar to the current pandemic for general consumption, we should not forget that each contract is administered by the Conditions of Contract contained in that particular project's contract documents.

1. Disruption:

Sub-Clause 6.3 of the GCC, MoWUD December 1994 discusses about **Disruption of Progress**. It stipulates about delay or disruption of the planning or progress unless any further

drawing or order, including a direction, instruction or approval, is issued by the Engineer within a reasonable time. In such cases, the Contractor shall give written notice to the Engineer. The notice shall include details of the drawing or order required and of why and by when it is required and of any delay or disruption likely to be suffered if it is late. Thus, the cause of delay or disruption discussed in this Sub-Clause does not address the event of Corona Pandemic the contents of the Sub-Clause as presented below:

The Contractor shall give written notice to the Engineer whenever planning or progress of the Works is likely to be delayed or disrupted unless any further drawing or order, including a direction, instruction or approval, is issued by the Engineer within a reasonable time. The notice shall include details of the drawing or order required and of why and by when it is required and of any delay or disruption likely to be suffered if it is late.

2. Excepted Risks:

Sub-Clause 20.2 of the GCC, MoWUD December 1994 deliberates about **Excepted Risks**. As presented in the Sub-Clause, *the "excepted risks" are war, hostilities (whether war be declared or not), invasion, act of foreign enemies, rebellion, revolution, insurrection or military or usurped power, civil war, or unless solely restricted to employees of the contractor or of his sub-contractors and arising from the conduct of the works, riot, commotion or disorder, or use or occupation by the Employer of any part of the permanent works, or a cause solely due to the Engineer's design of the works, or ionizing radiations or contamination by radio activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive, or other hazardous properties of any explosive, nuclear assembly or nuclear component thereof, pressure waves caused by aircraft or other aerial devices traveling at sonic or supersonic speeds, or any such operation of the forces of nature as an experienced contractor could not foresee, or reasonably make provisions for or insure against all of which are herein collectively referred to as "the excepted risks."*

Clause 44 of the GCC, PPA 2011 stipulates about **Exceptional Risks** as follows:

Exceptional Risks

If during the execution of the works the Contractor encounters artificial obstructions or physical conditions which could not reasonably have been foreseen by an experienced Contractor, and if the Contractor is of the opinion that additional costs will be incurred and/or an extension of the period of implementation of the tasks will be necessary as a result of this, he shall give notice to the Engineer in accordance with GCC Clauses 69 and/or 73. The Contractor shall specify in such notice the artificial obstructions and/or physical conditions, giving details of the anticipated effects thereof, the measures he is taking or intends to take and the extent of the anticipated delay in or interference with the execution of the works.

Following receipt of the notice, the Engineer may inter alia:

- (a) *Require the Contractor to provide an estimate of the cost of the measures he is taking or intends to take;*
- (b) *Approve measures referred to in GCC Sub-Clause 44.2 (a) with or without modification;*
- (c) *Give written instructions as to how the artificial obstructions or physical conditions are to be dealt with;*
- (d) *Order a modification, a suspension, or termination of the contract.*

To the extent that the Engineer shall decide that the whole or part of the said artificial obstructions or physical conditions could not reasonably have been foreseen by an experienced Contractor, the Engineer shall:

- (e) *take into account any delay suffered by the Contractor as a result of such obstructions or conditions in determining any extension of the period of implementation of tasks to which the Contractor is entitled under GCC Clause 73; and/or*
- (f) *in case of artificial obstructions or physical conditions other than weather conditions, determine additional payments due to the Contractor in accordance with GCC Clause 69.*

Weather conditions shall not entitle the Contractor to claims under GCC Clause 69.

If the Engineer decides that the artificial obstructions or physical conditions could, in whole or in part, have been reasonably foreseen by an experienced Contractor, he shall so inform the Contractor as soon as practicable.

Here again, Sub-Clause 20.2 of the GCC, MoWUD December 1994 does not address event/circumstance similar to the current pandemic. The artificial obstructions or physical conditions which could not reasonably have been foreseen by an experienced Contractor included in Clause 44 of the GCC, PPA 2011 as *Exceptional Risks* also does not include event like the present pandemic for artificial obstructions or physical conditions are totally different events from the current pandemic.

