

COVID-19 AND THE IMPACTS ON CONSTRUCTION PROJECTS: Force Majeure, Notice Obligations, the Right to Recovery, Keeping People and Places Safe, and More....



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The rapid onset of the novel Coronavirus (COVID-19) is impacting every sector of the economy, and posing special challenges for construction projects as Owners and contractors face the prospect of workforce shortages, supply chain backups, workplace safety concerns, and even government shutdowns. Although the issues will vary based on the particular circumstances of each project, below are the key factors that both contractors and owners need to address now to properly preserve their legal rights as they navigate this outbreak.

Know Your "Force Majeure" Contract Provisions

Most construction contracts contain a "force majeure" or similar clause that applies to unanticipated events or "acts of God" that are beyond the control of the owner or contractor. These clauses often list specific examples of qualifying events, such as war, riots, earthquakes and other natural disasters, and in many cases, unforeseen government orders or legislation, which may apply to local or state-wide stop work orders like the one recently issued for the City of Boston by Mayor Walsh (which was just recently voided by Governor Baker's designation of construction activity as "essential" work).

Depending on the form of contract you are using (e.g., AIA, ConsensusDocs, or a "homemade" document), your force majeure provisions may vary widely with respect to the definition of qualifying events and how and what risks are allocated among the parties to the contract. Some forms (like ConsensusDocs) specifically include "epidemics," while others, like the AIA A201 General Conditions, contain more general "catch-all" language tied to events outside of the contractor's control.

Certain issues created by the current pandemic will be fairly clear-cut: a government shutdown, delay in supply chain/deliveries, and industry-wide labor shortages usually will fall within the typical forms of force majeure clauses. Other situations may be more ambiguous: if there is no shutdown, but a subcontractor refuses to continue working for fear of exposure, or a critical mass of your own employees becomes sick and unable to work. Whatever the issue, it is important to protect your rights by understanding your risk, tracking your cost impacts, and understanding who should be giving notice to relevant parties.

Understand the Cost Impacts

The typical impact from a COVID-19 related event will be delay-related costs, whether caused by disruptions to supply chain, reduction in the general contractor's or a subcontractor's workforce, a government-ordered shutdown, or possible owner-initiated suspension. For contractors, this means extended site costs/general conditions for idle time, potential demobilization costs, and other time-related cost impacts. Material escalation costs may also be a factor, so it is a good idea to review your contract for escalation clauses, if any, to understand what rights you may have to be paid for cost increases under those particular provisions.

The good news for contractors is that most force majeure clauses at least provide for extensions of time for these covered events, meaning relief from liquidated damages or forced acceleration obligations that may be in the contract.

The bad news is that an extension of time often is the only remedy available, and contractors may not be able to recover costs incurred on account of the force majeure delay. Depending on the contract, these restrictions may be inapplicable or more friendly to damage recovery, so it is important to understand those provisions if you believe your project may be affected by the current COVID-19 outbreak.

Owners should take note that some contract forms, particularly on smaller projects, may grant the contractor the right to an equitable price adjustment for any delay that is "not the fault of the contractor." In that case, the Owner will want to take steps to minimize its exposure by working with the contractor to "ramp down" its operations so as to limit extended site costs and other costs due to idle time.

Provide Prompt Notice

Contractors who believe that their work will be impacted by COVID-19 should provide written notice of the potential for impact or delay to the Owner as soon as possible. Your notice must comply with the notice requirements in the contract, and should cite the specific cost and

time impacts you anticipate (e.g., material unavailability, escalation costs, delivery delays, workforce shortages, etc.), when the impacts began to affect your work, and what you are doing to mitigate those losses, including any demobilization, which may present a separate/additional basis for cost recovery. Also be sure to indicate what relief you expect to seek under the contract – additional time and/or money – and state your intention to document and substantiate your costs or time entitlement and provide it to the Owner when available.

Project owners are likely to face different considerations regarding notice to contractors, and again those considerations will be dictated by the language in the contract. Owners who anticipate project delays due to COVID-19 related events should evaluate whether notice to the contractor is required (or prudent) to enforce contractual limitations on contractor cost recovery in force majeure situations. Where the contract permits the contractor to recover cost impacts (as opposed to just time extensions), the burden is on the contractor to notify the owner, who should focus on responding to any such contractor notice in a manner that limits potential liability to reasonable costs (e.g., by coordinating demobilization or reduction in forces).

Address Safety Issues and Other Matters Unrelated to Cost Recovery

Of course, the overriding concern with this pandemic is safety – of the workers and the public – and all parties first and foremost must take steps to ensure that site safety standards and protection of property is maintained. If your project remains unaffected by COVID-19 and is proceeding full steam ahead, take care to ensure that all CDC and state and federal governmental guidance is being strictly followed on site. This may mean changing long-standing routine operations, which could involve cost implications of its own.. Establish regular check-ins between owners and contractors to monitor compliance and address health and safety concerns. Keep all project stakeholders (including the public, where applicable) informed through periodic status updates. And continue to monitor and adapt to the ever-changing best practices for site safety and worker interaction.

If your project is being shut down or slowed, you will need to ensure that the site is secured and maintained in a safe condition. This may include continued compliance with applicable NFPA fire protection standards and other fire, life, and safety regulations required by building code and state law. Owners should review any applicable builder's risk policies to see if there are requirements related to securing the site. Government-ordered shutdowns coupled with the social distancing urged by health officials may complicate these concerns by reducing staffing capacity necessary to maintain even basic safety standards. Owners and contractors must work cooperatively to address these issues and ensure the protection of their shared project assets.

Consider Notifying Your Insurer

Finally, if you have legitimate concerns over your ability to protect the site based on circumstances you believe are outside your control, consider putting the Project's builder's risk insurer on notice. Make clear the steps you have taken, if any, to mitigate personnel shortages and any resulting increased risk of exposure to project assets. This may or may not affect coverage, but at the very least will put the insurer on notice of potential exposure and provide them the opportunity to work with you in addressing and potentially mitigating the altered risk profile caused by this unprecedented situation.