Coronavirus and the Construction Industry

April 7, 2020

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POTENTIAL EFFECTS OF COVID-19 ON CONSTRUCTION

- Labor shortages
- Project suspensions and/or shutdowns
- Supply chain disruptions
- Labor and material cost escalation

Spike in Project Delays, Disruptions, and Project Costs.
TIME-RELATED TERMS ON CONSTRUCTION PROJECT

• Delay
  • When the project is not completed by its contractually required completion date or by interim milestone dates.

• Disruption
  • The method and/or sequence of construction upon which the contractor based its bid is changed and/or disrupted. Also called “interference” or “hindrance.”

• Acceleration
  • The process of speeding up the work of a contractor so that a particular activity, or the project as a whole, can be completed before the date required under the contract.
TYPES OF DELAY

1. Inexcusable – Contractor caused, may be assessed liquidated or actual damages or termination.

2. Excusable – delay beyond the control of the contractor. Contractor may receive additional time/relieved from liquidated damages.
   - Non-compensable - contractor is entitled to receive additional time but is not entitled to receive compensation.
   - Compensable – the contractor is entitled to receive additional time and additional compensation for the delay period.
EXCUSABLE NON-COMPENSABLE DELAYS

Delays beyond the control of the contractor:

- **Inclement weather**: unusually severe for the place and season.
- **Acts of God**: other unforeseen natural occurrences (also called *force majeure*), must be unanticipated force and/or severity.
- ** Strikes**: and other labor problems that are unforeseen.
- **Unavailability of materials**: unforeseeable and beyond control of contractor. Distinguished from increased prices or mere difficulty.
- **Governmental entity caused delays**.
- **Epidemics/Pandemics**
ARTICLE 16.1 OF THE ASSOCIATED GENERAL CONTRACTORS LONG FORM PRIME CONTRACT

• 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 DOCUMENTS A201–2017

• 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 CONSENSUS DOCS FORM 200

- 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).

- Engineers Joint Contract Documents Committee (EJCDC) standard contract at section 12.03 C, references **epidemics**.

- Federal Acquisition Regulations (FARs), Federal Acquisition Regulations (FARs), 52.249 – 14, references **epidemics**.
FORCE MAJEURE CLAUSE IN WIDELY USED CONSTRUCTION MANAGER AGREEMENT

If the Construction Manager is delayed at any time in the progress of the Project by any act or neglect of the District or the Architect or by any employee of either, or by any separate contractor employed by the District, or by changes ordered in the project, or by labor disputes, fire, unusual delay in transportation, adverse weather conditions not reasonably anticipated, unavoidable casualties or any causes beyond the Construction Manager’s control, or by any delay authorized or caused by the District, the above time schedules shall be extended by change order for a reasonable length of time.
FORCE MAJEURE CLAUSE PROTECTION

- Some courts have held *force majeure* excuses nonperformance only if the clause specifically lists the event that actually prevents a party’s performance.
- ConsensusDocs, EJDC, and FARS, name “epidemics.”
- But even under *force majeure* clauses that do not name epidemics or pandemics specifically, argue the “elastic” or “catch-all” 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.
WHAT MAY COURTS DO?

• 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.

• 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.

WHAT SHOULD YOU DO?

• Review your contracts force majeure clause for current projects.
• Review your notice provisions in the contract for current projects.
• Review insurance provisions/consult with counsel/agent for possible coverage.
• Provide notice any impacts of the pandemic on your performance.
• Request additional time, and if applicable, additional compensation, submit change order request, with a revised schedule, Fragnet, or TIA.
• Revise your contracts for maximum protection moving forward.
REVIEW/REVISE CONTRACTS

• Review Your Contract Clauses for Language that Excuses Performance for “Unforeseen,” “Uncontrollable,” and “Externally” caused conditions.
• Revise your contracts moving forward to include “epidemics,” “pandemics,” “disease outbreak of any kind,” and include an elastic provision, i.e., “acts of God” or “other unforeseen causes beyond contractor’s control.”
• If possible eliminate or minimize conditions precedent and any subsequent waiver language.
COMPLY WITH NOTICE PROVISIONS

• Most contracts require notice of delay/disruptive event within a number of days of the event causing delay/disruption.

• Write correspondence which explains in detail:
  – The event giving rise to the delay and the additional time requested in accordance with the applicable contract provision.
  – Revised schedule, Fragnet, or Time Impact Analysis.
  – Change Order Request, which includes a request for time, and if applicable, compensation.

• Rationale: gives owner opportunity to be part of the solution.

• Failure to give may act as a waiver.
NOTICE LETTER CONTENT

• Cite Contract, e.g., pursuant to section 16.1 of the prime contract . . .
• Explain the event, e.g., COVID-19 pandemic.
• Explain the consequence of COVID-19, e.g., workers prevented from entering site because of high fever.
• Request additional time, and if applicable compensation.
• Provide a Change Order Request.
• Provide revised schedule, Fragnet, or Time Impact Analysis.
• Anticipate future problems, delays, and/or disruptions.
• Any other relevant information, and reserve right to supplement the notice.
• Ask for confirmation of receipt and a response within a certain number days.
TYPICAL SUPPORT DOCUMENTS

- Reasonable and correct baseline schedule
- Schedule updates
- Daily Reports/Photographs/Meeting Minutes
- Notices to Owner
- Analysis using fragnets
- Supporting documentation
- Supporting cost records such as invoices, job cost reports, etc.
BE PROACTIVE

• Depending on how you’re situated, start the conversation now with owners, prime contractors, and subcontractors.
• Talk to your employees about concerns, expectations, and intentions.
• Write letters to your customers, let them know your intentions and expectations.
• Contact your counsel and get advice before problems arise.
• Obtain an advisory memorandum from your counsel should you have any question whether your company “supports construction . . .” or whether an event you encountered qualifies as a force majeure event.
• Make current health and social distancing recommendations company policy.