

## CONSTRUCTION LAW AND LITIGATION

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### IN THIS ISSUE

*Like virtually all other aspects of the economy, the construction industry has felt – and continues to feel – the impact and continuing effects of COVID-19. This article explores some of the questions relating to the potential delays and impacts on construction projects and the contract provisions that may be applicable.*

## COVID-19 and the Construction Industry: A Glimpse into Delay Issues Associated with the Global Pandemic

### ABOUT THE AUTHOR



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Since March, the COVID-19 pandemic has wreaked havoc on the United States and the rest of the world. Beyond the obvious health consequences and the changes in peoples' daily lives, the virus has also crept into the world of construction. Despite the fact that many (though not all) states throughout the country have deemed construction an essential business and the ongoing work on construction projects therefore has (for the most part) continued, there are still a variety of impacts on those jobs due to the pandemic.

In addition to the health of and well-being of the workers and the overall operations, there are widespread concerns over potential delays and other impacts on projects. Specifically, there are questions of whether the COVID-19 pandemic gives rise to excusable or even compensable delays. The construction industry has been facing myriad issues, including labor and manpower shortages, disruption to supply chains, material delays, resequencing of work, issues relating to social distancing requirements and other excessive or stringent protocols, and even voluntary withdrawal. Additionally, there are impacts to productivities and efficiencies as companies and job sites have adapted to a variety of requirements and protocols laid out by OSHA, the CDC and others.

### **Contract Provisions Relating to Excusable Delays and Force Majeure**

It seems almost inevitable that there will be some form of delay or labor inefficiency on any given project. Ultimately, this begs the

question: Will such claims be viable and, if so, who will bear the burden of any cost and/or schedule impacts? Many industry experts have debated whether the pandemic itself and/or any of the resulting impacts will qualify as an excusable delay or *force majeure* event. At its core, "*force majeure*" is the excusing of contractual performance as a result of unforeseen circumstances. Although many people associate *force majeure* with "Acts of God," the application can vary significantly depending on the wording of the contract.

In contracts, the purpose of an "excusable delay" or "force majeure clause" is to (1) allocate risk, and (2) provide notice to the parties of events that may suspend or excuse performance. Many construction contracts will make express reference to "Acts of God" or utilize the broader language of "circumstances beyond the control" of the parties. Specifically, the American Institute of Architects (AIA) A201 General Conditions § 8.3.1 pertaining to Delays and Extensions of Time states as follows:

"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, or of a Separate Contractor; (2) by changes ordered in the Work, (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, **or other causes beyond the 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.”

Additionally, the ConsensusDocs 200 Standard Owner-Constructor Agreement expressly refers to “epidemics” in its excusable delay clause. Although inclusion of the term “epidemic” or “pandemic” may make the analysis more straightforward under the ConsensusDocs, most parties nevertheless will be left to argue whether the COVID-19 pandemic fits within the scope of their respective excusable delay or force majeure clauses. On the one hand, the overall COVID-19 pandemic and the related social distancing measures and shutdowns of non-essential business would most likely fall within the broad scope of these contracts’ force majeure clauses. However, excusing non-performance or delayed performance resulting from the COVID-19 pandemic remains an issue. Stated differently, the resulting events and impacts stemming from the pandemic must be evaluated and put under the contract microscope.

Regardless of the scope of clauses like the AIA A201 or the ConsensusDocs, the parties must look to their respective contracts to determine whether only a time extension is allowed, or whether there are grounds for an adjustment to the contract price. The contract may further define (a) the types of

costs recoverable; (b) the burden or methodology needed to establish, prove and document such costs; and (c) notice, timing, and formal submission of claim requirements associated with pursuing any time extension or contract price adjustment.

### **Delay Notice Issues**

This latter point regarding notice, timing and submission is particularly important as satisfying these claim requirements in a contract is critical to preserving the right to relief. Notwithstanding the issues COVID-19 may present to office staff and personnel, contractors must nevertheless strictly conform with the timing and procedural requirements to successfully preserve a claim.

Typically, notice for any delay events – including *force majeure* or other delays which are claimed to be associated with COVID-19 – involves a multi-step process beginning with the initial notice requirements tied to the impact event followed by subsequent requirements to quantify costs as well as a “formal claim” submission. Additionally, for claimed ongoing delays, the contract may require periodic updates as costs continue to accrue. Finally, the form of claim submission (i.e., submission by mail or electronically, the identification of recipients, etc.) must still be followed.

Regarding “traditional” claim notices – that is, those not pertaining to COVID-19 – some courts have sounded a clear warning: Only by compliance with the notice requirements of the contract documents can a contractor help

ensure that if (and when) delays are encountered it can secure monetary as well as schedule relief. Even in those jurisdictions which take a more equitable approach, it is still important to meet the express contractual notice requirements to protect against an owner's arguments of lack of actual knowledge and prejudice by the noncompliance. In the end, a contractor who fails to satisfy the contractual notice requirements runs the risk of forfeiting its entitlement to delay damages and/or time extensions. This remains true on those claims resulting from COVID-19 impacts on a project.

### **Conclusion**

In the end, this pandemic is uncharted territory so it is not entirely clear how courts and arbitrators may come down on the specific issues which COVID-19 presents. Under some states' laws, claims that non-

performance or delayed performance of a contractual duty should be excused under a force majeure theory are largely evaluated on a case-by-case basis. The first and most important issue for courts to consider is the specific language of the contract, as the scope and effect of a force majeure clause or other excusable delay provision will depend on the specific contract language as opposed to traditional definitions. Ultimately, we are left with the harsh reality that delays associated with the COVID-19 pandemic will be extremely case specific based on the project, the contracts involved, and the underlying facts.

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