



## CONSTRUCTION LAW E-BRIEF

### FLATTENING THE CURVE: CONTRACTOR/SUBCONTRACTOR SURVIVAL GUIDE IN THE AGE OF CORONAVIRUS (COVID-19)

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As the novel coronavirus (“COVID-19”) erupts across the globe, individuals and businesses continue to brace for its rapidly evolving social and economic impacts. The construction industry can expect to do the same. Though COVID-19’s economic impact cannot yet be fully understood, some of these impressions have already made themselves clear. Relative to the construction industry, supply chains have been disrupted, business are struggling to keep a healthy, boots-on-the-ground workforce, and government regulations have impacted regular business practices, causing productivity issues. More and more jurisdictions are mandating “shelter in place” protocols and quarantines, which nearly cripple a construction project’s ability to timely progress. Other jurisdictions are placing moratoriums on all non-emergency construction projects.

An owner or general contractor might be enforcing the White House’s March 16, 2020 Guideline to avoid gatherings of 10 or more people, creating additional impediments to productivity. Unlike many other industries, construction cannot avoid most of these problems by “going remote.” These problems create several issues including material and equipment supply and demand problems, labor shortage and retention problems, and increased costs due to delays, disruptions, and suspensions, to name just a few. The pandemic inflicts new obstacles,

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day-by-day, but construction contract rights, obligations, and deadlines, remain the same.

With some construction projects continuing business as usual and other projects entirely suspended, it remains uncertain exactly what COVID-19 will do to the construction industry. During this uncertainty, however, contractors and subcontractors can (and should) take immediate steps toward preparedness and protection of their existing and future contract rights.

### **Find the Relevant Contract Provisions**

For existing projects, each contract should be carefully reviewed for any potential clauses that could provide relief for delays, unforeseeable conditions, or other time and/or cost impacts. Most contracts, but not all, contain a “force majeure” provision, and that contract provision is typically the most likely to provide relief for delays caused by the COVID-19. The force majeure provision is discussed in detail below, but contractors/subcontractors should keep looking for other potential provisions that could apply, particularly because “force majeure” provisions typically only afford the contractor/subcontractor additional time (not money). Each contract/subcontract is different, but some of the other potential provisions that should be carefully examined include the following:

- **Time Extensions/Delays** – Are there provisions (other than the force majeure clause) that afford relief for delays or other time or cost impacts? Most contract provisions will likely not be broad enough to cover delays or impacts related to epidemics/pandemics, but it is worth a look. Such provisions, if they apply, may permit recovery for both time and money (unless there is a “no damage for delay” provision). Also, consider whether the source of the delay is caused by COVID-19 or if it was caused by the owner or upstream contractor. Meaning, is the owner or upstream contractor putting greater restrictions on work activities in reaction to COVID-19, like permitting only 9 people in any given work area, despite nothing in the contract requiring it or no official government mandate (yet)? If so, consider whether relief is permissible under this kind of clause.
- **Changes/Claims** – Are there provisions that provide relief for changes or permit the contractor/subcontractor to assert claims for cost or time impacts? Most changes and claim provisions will not be broad enough to cover impacts related to COVID-19, but, again, an independent act of the owner/contractor may give rise to a claim. For example, if the owner/contractor restricts work hours or

mandates testing protocols that are not permitted or required by the applicable contract or law, the contractor/subcontractor may be entitled to assert a claim. Also consider reviewing the contractual scope inclusions and exclusions. Does the contract/subcontract include only a specified number of mobilizations, making any remobilization after a suspension or shut down a compensable change? Does the contract/subcontract expressly require the contractor/subcontractor uninterrupted access to the site, making COVID-19 disruptions a potential change in scope?