3. Employer's Risks:

Sub-Clause 20.2 of the GCC, PPA 2006 describes about Employer's Risks and unless and otherwise specified in the SCC, from the Start date until the defects correction certificate has been issued, the following are described as Employer's risks:

- (a) *The risk of personal injury, death, or loss of or damage to property (excluding the Works, Plant, Materials, and Equipment), which are due to:*
 - (i) *Use or occupation of the Site by the Works or for the purpose of the Works, which is the unavoidable result of the Works, or*
 - (ii) *Negligence, breach of statutory duty, or interference with any legal right by the Employer or by any person employed by or contracted to him except the Contractor.*
- (b) *The risk of damage to the Works, Plant, Materials, and Equipment to the extent that it is due to a fault of the Employer or in the Employer's design, or due to war or radioactive.*

Sub-Clause 20.4 of FIDIC 4th edition, 1987 has also contained Employer's Risks. The Sub-Clause defines the **Employer's risks** as:

- (a) *war, hostilities (whether war be declared or not), invasion, act of foreign enemies,*
- (b) *rebellion, revolution, insurrection, or military or usurped power, or civil war,*
- (c) *ionising radiations, or contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof,*
- (d) *pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds,*

- (e) riot, commotion or disorder, unless solely restricted to employees of the Contractor or of his Subcontractors and arising from the conduct of the Works,*
- (f) loss or damage due to the use or occupation by the Employer of any Section or part of the Permanent Works, except as may be provided for in the Contract,*
- (g) loss or damage to the extent that it is due to the design of the Works, other than any part of the design provided by the Contractor or for which the Contractor is responsible, and*
- (h) any operation of the forces of nature against which an experienced contractor could not reasonably have been expected to take precautions.*

As presented above, the **Employer's risks** in both Conditions of Contracts do not include event/circumstance similar to COVID-19 Pandemic.

4. Special Risks:

Sub-Clause 65.2 of the MoWUD December 1994 GCC defines **Special Risks** as:

- a. war hostilities/whether war be declared or not/invasion, act of foreign enemies;*
- b. ionizing radiation's, or contamination by radio-active from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive or other hazardous properties of an explosive nuclear assembly or components thereof;*
- c. pressure wave caused by aircraft or other aerial devices traveling at sonic or super sonic speeds;*
- d. riot, commotion, or disorder, unless solely restricted to employees of the contractor or his sub-contractor and arising from the conduct of the works.*
- e. rebellions, revolution, insurrection, or military or usurped power, or civil war, in so far as these relate to the country in which the works are to be executed.*

Clause 65.2 of the FIDIC 4th edition, 1987 has defined **Special Risks** as:

- (b) the risks defined under paragraphs (a), (c), (d) and (e) of Sub-Clause 20.4 as presented in no. 3 above; and*
- (c) the risks defined under paragraph (b) of Sub-Clause 20.4 (in no 3 above) insofar as these relate to the country in which the Works are to be executed.*

Here again, **Special risks** in both Conditions of Contracts do not include event/circumstance similar to COVID-19 Pandemic.

5. Suspension of Works:

Sub-Clause 40.1 of the MoWUD December 1994 GCC and Clause 20 of the PPA 2011 GCC describe about **Suspension of Works** and yet do not help us as summarized below at the end of this sub-title.

Sub-Clause 40.1 of the MoWUD December 1994 GCC specifies about suspension of works. It describes as follows:

The Contractor shall, on the written order of the Engineer, suspend the progress of the Works or any part thereof for such time or times and in such manner as the Engineer may consider necessary and shall during such suspension properly protect and secure the Work, so far as is

necessary in the opinion of the Engineer. The extra cost incurred by the Contractor in giving effect to the Engineer's instructions under this Clause shall be borne and paid by the Employer unless such suspension is

- (a) otherwise provided for in the Contract, or*
- (b) necessary by reason of some default on the part of the Contractor, or*
- (c) necessary by reason of climatic conditions on the Site, or*
- (d) necessary for the proper execution of the Works or for the safety of the Works or any part thereof in so far as such necessity does not arise from any act or default by the Engineer or the Employer or from any of the excepted risks defined in Clause 20 hereof.*

Provided that the Contractor shall not be entitled to recover any such extra cost unless he gives written notice of his intention to claim to the Engineer within twenty-eight days of the Engineer's order. The Engineer shall settle and determine such extra payment and/or extension of time under Clause 44 hereof to be made to the Contractor in respect of such claim as shall, in the opinion of the Engineer, be fair and reasonable.

