Construction Contracts and COVID-19: What You Must Know to Survive!

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As this article is written, one could scarcely imagine the world today from the one just a short while ago. The World Health Organization has declared the Coronavirus Disease 2019 (COVID-19) a pandemic.[1] And the President has declared a "National Emergency," while nearly all forms of social interaction — suddenly and stunningly— stopped! It is safe to say, it is not a matter of "if," but "when" the effects of COVID-19 will disrupt, suspend, delay, or downright end some current construction projects. The construction industry must anticipate and ready itself for COVID-19's possible effects: supply chain disruptions, labor and material shortages, price escalations for material and labor, not to mention hiked and extended insurance, performance, and payment bond premiums. Everyone in the construction industry must know how to effectively use their contracts to survive this pandemic.

Could COVID-19 Excuse Performance Under Typical Construction Contracts?

Under contract law, a breach of contract for delay or failure to perform is a strict liability offense. But nearly all construction contracts contain clauses that excuse a contractor's performance because of "unforeseen" events "beyond the control of the contractor," known as "*force majeure*" provisions, literally, "major force" in French. Given COVID-19's near instant appearance on the global stage, coupled with the unprecedented vast and sweeping response to it, a contractor would likely successfully argue COVID-19 qualifies as "unforeseen" and certainly "beyond any parties' control." Despite this, the party that bears the risk of loss, delay, labor shortages, or increased labor and/or material costs will depend on the plain language of the construction contract. Here are examples of *force majeure* clauses from the most

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widely used construction industry contracts:

Article 16.1 of the Associated General Contractors Long Form Prime Contract between Owner and Prime Contractor provides:

The Contract Time shall be extended as necessary to accommodate delayed progress of the Work resulting from changes in the Work . . . or any other cause which **could not have been reasonably foreseen, or which is beyond the control of the Contractor, its subcontractors or suppliers**, including, but not restricted to, acts of any governmental authority, acts of a public enemy, fire, flood, unusual delay in transportation, abnormal weather conditions, labor disputes, strikes, lack of worksite access, acts of God, natural disasters, or acts of third parties . . ." (emphasis added.)

Section 8.3.1 of the American Institute of Architects, AIA Document A201–2017, provides:

If the Contractor is delayed at any time in the commencement or progress of the Work by . . . (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions . . . **or other causes beyond the Contractor's control** . . . and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine." (emphasis added)

Section 6.3.1 of the ConsensusDocs Form 200 describes *force majeure* events, and even specifically references epidemics:

Constructor is delayed at any time in the commencement or progress of the Work by any cause **beyond the control of Constructor**, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of Constructor include, but are not limited to, the following . . . (h) fire; (i) Terrorism; (j) **epidemics;** (k) adverse governmental actions; (l) unavoidable accidents or circumstances . . .." (emphasis added).

Further, the Engineers Joint Contract Documents Committee (EJCDC) standard contract at section 12.03 C also references to "epidemics," in addition to "fire, flood, abnormal weather conditions, acts of God . . ." or "other causes not the fault of and **beyond the control of Owner and Contractor** . . .." Finally, the Federal Acquisition Regulations (FARs), at 52.249 – 14, provides, "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 . . . (5) **epidemics** . . .." (emphasis added.)

Not All *Force Majeure* Clauses Provide the Same Level of Protection

Under the AGC, AIA, ConsensusDocs, EJCDC, and FARS contract language, a contractor would have to invoke the above sections to find relief from delays and/or disruptions on the project's critical path caused by COVID-19. But the very existence of a *force majeure* clause does not guarantee that a contractor will be excused from strictly performing in accordance with the plans and specifications. Some courts have held

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force majeure excuses nonperformance only if the clause specifically lists the event that actually prevents a party's performance. Under such holdings, the contractor would find relief under the ConsensusDocs, EJDC, and FARS, all of which specifically call out "epidemics." But even under *force majeure* clauses that do not name epidemics or pandemics specifically, a contractor should argue the elastic phrase that usually attends *force majeure* clauses, such as the AIA's use of the phrase, "or other causes beyond the Contractor's control" or the AGC's use of the phrase "acts of God" includes pandemics like COVID-19.

While there is a dearth of case law concerning whether communal spread of disease qualifies as a *force majeure* event, some courts have indeed grappled with this issue. For example, a United States District court found an outbreak of Porcine Reproductive Respiratory Syndrome may rise to the level of a *force majeure* event when the outbreak interfered with the party's contractual obligation to provide hogs. Another District court found the Avian Flu outbreak of 2015 at least created a triable issue as to whether it excused performance of a contract to construct a $9 million industrial egg dryer because the Flu precipitated the elimination of birds (and their attendant eggs) essentially obviating the need for the dryer. Ultimately, to better determine whether COVID-19 would qualify as an excuse of performance on a particular construction project would require discussing the specific facts and circumstances coupled with an analysis of the construction contract language with an attorney.

Don't Ignore Notice Requirements that May Pre-Condition *Force Majeure* Relief

The contractor must also comply with any notice provisions of the contract that may act as pre-conditions to invoking the *force majeure* clause. Take, for example, the ConsensusDocs which concludes its *force majeure* clause with the following admonition, "Constructor shall submit any requests for equitable extension of Contract time in accordance with ConsensusDocs200." Even if any delays or disruptions from COVID-19 appear obvious, the contractor must still write correspondence which explains in detail the delay and costs in accordance with the applicable contract provision. The contractor should, among other things, also provide a revised schedule, Fragnet, or Time Impact Analysis along with a Change Order Request regardless of whether these items are required under the Contract. Once again, in anticipation of giving notice and providing backup for COVID-19 disruptions or other disruptions, consult with your attorney.

Concluding Remarks on *Force Majeure* Clauses in the Wake of COVID-19

Force majeure provisions are seldom invoked because their triggering requires events that are outliers, truly unforeseeable and uncontrollable. It is hard to imagine the current pandemic not fitting that description. But even in the context of COVID-19, not all *force majeure* contract provisions are created equal in that some provide much more protection than others when confronted with disruptive events. As a general rule, *force majeure* clauses that have a longer list of horribles, coupled with a broad elastic or catch-all clause, without any conditions precedent, provide more protection than would those *force majeure* clauses with fewer of these attributes. Further, the AIA gives the architect the power to decide whether a *force majeure* event, like COVID-19, would qualify for additional time, and if so, how much time. Given architects' and contractors' history of finger pointing, perhaps contractors feel less protected when architects are given this power. But

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regardless of the contract you currently use, before this pandemic continues its inevitable spread, it is imperative to have an attorney review your construction contract's *force majeure* provision in anticipation of the delays and disruptions that will inevitably follow from COVID-19.

[1] For information on COVID-19, *click here*.