- **Price Escalation** – Some contracts have provisions that permit the contractor to seek compensation for the increased costs associated with the high demand for specified materials. The ConsensusDocs cost-adjustment clause, Document 200.1, Time and Price Impacted Material Amendment 1, is an example of a cost-adjustment addendum/clause permitting such recovery. These clauses are rarely contained in subcontracts (unless specifically negotiated), but subcontractors should review the prime contract to determine if such a clause exists and whether it flows-down to the benefit of the subcontractor.
- **Suspension of Work** – Some contracts give the owner the right to suspend a project for a certain period. Such clauses often provide the contractor with not only a time extension but also additional compensation for idle time and/or demobilization and remobilization once the project restarts. Such clauses may also permit the contractor to terminate the contract if the suspension lasts longer than the specified period. While some work suspensions may be expressly stated or mandated by the government, owners may also take more subtle actions that could give rise to an argument that the work is suspended, even if the owner does not expressly invoke the suspension-of-work contract provisions. As for subcontractors, here again, subcontractors should review the prime contract to determine if such a clause exists and whether it flows-down to the benefit of the subcontractor.
- **Termination for Convenience** – Most contracts provide the owner with the option to terminate for convenience. In such instances, the contract typically permits the contractor to recover for the work performed to date but may limit other remedies, such as profit on work not performed, demobilization, and other closeout costs. Contractors/subcontractors should be mindful of what remedies are

afforded under the contract/subcontract in the event the owner elects to terminate for convenience.

### **Force Majeure**

“Force majeure” is a contractual term in which contracting parties seek to allocate the risk within the terms of their agreement or contract if performance becomes impossible or impracticable due to the occurrence of certain specified events or, more generally, due to events outside the control of the parties to the contract. As noted, a force majeure provision typically affords the contractor/subcontractor additional time but not money.

The lack of such a “force majeure” clause does not necessarily mean that all is lost (as common law remedies, such as impossibility of performance or commercial impracticability may exist in certain situations/jurisdictions), but it does require a different kind of analysis than the provision under consideration here.

Generally, a “force majeure” clause will be a stand-alone provision in a contract and is drafted in a manner that it will generally apply to both contracting parties. The events described in such a clause can be carefully negotiated in which certain identified events are listed such that if such an event occurred, either party may be relieved of having to contractually perform under the contract.

Most oft-used industry standard forms and government contract regulations contain a force majeure provision. Sample provisions from the ConsensusDocs, AIA, and Federal Acquisition Regulations are briefly discussed in turn below:

- **ConsensusDocs 200**

#### 6.3 DELAYS AND EXTENSIONS OF TIME

6.3.1 If the Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of the Constructor, the Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of the Constructor include, but are not limited to, the following: (a) acts or omissions of the Owner, the Design Professional, or Others; (b) changes in the Work or the sequencing of the Work ordered by the Owner, or arising from decisions of the Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by the Owner pending dispute resolution or suspension by the Owner under section 11.1; (e)

transportation delays not reasonably foreseeable; (f) labor disputes not involving the Constructor; (g) general labor disputes impacting the Project but not specifically related to the Worksite; (h) fire; (i) Terrorism; (j) **epidemics**; (k) **adverse governmental actions**; (l) **unavoidable accidents or circumstances**; (m) adverse weather conditions not reasonably anticipated. The Constructor shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8.

6.3.2 In addition, if the Constructor incurs additional costs as a result of a delay that is caused by items (a) through (d) immediately above, the Constructor shall be entitled to an equitable adjustment in the Contract Price . . .

Note that items (j) and (l) in Section 6.3.1 specifically reference “epidemics,” “adverse governmental actions,” and “unavoidable accidents or circumstances.” Also note in Section 6.3.2, however, that additional compensation is afforded only for items (a) through (d). Thus, items (j), (k), and (l) essentially operate as a typical “force majeure” provision in that such provisions offer relief to the contractor in the form of additional time but not money.

- **AIA A201-2017**

- § 8.3 Delays and Extensions of Time

- § 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either . . . ; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, **unavoidable casualties . . . or other causes beyond Contractor's control**; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

Unlike the ConsensusDocs provision, the AIA A201-2017 does not specifically reference epidemics or other disease but does reference “unavoidable casualties” and “other causes beyond Contractor’s control” in subsection 3. Like the ConsensusDocs provision, the remedy afforded under the AIA provision is additional time, but not additional compensation.