Clause 20 of the PPA 2011 GCC describes about **Suspension of Works** as presented below

- 1. The Contractor shall, on the order of the Engineer, suspend the progress of the works or any part thereof for such time or times and in such manner as the Engineer may consider necessary.*
- 2. During the period of suspension, the Contractor shall take such protective measures as may be necessary to safeguard the works, plant, equipment and site against any deterioration, loss or damage. Additional expenses incurred in connection with such protective measures shall be added to the contract price, unless such suspension is:
 - (a) otherwise provided for in the contract; or*
 - (b) necessary by reason of some default of the Contractor; or*
 - (c) necessary by reason of normal climatic conditions on site; or*
 - (d) necessary for the safety or the proper execution of the works or any part thereof insofar as such necessity does not arise from any act or default by the Engineer or the Public Body or from any of the exceptional risks referred to in GCC Clause 44.**
- 3. The Contractor shall not be entitled to such additions to the contract price unless he notifies the Engineer, within 30 days after receipt of the order to suspend the works, of his intention to make a claim for them.*
- 4. The Engineer, after consultation with the Public Body and the Contractor, shall determine such extra payment and/or extension of the period of performance to be made to the Contractor in respect of such claim as shall, in the opinion of the Engineer, be fair and reasonable.*
- 5. If the period of suspension exceeds 120 days and the suspension is not due to the Contractor's default, the Contractor may, by notice to the Engineer, request permission to proceed within thirty (30) days or terminate the contract.*
- 5. Where the award procedure or implementation of the contract is vitiated by substantial errors or irregularities or by suspected or proven fraud, the payments and/or implementation of the contract shall be suspended. Where such errors, irregularities or fraud are attributable to the Contractor, the Public Body may also refuse to make payments or may recover monies already paid, in proportion to the seriousness of the errors, irregularities or fraud. The payments may also be suspended in cases where there are suspected or established errors, irregularities or fraud committed by the*

Contractor in the performance of another contract funded by the Federal Government of Ethiopia, which are likely to affect the performance of the present contract

Here, as discussed by the two Conditions of Contracts, in order to suspend the works, the contractor shall receive a written order from the Engineer (consultant). Such written order from the Engineer might be hardly available in any of the site in the country. Because, there is a clear position of the Government of FDRE that construction sites should not be closed during the period of the State of Emergency. Therefore, these clauses also do not help us.

6. Frustration:

Clause 66 of the MoWUD December 1994 GCC describes about events of frustration and payment in such event. As the Clause demonstrated below, either party should be prevented from fulfilling his contractual obligations, or under the law governing the Contract, the parties are released from further performance, then the party or parties may be considered as Frustrated.

If a war, or other circumstances outside the control of both parties, arises after the Contract is made so that either party is prevented from fulfilling his contractual obligations, or under the law governing the Contract, the parties are released from further performance, then the sum payable by the Employer to the Contractor in respect of the work executed shall be the same as that which would have been payable under clause 65 hereof if the contract had been terminated under the provision of clause 65 hereof.

It could be learnt that, if frustration to exist either party should be prevented from fulfilling his contractual obligations, or under the law governing the Contract, the parties should be released from further performance due to the occurrences of a war or other circumstances outside the control of both parties. Nonetheless, no contracting party is prevented from fulfilling his contractual obligations fully due to the current COVID-19 Pandemic since construction sites are not closed. There is no law governing the Contract that released the parties from further performance. Thus, this clause will not also help us either.

7. Release from Performance:

Clause 66 of the MoWUD December 1994 GCC describes that “*if a war, or other circumstances outside the control of both parties, arises after the Contract is made so that either party is prevented from fulfilling his contractual obligations, or under the law governing the Contract, the parties are released from further performance*”.

