

Construction Contracting and COVID-19: Negotiating in Uncertain Times

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Given that the COVID-19 pandemic has been front and center for well over a year now, is COVID-19 still something owners and contractors should be worried about in their contracts? The answer is a resounding yes! The authors of this article discuss key provisions in the widely used legal forms and agreements that parties should be mindful of when negotiating construction contracts during both certain and uncertain times.

Determining what is foreseeable when embarking on a new construction project can be difficult, especially during a worldwide pandemic. Events that once seemed unfathomable may actually now be considered foreseeable. Since early spring 2020, there have been:

- Considerable delays to project schedules and significant increases in project costs resulting from emergency orders intended to slow the spread of the virus;
- New construction industry guidelines developed by the Centers for Disease Control and Prevention (“CDC”);
- On-site testing requirements imposed by local and state authorities; and
- Additional cleaning and labor resources

to ensure project site safety during the pandemic.

Given that the COVID-19 pandemic has been front and center for well over a year now, is COVID-19 still something owners and contractors should be worried about in their contracts? The answer is a resounding yes! With the emergence of new variants of the virus, it is likely that the pandemic will continue to negatively impact construction projects for the foreseeable future. Project participants cannot afford to pretend that the pandemic is over or that another similar event (such as another public health crisis) will not happen in the future. With all the knowledge and risk exposure that this last year has brought to the construction industry, it is only prudent to address these issues head on at the commencement of a new construction project.

Luckily, there are key provisions in the

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What Is the Industry Standard?

The principles of force majeure and excused delay are commonly used to excuse performance under a contract for events beyond the control of the party with the performance obligation (typically, the contractor). The American Institute of Architects (“AIA”) produces some of the most widely used form agreements in the construction industry. Section 8.3.1 of the A201 (the AIA’s general terms and conditions document) addresses the principle of force majeure and excused delay and lists common triggering events such as actions or inactions by the owner, labor disputes, fire, unusual delivery delays, and other causes beyond the contractor’s control. If any of the foregoing events occur, the A201 entitles the contractor to a reasonable extension of time to complete the work.

There are a couple of important things to note about the A201. First, it does not specifically identify a pandemic, epidemic or similar health crisis as a triggering event. Instead, to be excusable, such an event needs to fall within the provision’s catchall—as an event beyond the contractor’s control. Now that we are well over a year into the pandemic, an argument can be made that delays due to the pandemic are foreseeable and do not qualify as an excusable event beyond the contractor’s control. As such, if a contractor wants to protect itself from the impacts of the pandemic, it should specifically address the pandemic in the construction contract, and, at the very least, it should add the terms “pandemic,

epidemic and/or health crisis” in the list of triggering events in the force majeure or excused delay provision. Second, the A201 does not afford the contractor monetary relief for delays caused by events beyond its control, even if the triggering event causes the contractor to incur expenses that were not otherwise built into the cost to complete the work.

While the A201 specifically states in Section 8.3.3 that neither party is precluded from recovering damages elsewhere in the contract, the other provisions that afford the contractor both time and money are related to differing site conditions, suspension of the work by the owner and owner’s termination for convenience. There are not, however, provisions in the A201 that allow the contractor to recover money damages if the project is delayed by other things like pandemics, labor shortages, material deliveries and changes in the work; rather, the contractor is only given extra time.

Thus, contractors need to be diligent in contract negotiations to ensure that language is added to Section 8.3—or elsewhere in the contract—that entitles the contractor to recover any extra costs it incurs as a result of a delay beyond its control. Similarly, the equivalent construction contract forms developed by ConsensusDocs and the Engineers Joint Contract Documents Committee (“EJCDC”) only allow the contractor an extension of time (and not an adjustment to the fee) should an excused delay occur.

Given the Pandemic, What Is Reasonable for Excused Delays?

Now that we are well over a year into the COVID-19 pandemic, parties to a construction contract should be able to reasonably under-

stand and negotiate what delays (and potential costs) are foreseeable as it relates to health crises and other unavoidable situations. At this point, contractors should be incorporating certain increases into their contract price and project schedules that result from these unavoidable conditions, including:

- Material and labor unavailability;
- Material price escalations (including labor); and
- Additional safety measures (including additional jobsite cleaning/sanitizing, providing personal protective equipment for workers, COVID-19 screening/testing, etc.).

Many owners and contractors have been able to compromise during these uncertain times on what is foreseeable—and the relief afforded to the contractor should an unforeseeable event occur. Typically, compromises will cover impacts not known or reasonably anticipatable as of the date the parties sign the agreement, and relief will be negotiated such that the contractor will not be responsible for all cost increases. Because it is not standard for owners to be responsible for costs that delay the contractor's work, these provisions have been and continue to be heavily negotiated between the parties.

In cases where owners agree to reimburse the contractor for unanticipated expenses resulting from a delay, we have found that owners tend to require a combination of any or all of the following qualifications:

- Timely notice from the contractor of the event causing the delay;
- Detailed documentation from the contrac-

tor proving the additional costs (including some form of proof that the contractor has mitigated its costs during the delay);

- Entitlement to reimbursement is often tied to a government shutdown or executive order; and
- A cap to all delay costs for which the owner will be responsible.

What Else Can the Parties Do to Address Health Crisis Impacts?

As noted above, for the foreseeable impacts of the pandemic like additional cleaning and safety measures, material delivery, and shipping delays, the contractor should consider building such additional expenses into its contract price. Assuming this is not feasible, the contractor should discuss with the owner whether it makes sense to:

- Include an allowance or contingency under the contract to cover COVID-19 costs;
- Add a mutually acceptable material escalation clause in the contract;
- Order materials early or through a local provider to avoid potential delivery and shipment delays due to the pandemic; and/or
- Obtain business interruption insurance coverage to cover work stoppages and unexpected costs and losses resulting from the pandemic.

The COVID-19 pandemic has shown a spotlight on these once glossed-over contract provisions. As a result, the parties' focus has changed. As contracts continue to be negoti-

ated during and post-pandemic, project participants should expect to adapt to change and negotiate a compromise to the excused delay and force majeure concepts, including the corresponding relief entitled as a result. We

expect these challenges and negotiations to continue in a post-COVID-19 world as parties grapple with future unanticipated and unforeseeable situations.