

COVID-19 and the Construction Industry: Looking Beyond Force Majeure to Recover Time and Costs for Delay

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Much has been written about whether and how COVID-19 qualifies as a force majeure event, and some [additional information can be found here](#). But typical force majeure provisions entitle contractors to only schedule relief. While force majeure clauses may limit exposure to liquidated or consequential damages for delays, contractors who incur increased costs resulting from COVID-19 related delays should carefully evaluate the entirety of their contractual rights to not only an extension of time, but also recover prolongation costs. To assist in this endeavor, this article looks beyond force majeure to other potentially relevant contractual provisions. Potential remedies under the various contractual clauses discussed below will depend on the specific contractual language and project-specific facts.

Change-in-Law Provisions

A change-in-law provision is a common contractual provision that may allow for additional time, money or both if there is a change to a federal or state law, executive order or other governmental action during contract performance. COVID-19 has produced multiple government orders and directives that have impacted construction throughout the country. A 50-state account of these orders and directives can be found [here](#). Change-in-law provisions may appear in broader force majeure provisions, or as standalone clauses.

Emergency Provisions

Some contracts include provisions for relief in the case of an emergency. For example, the American Institute of Architects (AIA) provides a standard emergency clause:

In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury, or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7.

See AIA Document A201-2017 § 10.4.

Emergency provisions may provide contractors the right to suspend work and seek consequent compensation and time extensions. Furthermore, emergency provisions may provide an avenue for recovery of additional

compensation and time related to isolated events, such as shutting down a project for a short period to disinfect a work area after an infected employee leaves the worksite or leasing a larger space to hold project meetings to comply with social distancing requirements.

Escalation/Unit Price Provisions

Escalation or unit price provisions entitle the contractor to an equitable adjustment in the contract or material price if the character or quantity of an item is now so different as to create a substantial inequity. COVID-19 has, and will likely continue to, dramatically affect global supply chains, resulting in increased lead times and costs for project-specific equipment and materials outside the contemplation of the contracting parties. However, escalation or unit price provisions typically require that any change — here the COVID-19 pandemic — must create a **substantial** inequity mandating relief, a fact-specific analysis.

Change Order Provisions

Change order provisions may allow contractors to recover additional compensation and time as the result of COVID-19 disruptions. In certain instances, contractors may receive informal or written directives from an owner or, in the instance of a subcontractor, a general contractor related to COVID-19 that unilaterally mandate changes to an existing contract's scope of work. In these cases, contractors should request written orders for any directed changes prior to commencement of work, if practicable, and, in any event, document the time and costs associated with any directed change.

Stop Work Notices and Provisions

Under certain circumstances, typically due to certain acts, omissions or directives by the owner, a contractor may be permitted or required to stop work. In that event, the contractor may be entitled to an extension of time and reasonable costs related to the shutdown, including delays and demobilization and mobilization costs. Stop work provisions typically apply under very specific situations and require strict compliance with notice requirements.

Suspension and Termination Provisions

Suspension of work clauses may provide an avenue of relief for contractors. For example, some suspension provisions include the right to suspend project work during the presence of “hazardous conditions” at the project worksite. The actual or potential presence of COVID-19 at a project worksite may arguably constitute a hazardous condition, allowing the contractor to suspend work and obtain time extensions and recovery of costs related to the suspension period.

Contractual termination provisions typically require stoppage of work on a project for a defined period of time as a result of a court order or government act. If applicable, termination provisions may entitle contractors to compensation for work performed, reasonable overhead and profit for work not executed, and costs incurred due to termination. Since termination of a contract is an extreme remedy, contractors should give careful and due consideration to the effects of invoking a termination provision.

Additional Considerations for Contractual Remedies

Providing proper notice is typically a condition precedent to the exercise of the above contractual remedies. Accordingly, contractors are advised to closely examine and strictly follow contractual and, in the event of public works, administrative notice requirements to help reserve rights and avoid potential claims of waiver. While COVID-19 regulations and orders may impact your ability to strictly comply with certain notice requirements — e.g., in-person service requirements — substantial compliance under the circumstances may excuse failure to achieve literal compliance with contractual notice requirements. In that event, contractors are well-advised to document all efforts to provide notice. Furthermore, exercise of the above-discussed contractual provisions may invoke contractual dispute resolution provisions. For example, the AIA Standard General Conditions require that most claims first be submitted to the Initial Decision Maker, and then be subject to mediation as a condition precedent to binding dispute resolution. Ignoring dispute resolution provisions may impact your ability to submit a claim or recover additional compensation. In the event of claims arising from COVID-19, contractors should consider providing compliance notices to subcontractors regarding their potential impact claims, emphasizing the importance of timely claim submissions, the failure of which may impact the contractor's ability to pass-through subcontractor claims to the owner.

The potential applicability of contract provisions to COVID-19 impacts on your project is a time-sensitive and deliberate process for contractors suffering from delays and cost increases. The information above is for informational purposes only and is not intended to serve as providing legal advice. If you have further questions or seek advice based on your specific fact situation and contractual provisions, please reach out to any members of the Pepper Hamilton and Troutman Sanders Construction groups. In addition, Pepper Hamilton and Troutman Sanders maintain a COVID-19 [Dedicated Resource Center](#) to help guide clients through the challenges presented by COVID-19.

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