Clause 62 of the PPA 2006 GCC included provision for “**Release from Performance**” in as presented below:

*If the Contract is **frustrated** by the outbreak of war or by any other event entirely outside the control of either the Employer or the Contractor, the Engineer shall certify that the Contract has been **frustrated**. The Contractor shall make the Site safe and stop work as quickly as possible after receiving this certificate and shall be paid for all work carried out before receiving it and for any work carried out afterwards to which a commitment was made.*

FIDIC Conditions of Contract for Plant and Design-Build, First Edition, 1999 Sub-Clause 19.3 stipulates *Release from Performance under the Law* as presented here below:

Notwithstanding any other provision of this Clause, if any event or circumstance outside the control of the Parties (including, but not limited to, Force Majeure) arises which makes it impossible or unlawful for either or both Parties to fulfill its or their contractual obligations or which, under the law governing the Contract, entitles the Parties to be released from further performance of the Contract then upon notice by either Party to the other Party of such event or circumstance:

- (a) the Parties shall be discharged from further performance, without prejudice to the rights of either Party in respect of any previous breach of the Contract, and*
- (b) the sum payable by the Employer to the Contractor shall be the same as would have been payable under Sub-Clause 19.6 [Optional Termination, Payment and Release] if the Contract had been terminated under Sub-Clause 19.6.*

From the above Clauses and Sub-Clause, Release from Performance or Discharge from further performance emanates from frustration as aforementioned in paragraph no 6. The Contract should be **frustrated** by the outbreak of war or by any other event (*including, but not limited to, Force Majeure*) entirely outside the control of the contracting parties which makes it impossible or unlawful for either or both Parties to fulfill its or their contractual obligations or which, under the law governing the Contract, entitles the Parties to be released from further performance of the Contract and then, the Engineer should certify that the Contract has been **frustrated**. Do we have such circumstance? Not at all for the construction sites are not closed. In fact, closing construction sites currently will be unlawful.

8. Force Majeure:

Clause 18 of the PPA 2011 GCC (which is believed to be currently under use for public projects) included a clause (Clause 18) for Force Majeure as indicated hereunder. Unfortunately, circumstance like the current Pandemic is not included in the list of events to be considered as Force Majeure.

For the purposes of the Contract, “Force Majeure” shall mean an event or events which are beyond the reasonable control of a Contractor, and which makes a Contractor’s performance of its obligations hereunder impossible or so impractical as reasonably to be considered impossible in the circumstances, and includes:

- (e) An official prohibition preventing the performance of a contract,*
- (f) A natural catastrophe such as an earthquake, fire, explosion, storm, floods, or other adverse weather conditions, or*
- (g) International or civil war, or;*
- (h) **Other instances of Force Majeure identified as such by the civil code.***

The clause stipulates in (h) above that “*other instances of Force Majeure identified as such by the **civil code***” which are beyond the reasonable control of a Contractor and which makes a Contractor’s performance of its obligations impossible or so impractical as reasonably to be considered impossible in the circumstances are taken as events of Force Majeure.

It is therefore, important to visit what the civil code of Ethiopia pronounces about the Force Majeure.

Civil Code: Article 1792- Force Majeure:

- (1) Force Majeure results from an occurrence which the debtor could normally **not foresee** and which prevents him **absolutely** from performing his obligations.*
- (2) Force Majeure shall not exist where the occurrence could normally have been foreseen by the debtor or where it renders more onerous the performance by the debtor of his obligations.*

Civil Code: Article 1793- Cases of Force Majeure:

The following occurrences, may according to the circumstances, constitute cases of Force Majeure:

- (a) The unforeseeable act of a third party for whom the debtor is not responsible; or*
- (b) An official prohibition preventing from the performance of the contract; or*
- (c) A natural catastrophe such as an earthquake, lightning or floods; or*
- (d) International or civil war; or*
- (e) The death or a serious accident or unexpected serious illness of the debtor.*

From the above two articles of the civil code, we can learn that, the circumstances like the current Corona Pandemic is not considered as a Force Majeure.

The civil code depicts that Force Majeure stands on two pillars as indicated in Article 1792 (1) above. The first pillar is the event's un-foreseeability by the contracting parties which the current pandemic satisfies. But it is only 50% of the requirements. The other 50% of the requirements is that the event should prevent one of the contracting parties **absolutely** from performing its obligations. The current pandemic might have some adverse impacts on projects (though project specific assessment is required) but has not absolutely prevented one of the contracting parties from performing its obligations.

