

FORCE MAJEURE

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WHAT IS IT?

- Generally a force majeure event is an event that is beyond the control of the parties that prevents performance under the contract and may excuse non-performance.
- What types of events constitute a force majeure clause will depend on the specific language included in the contract clause itself.
- That language will dictate the application, effect and scope of force majeure applicable to that specific contract.

WHAT IT IS NOT

- Not an excuse to abandon any project that has become unprofitable due to cost increases or delays (subject to the terms of the contract)
 - A mere increase in expense does not excuse performance under a *force majeure* provision unless there exists an extreme and unreasonable difficulty, expense or injury. § 77:31. Force Majeure clauses, 30 Williston on Contracts § 77:31 (4th ed.)
- Not an excuse to cease work on a project simply because of the existence of a force majeure event in the world. There must be a direct impact to the project.



Contract Provisions Implicated

It is important to read each contract as a whole. There is not a standard force majeure clause and there are several contract terms that are likely to come into play during a force majeure event.

- Force Majeure – there may be a stand alone clause entitled Force Majeure that defines the applicable events
- Delay – force majeure events applicable to the contract may be set forth in the delay clauses
- Changes – the process for requesting additional time and/or compensation (as applicable) may be set forth in changes clauses
- Notice – requirements for notifying the owner or prime contractor may be included in the notice provision
- Termination – Does the contract give either party the opportunity to terminate for convenience in the event that work is suspended?



AIA A201-2017: Delays and Extension of Time

§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15



AIA A201-2017: Delays and Extension of Time

Clause does not explicitly name pandemics, quarantines, government acts.

Events that would arguably justify delay due to COVID-19

- Unusual delay in deliveries – supply chain disruptions as a result of COVID-19 related shutdowns
- Other causes beyond the Contractor’s control – catch-all event that may include government shutdowns, labor shortages, etc.
- Other causes that the Contractor asserts, and the Architect determines, justify delay – provides latitude to the parties to determine justifiable events on any individual project.

Section 8.3.1 applies “at any time” and entitles the contractor to a time extension as a result of delays that the parties couldn’t have determined when they entered into the contract.



AIA A201-2017 – Notice of Claims

§ 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor...shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect. Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after the occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the claim, whichever is later.



AIA A201-2017: Right to Terminate

§ 14.1 Termination by the Contractor

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, for any of the following reasons:

- .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2 An act of government, such as declaration of a national emergency, that requires all Work to be stopped



AIA A201-2017: Right to Terminate

In order to exercise Right to Terminate, the Contractor must provide a 7 day notice to the Owner and Architect.

Contractor may be entitled to recover costs from the owner including overhead and profits subject to any modifications to the agreement.

May come into play in the event of quarantine requirements or executive orders that prohibit work from progressing on a project.



States where Construction is Suspended

- Hawaii – Construction suspended except for essential infrastructure
- Louisiana – Construction suspended except for critical or strategic infrastructure
- Michigan – Construction suspended except for public works and public health infrastructure
- Minnesota – Construction suspended except for critical or strategic infrastructure
- New York – Construction Suspended except for emergency repairs, public works, hospitals and affordable housing
- Pennsylvania – All construction suspended with exceptions for hospitals and emergency repairs
- Vermont – Construction suspended except for critical infrastructure and COVID-19 response
- Washington – Construction suspended. Exemptions for critical infrastructure, housing emergency repairs and projects ensuring structural integrity



Construction Suspension Information

There are numerous exceptions to broad construction shutdowns which vary from state to state.

Local governments may also have further restrictions in certain counties, cities, or towns

A comprehensive state by state tracker can be found at the following website:

<https://www.foley.com/en/insights/publications/2020/03/how-coronavirus-affecting-construction-industry>

Once on the website, click on the link titled **Construction Shutdown Tracker** at the bottom of the article.



Federal Contracts

The Federal Acquisition Regulations (“FAR”) applicable to most federal construction contracts allow contractors to seek an extension of time for delays in performance attributable to COVID-19.

Delays attributable to COVID-19 may fall into three primary categories:

- Direct government-imposed work stoppages in principal’s geographic area.
- Indirect impacts caused by labor disruptions
- Indirect impacts caused by material/equipment supply disruptions elsewhere.



