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To: **Adv. Fathima Khan** - EThekweni Metro

From: Mike Miles – Miles Attorneys Inc.

Date: 27 April 2020

Dear Fathima

Herewith as requested our comments for your perusal.

CONSTRUCTION INDUSTRY:

With the onset of the economic hardship brought about by COVID-19 - is unfortunate and understandable that the majority of SMME's and CONTRACTORS (hereafter – "CONTRACTORS") currently engaged in business with Government (National, Provincial, Local –Metro levels- "GOVT") will face unprecedented tough times.

Many will cease to exist and be unable to continue to carry-out their contractual obligations. There will be an increased dialogue business networking ethos built up, which will change the private sector playing field. Opportunities and new relationships will be spawned, some building on previously unearthed synergies. However, in the interim, there will be enormous fallout resulting in liquidations, massive unemployment, cessation of contracts and cession of others.

The Construction Industry might be a leading sector evidencing companies actively trying to stay afloat, positively engaging each other, assisting one another, working with authority leaders and Metro decision makers and actively seeking alliances, mergers and acquisitions, joint ventures. This in itself could be the microcosm of slowly building the New, New South Africa

This could be an excellent platform, for CONTRACTORS to GOVT to realign themselves in strength – so that catalytic projects are not held up and others are commissioned and that the stronger CONTRACTORS involved



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COMMERCIAL ATTORNEYS & ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS

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in these various projects with yourselves, do not suffer with projects being shelved after years of risk work. The real aim must be to ensure the projects do not fail or be held up as they sustain employment, cash flow into a Metro, secure a better rates base, increase property values, etc. In essence, the now is about us all working together and assisting each other positively.

As you will recall the last three years have been exceptionally tough for the Construction Industry with only WBHO, (out of the Big Five Construction Houses) sustaining a strong order book. Putting that into perspective, one can appreciate how the medium and smaller construction companies will now begin to suffer. Optimally it will be best for them to unshackle their competitiveness and align smartly, with synergistic partners, increasing their collective value-add. That strategy would surely impress any GOVT contracting partner, when for example pre-30-day invoice payment matters were to be discussed.

For any GOVT authority (in this case a Metro) to be lenient with CONTRACTORS - it must of course be assured that its risk is minimized and the CONTRACTORS future is a sustainable one placing it in a positive position to fulfil its contractual duties.

SHOULD PAYMENTS BE MADE EARLIER THAN 30 DAYS FOR SMME'S AND OTHER SMALL CONTRACTORS TO NATIONAL, PROVINCIAL AND LOCAL GOVERNMENT?

Payment Terms and Contract Types:

The contractual payment terms that National, Provincial and Local Government (GOVT) has with its various SMME'S and Small Contractors (CONTRACTORS) will of course vary. In this regard we are specifically referring to the specific payment day, whether it be 30 days' post invoice; 15 days; 3 months; etc. Of course there are of course numerous types of contracts between GOVT and CONTRACTORS – viz. service delivery contracts, consultancy contracts, etc. Contract payments terms are infrequently retainer based, it being more common-place that payment terms are more achievement and deliverables structured into the Contract's Term Sheet, with GOVT paying on those deliverables post the receipt of the requisite invoice. That being said if GOVT elects unilaterally to make payments prior to any deadline and / or action task has been achieved, it attracts risk in doing so.

Furthermore, payment for work already completed (subject to necessary sign off letters if required) could be expedited. Such payments would not ordinarily place GOVT at risk contractually as the contracting party has fulfilled its obligations and is for all intents and purposes would be being paid in terms of work performed in

terms of the contract. Positively, such payments would of course have a multitude of advantageous spin-off implications in so far as the CONTRACTORS are concerned. They will be placed in a more liquid position to continue their relationship with GOVT and the project per se, to pay their employees, sub-contractors and creditors. In essence to revitalize the cycle of business! Furthermore, the CONTRACTORS would be incentivized to fulfil its duties in terms of the contract.

Pre-30 days Payment Implications for GOVT:

It would be unwise to pass a blanket policy decision to pay CONTRACTORS pre-30 days or prior to the achievement of any deliverable ito. the Contract. That would open GOVT to numerous risk areas which GOVT might not be able to claw back from. It would of course also due to the hundreds of thousands of CONTRACTORS and the associated amounts, precipitate cash-flow concerns. In addition, in the event of the CONTRACTORS failing fiscally at a later stage, it could be argued that GOVT placed itself in that position voluntarily (notwithstanding the goodwill), which would be problematic.

Having said that, GOVT is at liberty to relax the terms in favour of the CONTRACTORS piece-meal without amending the agreement, due to the fact that the new payment terms are to advantage and favour the CONTRACTORS. It would however be prudent to inform the said CONTRACTORS, that any such indulgence does not constitute new, set amended payment terms and that the indulgence has been made in order to assist the CONTRACTORS as a result of the current unfortunate circumstances.

Furthermore, it would be prudent to inform that GOVT reserves its right to unilaterally reinstitute the original payment terms. Naturally there are thousands of CONTRACTORS nationally in this predicament and GOVT is beset with a situation of possibly cherry-picking those which it believes will be more sustainable to assist. There is of course no obligation on GOVT to be increasingly lenient to CONTRACTORS where there is a direct contractual relationship. The obligation of fulfilling its fiscal obligations in terms of the contract between the parties is the paramount instrument to abide by.