FIDIC Conditions of Contract for Plant and Design-Build, First Edition, 1999 includes a clause for Force Majeure and the event similar to the current Pandemic is not included in the explicit definition of the Force Majeure. However, it contained phrases like the following:

- a. an exceptional event or circumstance which is beyond a Party's control;*
- b. such Party could not reasonably have provided against before entering into the Contract;*
- c. which, having arisen, such Party could not reasonably have avoided or overcome;*

The Conditions of Contract listed events or circumstances that can be included as Force Majeure.

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed in the above four Conditions of Contract, so long as conditions 19.1 (a) to

(c) below are satisfied:

Sub-Clause 19.1 defines the Force Majeure as an exceptional event or circumstance:

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

According to the Sub-Clause, Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

- (i) *war, hostilities (whether war be declared or not), invasion, act of foreign enemies,*
- (ii) *rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,*
- (iii) *riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors,*
- (iv) *munitions of war, explosive Materials, ionizing radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and*
- (v) *natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.*

The exceptional events or circumstances listed under the Force Majeure are more or less similar to the events listed in Excepted Risks under paragraph no 2 and Special Risks under paragraph no 4 above. The current pandemic does not fall under the list of events.

Summary of findings of Section 2

As indicated in each sub-title under section 2, the current Novel Corona (COVID-19) Pandemic is not explicitly addressed by one of the above visited Clauses and Sub-Clauses. Thus, it may be difficult to invoke contractual Clauses for any Claims possibility apart from the normal Extension of Time (EOT) Clause for EOT and Compensation event Clause for Financial Claims.

The alternative possibility of approaching the issue is presented in the following sections.

III. Impacts of the current Corona Pandemic on the construction Industry

One may ask that has the exceptional event or circumstance which hamper the smooth implementation of a project at site level occurred (existed) due to the current Corona (COVID-19) Pandemic? We all may agree and say that yes; but not fully. Then what are the actual adverse impacts of the current Corona Pandemic on the progress of the works? The issue needs project specific assessment. The impact may vary from zero (0) on one project to a certain degree at another project.

Though the current situation is not explicitly included in the Conditions of Contracts, as Presented in the aforementioned section 2 above, it is very difficult to conclude that it has not affected the smooth progress of works at each site. Some of the possible areas of adverse impacts are on the following:

1. Shortages of labor due to difficulties in mobilization

- Employees (workers) may not arrive at site timely due to transportation problem due to the requirement of physical distancing and shortage of transportation due to the Government's restriction on the transport vehicles to use only half of their capacities. This will have negative impact by causing delay of works (delay of schedule). This may be mitigated by providing transport services to their employees by contractors with additional costs.
- Contractors may not be able to deploy as many employees as required by the schedule due to the requirements of physical distancing. The contractor may devise means to compensate the reduced outputs by working extended hours, shifts, etc. This may of course, will expose the contractors to additional costs. Otherwise, delay of works will be inevitable.
- Some of the employees might have gone to their homes at Regions or prefer to stay at their homes causing shortages of labor at site. This ultimately might have caused delay on schedules.

2. Disruptions on the supply chain of construction materials due to difficulties in mobilizing Construction materials

Mobilization of local construction materials like sand, wood, stone, gravel, etc. and imported materials (specially the finishing materials) might not be smooth to contractors due to Regional lockdowns and international market disruptions due to lockdowns of countries. This might have caused delays on constructions and additional costs.

3. Additional costs due to the new Safety and Health requirements

The contractor has a contractual obligation to provide some of the Safety and Health requirements as stipulated in its contract. Besides, the contractor should also implement the guidelines and directive of the Ministry of Urban Development and Construction. If there are additional supplies involving additional expenses, they have to be scrutinized.

4. Delay or Additional cost emanated from changes of the law restricting the activities

The impacts of the guidelines issued by the Ministry of Urban Development & Construction and the decree of the State of Emergency and other decrees issued from time to time by the Government have to be closely inspected at each project site if they have caused delays on the projects progress and additional costs.

