

MITIGATING THE IMPACT OF COVID-19 ON CONSTRUCTION CONTRACTS

While it is too early to determine the full extent of the toll that the COVID-19 pandemic will have on business, and the construction industry in particular, it is clear that owners and contractors alike have already started to feel its effects. Businesses are faced with decisions on how to keep employees safe, how to determine whether their job sites will be shut down, and how to manage the inevitable supply chain disruptions that have already begun to occur. Although the impact of the pandemic will be widespread, it may vary to some degree on a state-by-state basis, as executive orders differ in their determination of whether construction is an “essential service.” Regardless of location, it is important for all involved to prepare for and mitigate the broad range of performance impacts associated with these issues.

While questions of delay will almost always be resolved upon completion of a project, owners and contractors should work proactively – and cooperatively – to actively mitigate any disruptions. To the extent possible and practicable, not knowing when or if a virus-related delay may occur, owners and contractors should seek to mitigate potential project delay now by taking the following steps:

1. **Consider Acceleration.** If a delay is anticipated, consider whether it is appropriate and feasible to accelerate the manufacture of products, deliveries of materials and installation. Acceleration may come at a significant cost, but since delay is a cost to everyone, the parties should consider whether a cost-sharing resolution may be preferable to all parties being forced to endure a prolonged delay. Notably, this may not be possible if, for instance, the availability of certain supplies has already become limited.
2. **Discuss and Document.** Discuss the status of each project and, as applicable, document existing pre-virus related delays, and formally request an extension of time.

The contract between the parties will in large part dictate the circumstances under which an extension of time may be sought by the contractor, and will specify the notice and documentation requirements that must support such requests. Even if the contract contains a force majeure provision, which would excuse or allow performance to be suspended in the wake of certain delays

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that are beyond a party's control, such clauses will eventually be scrutinized to determine whether they will be construed by the applicable jurisdiction to apply to pandemic-related delay. Notably, barring the trigger of some other contract provision, such as a price escalation clause or equitable adjustment provision, any accommodation will likely only result in an extension of time, not a claim for an increase in cost.

Moreover, as a practical matter, it is quite possible that the question of whether a contractor is entitled to an extension of time as a result of a COVID-19 related delay will not be one that can immediately be answered, and will instead be resolved at the conclusion of the project. Accordingly, it is critical for contractors to continuously document the impact of the virus-related delay to the project with contemporaneous notice to the owner, in accordance with the contract requirements for notice details and cost, and failure to do so may result in waiver. Requests for additional time or increased costs, to the extent they are even permitted, will be assessed based upon numerous factors, including whether the project delay to substantial completion was caused by others, or was concurrent with another delay. Contractors should also be mindful that their continued performance may contractually be required, if possible, pursuant to "proceed despite dispute clauses", even in the face of disputes over these potentially contentious issues.

3. Look Forward. Discuss "look ahead" views of the project schedule and provide notice in a non-adversarial way that unless certain preceding, scheduled activities due from others occur, the project schedule will become affected, and request that those activities be expedited so that delay does not occur. This pre-delay notice is both good general practice and sets the stage for a later determination of concurrent delay.

Business disruption and delay may be inevitable as a result of the hardships caused by the COVID-19 pandemic, however, proactive engagement by all involved in a contract and cooperative discussions can minimize the overall burden on a project and help to ensure that the project reaches a timely and cost-effective conclusion.