- **Federal Acquisition Regulations (FAR 52.249-14)**

## EXCUSABLE DELAYS

(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from **causes beyond the control and without the fault or negligence of the Contractor**. Examples of these causes are (1) acts of God or of the public enemy, (2) **acts of the Government in either its sovereign or contractual capacity**, (3) fires, (4) floods, (5) **epidemics**, (6) **quarantine restrictions**, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. *Default* includes failure to make progress in the work so as to endanger performance.

As indicated above, the FAR provision excuses the contractor's failure to perform in instances that are "beyond the control" of the contractor, specially including "epidemics," "acts of the Government," and "quarantine restrictions." Like the ConsensusDocs and AIA provisions, the remedy afforded under the FAR provision is to excuse the delay of the contractor to the extent caused by the force majeure event, but it does not provide for any additional compensation.

### **Evaluation of Force Majeure Provisions**

If the language of a force majeure clause includes references to epidemics or pandemics, as is the case with ConsensusDocs and the FAR provisions, then the current COVID-19 outbreak would likely provide a sound justification for the affected party to claim that a force majeure event had occurred and that party's contract performance was thereby excused. Both the World Health Organization and the Department of Health and Human Services have declared COVID-19 a public health emergency. This, however, does not end the contractor's inquiry, since often there typically are also specific notice requirements that must be satisfied in order to fully rely upon such a provision.

Generally, the affected contract party must promptly act to notify the other party that a force majeure event is being claimed. The notice requirements may be specific in mandating a certain method of notification (e.g., certified mail, email to specific people, etc.) and/or that notification be given within a certain time. As such, contractors/subcontractors must review their current contracts and make an assessment if the current situation will impact their contractual performance and make sure that any required notice obligations are satisfied.

If the event at issue is not listed in the force majeure clause, then absent some generalized language within the provision, the occurrence of such an event likely will not excuse such a party's performance. If, however, the contract contains at least a boilerplate force majeure provision, there is likely a credible argument that the outbreak of COVID-19 would qualify as an "other cause beyond the reasonable control of either party" assuming, of course, that the effect of the COVID-19 outbreak is, in fact, causing the contractor/subcontractor a delay or disruption of its contractual obligations.

In addition to the announcements of the World Health Organization and the Department of Health and Human Services, the President on March 13, 2020, declared a national emergency under the Section 201 and 301 of the National Emergencies Act with respect to the COVID-19 outbreak. Many state and local governments have also declared emergencies for their jurisdictions. Such declarations are certainly indicative of events happening beyond the reasonable control of either party. Again, if a contractor/subcontractor wishes to invoke a force majeure clause, it needs to provide notice and any other supporting information required by the contract.

### **Recommendations and Action Steps**

1. Stay current with any national, state, and local government-mandated actions that may affect your project.
2. Review contract/subcontract provisions and find the relevant provisions that may afford relief.
3. Provide the contractually required notice and supporting documentation. Each contract/subcontract should be carefully reviewed to determine the timing and manner of notice required along with any other documentation or support that may be required.
4. Document and keep track of time and cost impacts. To prevail, contractors/subcontractors typically need to establish not only a contractual right to additional time and/or money, but also the extent or amount of the delay and/or added cost. Accordingly, contractors/subcontractors should carefully track and record impacts in daily logs and schedule updates, and separately track costs in their cost accounting systems.
5. Evaluate whether any insurance policies may provide relief. Contractors/subcontractors should review their existing insurance policies and contact their brokers to determine whether any existing

policies, such as a builder's risk or business interruption policy, may provide relief.

6. Monitor job site safety. Review office and job site safety protocols for compliance with the latest health and safety requirements and guidelines.
7. Be mindful of employment law and tax considerations.

### **Conclusion**

If you are experiencing delay or disruption issues related to COVID-19, please review your contracts/subcontracts to determine whether there is a force majeure or other contract clause that may provide relief and what notice requirements there may be.

Also, consider the impact of COVID-19 on future contracts. While the totality of the effects of COVID-19 are still ultimately unknown, it is certainly now a more foreseeable cause of delay, change, and impact. Accordingly, contractors/subcontractors would be well advised to include language in future contracts that specifically addresses pandemics and epidemics, like COVID-19, and affords at least time, if not costs, for any resulting impacts.

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