IV. Actions required from the Project stake holders during the pandemic

A. Actions to be taken by contractors

The following actions may be taken at project level.

1. Contractors should provide transportation services for their employees as aforementioned;

2. Physical distancing has to be kept at work place in compliance with the standards of the Ministry of health and the guidelines of the Ministry of Urban Development and Construction;
3. The contractor shall not terminate any of its employees during the period of the State of Emergency.
4. The contractor should also do but not limited to the following in accordance with the guidelines of the Ministry of Urban Development and Construction:
 - 4.1. Screen workers entering to site for fever or illness;
 - 4.2. Provide adequate water, soap and hand sanitizer on site for frequent hand washing and cleaning;
 - 4.3. Provide hand washing stations at different locations within the site;
 - 4.4. Plan a working environment that maintain safe physical distancing;
 - 4.5. Make their meal place clean and safe;
 - 4.6. Assign a qualified person to control the above stated health and safety issues; and
 - 4.7. Provide proper gloves and protective masks for employees.
5. The contractor should register/record all delay causes/factors and additional costs incurred resulted from the Pandemic or related changes of laws restricting the activities.
6. The contractor shall at all times use all reasonable endeavors to minimize any delay in the performance of the Contract as a result of the current pandemic.

B. Actions to be taken by Engineers/Consultants

1. The Resident Engineer should prepare a Site Diary in consultation with the Client and Contractor's (Project Manager) which shall be used for the registration of delay factors and additional costs incurred ONLY due to the current pandemic.
2. The Engineer's representative (Resident Engineer) should monitor the Contractor's Project Manager registered data with regards to causes of delay and additional costs due to the current pandemic on daily basis.
3. Assess any claims submitted by the contractor related to the pandemic and submit its recommendations to the Client.

C. Actions to be taken by the Client

1. Assign a representative for each project so that he may sit down and discuss in a form of meetings with the Engineer's representative and the contractor's Project Manager on weekly basis (or any time to be agreed) on the impacts of the Corona Pandemic on the delay of the project and any additional costs incurred based on the data registered on the site diary and consolidated by the Resident Engineer.
2. Following the above discussions, the Client's representative may need to advise the top management on the possible time extension to be granted to the contractor (delay on the project) and additional budget required.

D. Actions to be taken by the Regulatory body and Ministry of Urban Development and Construction

1. The regulatory body or the MoUDC should arrange a forum for discussions among the Ethiopian Consulting Engineers and Architects Association and the Ethiopian Contractors Association and other stakeholders to look into the matter closely.
2. The MoUDC and the regulatory body should prepare a guideline how to handle the possible EOT and Financial Claims. Notwithstanding paragraph no 5 in V below, the possibility of additional budget for possible financial claims should also be planned.

V. Possibility of Claims from the Contractor's side

Claims may include Time claims, money claims or both. Notwithstanding the requirements of contract specific assessments, the contractor may be forced to unexpected delay and in some areas as aforementioned and to additional expenses. It is easier to grant Extension of Time (EOT) based on the contractual provisions and proper assessment. Assessment of the financial claims is sensitive and difficult due to the following factors:

1. It will be difficult to contractors to substantiate their claims by invoking appropriate clause (They may not get appropriate clause supporting their claims) as discussed in paragraph no II above.
2. The Client has not allocated additional budget for the extra expenses incurred. Furthermore, the Pandemic is an unforeseen event for the Client as well. Besides, both contracting parties suffer equally by the unforeseen circumstance and thus, the contractor may be requested to absorb the additional expenses as aforementioned.
3. If the project is a public one, the client is the Government. The Government as we all know is fighting to keep-up the economy from collapse. Such kind of unexpected additional cost will undoubtedly be additional burden to it. All citizens including firms are expected to help the Government.
4. In accordance with the provisions of Articles 3190 and 3191 of the Civil Code , compensation may not be refused unless the laws, regulations, orders and other measures of general application has specified that no compensation shall be paid. The burden of proof for the additional costs incurred is still on the contractor.

Article 3190: General measures - 1. Affecting substance of contract

- (1) Laws, regulation, orders and other measures of general application, made by the public authorities, which directly modify the provisions of the contract or prevent the enforcement of some provisions of the contract or prematurely put an end to the performance of the contract shall enable the party having contracted with the administrative authorities to claim compensation.
- (2) Such compensation may not be refused unless the measure of general application has specified that no compensation shall be paid.