A concerning issue that will need to be addressed sensitively is the matter of Publicity. Numerous CONTRACTORS will on early payment by GOVT be exceptionally positive and as a result disperse their good news. Naturally other CONTRACTORS will receive less favourable news and this will convert into rebuke. Our advice is to deal with each matter on its own creditworthiness in tandem with strict rules of audit that you – GOVT - set yourselves.

Undoubtedly hundreds of thousands of CONTRACTORS will now go out of business, go into Business Rescue, and sadly more into Liquidation etc. Representations will be made to GOVT by the various businesses that they are financially secure in order that payments from GOVT be accrued prematurely. This is of course human nature but a major concern to guard against.

GOVT is placed in an unenviable task of trying to be fair but firm. To do so it must implement its systems via National, Provincial, Local and Metro screening level via committees, through the use of requisite skills and expertise, of in-house and outside if necessary project managers and legal, to deal with the tasks reporting to in-house senior Compliance Managers i.e. Legal. It might be useful for the terms of reference, credit committees, due diligence rules, legal structures, audit payment terms and dispute settlements to be drafted as soon as possible before the avalanche of requests commences.

An important practical issue to be borne in mind is the fact that many CONTRACTORS work together on large GOVT projects, especially on the Metro's Catalytic projects. These CONTRACTORS communicate frequently and the practicality apropos some being paid whilst other are not, will naturally cause discourse. This must be pre-empted. A possible solution is getting them to work together to become more sustainable, assisting each other in consultation. These private sector CONTRACTORS work together on other projects in as that is exactly what happens in the private sector projects.

CONTRACTOR Assessment:

What will be critical for CONTRACTORS to provide GOVT when it is being determined whether a pre-30-day payment needs be approved – must be inter alia: - the future cash flow projections (other than from that specific GOVT contract in question) in order that GOVT can ascertain the CONTRACTORS real liquidity or sustainability over the next six months.

If work is paid for without milestones being reached, the GOVT department places itself at risk – especially in the event of the CONTRACTORS falling on hard times and being unable to fulfil its duties and responsibilities in terms of the contract.

It must be appreciated that the possibility of further contractual practical difficulties will be very likely. In the circumstances it would be smart to obtain, subject to the contract's terms and the amounts in question, Directors sureties.

Furthermore, if any CONTRACTORS receive fiscal leniency that contract going forward should be red-flagged or placed into the system which will require on-going assessment apropos action delivery and compliance in terms of the contract obligations. Frequently GOVT contracts include clauses that require CONTRACTORS to inform GOVT per designated notice period of any change in ownership. This must similarly be red-flagged as a new risk area!

Funding and Loans:

There are numerous funds now available where loans and myriad forms of hybrid finance can be sourced by the CONTRACTORS, dependent on numerous factors, industry sector, requirements, status etc. However, this will be increasingly difficult to secure and the amounts accrued to employees for example will become less and less, culminating in more retrenchments and redundancies and liquidations.

It would be prudent to have CONTRACTORS be absolutely transparent with GOVT at all times with regards to any finance application they are attempting to secure. GOVT's intervention would always be of assistance, especially when one GOVT hand is talking to the other. Such disclosure attitude underscores for a healthy relationship between the two contracting parties and furthermore builds up a trust and working relationship going forward – all in the ultimate aim of getting the contract finalized and assisting the CONTRACTORS over any difficulties (without over representing itself or dishonestly portraying any relationship with GOVT).

There are numerous finance houses, other than the traditional banking institutions that are offering highly competitive loan finance for CONTRACTORS due to COVID-19. Naturally the terms and conditions available vary. The various documentation required for approval and the time to approval and the amount that might be accessible vary and are all highly competitive.

The financial sector has seen massive opportunities as a result of the mayhem that exists. Numerous contractors surely will seek out CONTRACTORS who are often taken advantage by unscrupulous companies. Yet others are highly credible.

GOVT must at all times keep alert as to which loan houses to avoid – which are not fully compliant - and pass on such information to CONTRACTORS and the requisite authorities. Having said that, such advice must be passed on in the most sensitive non-defamatory manner in order that GOVT nor its employees and representatives may be held accountable or sued for defamation. As a result, it would be in both parties' interests to work together in seeking finance via a relief fund and having senior GOVT officials responsible

for specific sign off letters of excellence pertaining to the CONTRACTORS - which will assist any finance house's credit committee in approving a loan.

Business Rescue:

Business Rescue has really commenced to become a significant positive part of SA legal commercial terrain. In public and private business transactions Business Rescue is proving to be increasingly helpful in saving floundering businesses. As you will be aware the aim of Business Rescue is to assist a company trade out of a difficult financial position. However, if the company has already fallen into the definition of an insolvent company, the opportunity of utilizing the Business Rescue process would have been lost.

That being said with the increased success of Business Rescue – if any CONTRACTORS are in financial difficulties and falls within the requisite definition - such companies really benefit from Business Rescue. GOVT could assist by making pre-30day payments, but securing its risk!

GOVT could make such suggestion as part of the premature payment plan that the directors resolve to pass a resolution to initiate Business Rescue which could mean a Business Rescue Practitioner to be appointed in 10 days, post CIPC confirming the Business Rescue on receipt of the resolution.

The benefit of this for GOVT is to be fully appraised during the process by the Business Rescue Practitioner which will enable GOVT to make on-going, practical fiscally sustainable, risk diligent decisions, pertaining to the on-going relationship with the CONTRACTOR.

Please do not hesitate to contact the writer personally on - 082 5678 768 / mike@milesattorneys.co.za if you require clarification on any issue above.

Best Regards



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