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COVID-19 and Construction Contracts: Considerations for Owners and Developers



Owners and developers with construction projects underway are understandably very concerned about the impact of COVID-19 on the viability of their projects. Even those construction projects permitted to continue under the numerous stay-at-home orders issued across the country potentially face substantial delays and cost increases due to interruptions in the supply chain, lack of availability of workers, new safety protocols, and other unanticipated events. The effect on performance of construction contracts on any particular job site will likely depend upon three principal factors: (1) the specific terms of the construction contracts, (2) the scope and timing of state and local government orders affecting construction and other work at the job site, and (3) the specific facts surrounding the impact of COVID-19 in the job-site community. This update provides attention to certain construction contract terms that owners and developers should consider.

The repercussions of the COVID-19 pandemic raise the legal concept known as "force majeure," which generally refers to events or forces that cannot be reasonably anticipated or controlled and are the fault of neither party. Most construction contracts address this concept, but the way in which the concept is addressed varies markedly from one contract to another. For example, many construction industry form contracts, such as those published by the American Institute of Architects (AIA), do not even use the term "force majeure."

Taking, for example, the AIA A201 General Conditions of the Contract for Construction, it includes delay and time-extension provisions that may be triggered by COVID-19. Specifically, Section 8.3.1 contains the following standard language:

If the Contractor is delayed at any time in the commencement or progress of the Work by . . . unusual delay in deliveries . . . or other causes beyond the Contractor's control . . . then the Contract Time shall be extended for such reasonable time as the Architect may determine.

This provision addresses time, not costs, and it is often modified for particular projects, owners, and/or contractors. Similar language is also present in other AIA contracts, including in Section 14.5 of the A104–2017.

The allocation of any costs associated with a delay may be addressed in the agreement, especially if the pricing mechanism is "cost-plus." It also may be addressed in the general conditions. This allocation varies from contract to contract and is frequently the subject of negotiation. Generally speaking, if the owner causes a delay, it is responsible for a time extension and reasonable costs; if the contractor causes the delay, it remains obligated to complete the project within the contract time, and it absorbs its extra costs; and if neither is responsible for the delay, the contractor's time is extended, but it must absorb its extra costs.

There are other Sections of the A201 General Conditions, including *Article 14 Termination or Suspension of the Contract*, that may be implicated by COVID-19 depending on the how the situation continues to evolve.

There is also case law in most states that addresses these issues more specifically and, unfortunately, differently.

Takeaways

- **Carefully review your specific construction contract provisions.** Standard provisions are frequently modified or eliminated depending on the industry form and specific project and parties.
- **Stay informed about government rules and regulations.** The situation is fluid, with overlapping and ever-changing city, county, state, and federal orders and restrictions relating to COVID-19.
- **Consider the priorities of the project, the parties, and those at the jobsite.** Individual owners or developers may have different goals depending on the type of project and the anticipated completion date.
- **Work together.** Parties should communicate on potential approaches to mitigate the effects of COVID-19 and find solutions, understanding that the contractor remains responsible for performing under the contract and that owners and developers should avoid directing the contractor.

We are on working these issues every day and welcome the opportunity to discuss them.

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