

PUBLICATION

Coronavirus: Construction Industry Impacts

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In early March, COVID-19 seemed like a distant threat, but we are now all too well aware of its rapid intercontinental spread. In the less than three months since the first case out of Wuhan, China was reported to the World Health Organization (WHO) on December 31, 2019, COVID-19 has spread to every continent, except Antarctica, and has been declared a pandemic and national, state, and local emergency. To date, more than 205,000 cases have been reported worldwide, with approximately 6,500 of those in the United States. Concerns about COVID-19 have impacted multiple facets of our day-to-day lives, from business and school closings and restrictions on travel and public gatherings, to stock market volatility.

The construction industry will not be spared from the impacts resulting from COVID-19. Projects across the country are already experiencing issues like jobsite shutdowns, labor and material shortages, and material price escalation, just to name a few. Owners, contractors, subcontractors, suppliers, and all other project participants should be preparing now for the unique and rapidly evolving challenges the construction industry will continue to face as the virus spreads. This alert offers insight on some of the key issues members of the construction industry should be evaluating now so that they will be prepared if and when this pandemic impacts one of their projects.

A. Force Majeure Clause

For COVID-19-impacted projects, one of the first questions will typically be whether your construction contract contains a "force majeure clause" and, if so, whether the scope of that clause covers the situation presented. Force majeure provisions, sometimes known as "act of God" clauses, may excuse contractual obligations due to unavoidable circumstances outside of a party's control.

Some form contracts specifically include "epidemics" as a force majeure event, such as ConsensusDocs 200 and Federal Acquisition Regulation (FAR) 52.249-14, whereas the force majeure language in the standard AIA construction contract general conditions (Section 8.3.1 of both the 2007 and 2017 versions of the A201) does not. Regardless of whether the force majeure clause specifically includes the words "epidemic" or "pandemic," a party must evaluate how the circumstances could be interpreted under the contract language.

If a party intends to raise a force majeure event to attempt to excuse performance of its contractual obligations, it should begin gathering supporting information and documenting impacts immediately. For example, if getting materials from China is an issue, the China Council for the Promotion of International Trade can issue a "force majeure" certificate. Closer to home, President Trump declared COVID-19 a national emergency on March 13, 2020, and several governors have declared a state of emergency as COVID-19 has spread. Also, the WHO declared COVID-19 a "public health emergency of international concern" on January 31, 2020, and a "pandemic" on March 11, 2020. Force majeure must also be viewed in the light of any potential concurrent delays that are separately impacting the project critical path.

Additionally, notice of the force majeure event and its anticipated project impacts should be provided to the other party in accordance with the contractual notice provisions. Timely notice and open communication among all parties could help mitigate impacts and facilitate agreements on otherwise contested issues.

Finally, when entering into new contracts, carefully consider whether to specifically include or exclude infectious diseases, epidemics, pandemics, and other potential COVID-19 impacts. Foreseeability often comes into play in a force majeure analysis. Now that at least some of the risks associated with COVID-19 are known (or reasonably foreseeable), a party seeking to raise the current pandemic as a force majeure event under future contracts may face challenges based on that party's knowledge of those potential risks.

B. Price Escalation Clause

Some contracts may contain a price escalation clause that permits the adjustment of the price of certain materials or equipment if their price has changed by a certain amount since the execution of the contract. Such provisions may also allow for the use of an acceptable substitute if the specified material or equipment is unavailable or its use is no longer economical. These clauses may also allow an extension of contract time for any delay in obtaining the materials or equipment. It is prudent to analyze any such clauses now and consider whether a price increase or the use of substitute materials or equipment may be warranted. As with force majeure, any contractually required notices should be provided.

C. Common Law or Statutory Defenses

Despite their prevalence, some contracts do not contain force majeure or price escalation clauses. In those instances, common law or statutory defenses from the relevant jurisdiction (be sure to check for choice-of-law provisions) can become critical. Some jurisdictions will find force majeure clauses implied. Further, many states recognize defenses of impossibility and frustration of purpose. For example, Louisiana Civil Code articles 1873-1878 provide default rules for when a "fortuitous event" renders a party's performance of a contract "impossible" either in whole or in part. The potential applicability of such defenses should be analyzed under the law of each jurisdiction and the unique facts of each case.

D. Potential Insurance Coverage

Most construction contracts require parties to maintain minimum levels and types of insurance and often require the naming of other parties as additional insureds. Because of the number of policies potentially at play, it would be wise to proactively evaluate potential coverages and have a plan in place for submitting a claim if impacts from COVID-19 appear to implicate coverage. Available coverage may not be readily apparent, but coverage could be triggered as circumstances change.

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