Article 3191: 2. Making the performance of the Contract more onerous

- (1) Measures of general application taken by the public authorities shall not create any right to compensation where, without affecting the substance of the contract, they only modify the conditions of its performance and render such performance more difficult or more onerous.
 - (2) Compensation shall however be due where the measure made or the contract itself provides that there shall be a right to compensation.
5. Contractors may be requested to consider the additional costs they incurred as a donation to the Government to fight the Pandemic and certificates of donation may be granted to them. In such case, the detail costs in the areas of salary of payments to the retained employees (while they should have been terminated), health and safety provisions, mobilization of labor due to restrictions and in the supply chain of local and imported construction materials should be registered.

VI. Impact of the Pandemic on Consultants' Services

The consultants' services may include Pre-Design, Design, Tender Processing, Supervision and Contract Administration Services. The current situation does not bring significant adverse impacts. Designers can do their designs at home if they have to stay at home. Supervisors may have to reduce their appearances at site and yet they can supervise periodically. Contract Administration Services can be run without any difficulty.

However, they have to retain some of their employees during the period of the State of Emergency whom they may have to terminate. This will require them additional costs. Furthermore, the detail rigorous assessment due to the Pandemic may require them additional time with broader scope of services. This may also entail additional cost due to additional payments for the staffs involved.

Considering that the Pandemic is a national threat, consultants may be requested to absorb the additional expenses. As stated above for contractors, consultants may be requested to consider the additional costs they incurred as a donation to the Government to fight the Pandemic. Here again, the exact realistic additional cost incurred has to be registered.

VII. Conclusions and Recommendations**Conclusions:**

1. As indicated in each sub-title under paragraph no. 2, the current Novel Corona (COVID-19) Pandemic may not be addressed by one of the Clauses and Sub-Clauses of the Conditions of Contract. Thus, it may be difficult to invoke contractual Clauses for any Claims possibility apart from the normal Extension of Time (EOT) Clause for EOT and Compensation event Clause for Financial Claims.
2. The actual adverse impacts of the Pandemic on the progress of the works and its additional cost implications need project specific assessment. The impact may vary from zero (0) on one project to a certain degree at another project.
3. Based on Articles 3190 and 3191 of the civil code, compensation may not be refused unless the laws, regulations, orders and other measures of general application have specified that

no compensation shall be paid. The burden of proof for the additional costs incurred is still on the contractor.

Recommendations:

1. The Current Corona Virus (COVID-19) Pandemic is a new exceptional event or circumstance to Ethiopia in particular and to the world at large. Thus, it was not foreseen and similar events are not included in any of the Conditions of Contracts. It has to be treated in a new way. We may need to go out of the legal framework box (or Conditions of Contracts box) and treat the issue in good faith. Clients and Contractors conclude their contracts in good faith. One of the parties should not seek undue advantage from the other. Thus, the two contracting parties should closely discuss and agree on the additional time and cost issues emanated from the Pandemic based on the recommendations of the Engineer (Consultant).
2. Considering that the Pandemic is a national threat, Consultants and Contractors may need to absorb their additional expenses. The additional costs they incurred may be considered by the Government as donation to the Government to fight the Pandemic. This will be a landmark for them in discharging their social responsibilities. Certificate of recognition should be given by the Government to the firms.
3. Clients and Contractors may need to assign an adjudicator or Arbitrators (Ad-hoc or Institutional) or as FIDIC suggests a Dispute Avoidance Adjudication Board (DAAB) to handle the EOT and additional cost case on their behalf.

.....**END**.....

References:

1. General Conditions of Contract, MoWUD, Dec. 1994
2. General Conditions of Contract, PPA 2006
3. General Conditions of Contract, PPA 2011
4. General Conditions of Contract, FIDIC 4th edition, 1987
5. Conditions of Contract for Plant and Design-Build, FIDIC First Edition, 1999
6. FIDIC COVID-19 Guidance Memorandum, April 2020
7. Civil Code of the Empire of Ethiopia, Proclamation No.165 of 1960