Federal Contracts – Excusable Delay

FAR § 52.249-14(a) provides for “Excusable Delays” “if the failure arises from causes beyond the control and without the fault or negligence of the Contractor,” including:

- “epidemics”
- “quarantine restrictions”
- “acts of the Government in either its sovereign or contractual capacity.”



Federal Contracts - Compensation

- FAR § 52.249-14(c) – “If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised...”
- The goal is to avoid liability for LDs and other delay-related damages flowing from the contractor’s period of disrupted performance.



Federal Contracts: Notice Required

FAR § 52.249-10 - The Contractor must provide written notice to the Contracting Officer within 10 days from the beginning of a delay.

This is the trigger for the Government's duty to investigate and render a decision on the claimed excusable delay.

Without this timely notice, the Contractor runs the risk of being declared in default for untimely performance.



Federal Contracts - Documentation

Start Documenting Immediately

Contractor should:

- Document all impacts that the coronavirus is having on the project
- Review contract and facts with their attorney



Burden of Proof

- The Contractor's burden of proof with regard to excused delay includes
 - Demonstrating that the performance would have been timely but for the COVID-19 related disruption (e.g., otherwise timely mobilized and contracted with subcontractors/suppliers)
 - Demonstrating that the Contractor took precautions to avoid foreseeable causes to the delay and mitigate the effects (materials/equipment not available from other sources)
 - Establishing a specified period of time that performance was delayed by the causes alleged.
- See, In Matter of Appeal K.C. Printing Co., GPOBCA No. 2-91, 1995 WL 488531 (Feb. 22, 1995); See also In Matter of Appeal of Asa L. Shipman's Sons, Ltd., GPOBCA No. 06-95, 1995 WL 818784 (Aug. 29, 1995)



Uncertainty

What if quarantines in other countries or locations disrupt production and transportation of goods to the project location; but more expensive sources of goods and materials would lead to project cost overruns?

Subcontractors: Flow-down Provisions

Many subcontracts on Federal projects contain an “Incorporation-by-Reference” or “Flow-Down” clause. These are used to bind subcontractors in the same fashion as the general contractor is bound under its contract with the Government.

Example

*“The Subcontractor, as to this subcontract work ... assumes toward the Contractor all the obligations and responsibilities that the Contractor ... assumes towards the Owner, **and the Subcontractor shall have all the benefits of the obligations and responsibilities that the Owner ... assumes toward the Contractor ...**”*



New Contracts

Contracts entered into during the COVID-19 pandemic may not be able to claim force majeure in the event of delays or disruptions stemming from COVID-19

- A force majeure clause does not relieve a contracting party of the obligation to perform, unless the disabling event was unforeseeable at the time the parties made the contract. [TEC Olmos, LLC v. ConocoPhillips Company, 555 S.W.3d 176 \(Tex. App. Houston 1st Dist. 2018\)](#)
- Has the account confirmed and/or renegotiated, as necessary, any pricing that was submitted prior to the COVID-19 pandemic?



New Contracts

Owners may attempt to add language to new contracts seeking to exclude COVID-19 as a force majeure event

CONDITIONS OF THE CONTRACT

A1.1 SECTION 00 73 00– SUPPLEMENTARY CONDITIONS

SC-12 CHANGE OF CONTRACT TIMES

SC-12.1. Add the following paragraph immediately after Paragraph 12.1.D:

Both the Owner and the Contractor have evaluated the effects of COVID-19 on this Contract. The Nevada Department of Public Safety, Division of Emergency Management, adopted an emergency regulation on March 20, 2020, defining Owner and construction companies as an Essential Licensed Business. The Owner and the Contractor expressly agree that COVID-19 and what is known about COVID-19 as of the execution of this Agreement are not considered Force Majeure Events.



New Contracts

Example Language that was added into an AIA contract

*“Owner and Contractor recognize the **existing and potential** extraordinary measures being taken by governments, companies, and individuals due to COVID-19 and the **potential impacts from the same** on this Project. Owner shall not be liable to Contractor for extended overhead or any other delay damages, and the GMP shall not be increased, due to shortage of labor, materials or other causes of COVID-19.”*



Key Concepts

Not all force Majeure Clauses are the same

- Read the contract, consult an attorney as needed

Comply with contractual notice requirements

- Does not need to be adversarial. Communicate early and often.

Force majeure clauses will be construed narrowly

- Not a get out of jail free card for a difficult or bad project



Take-Away Questions for your Accounts

- Has on-site work been stopped by federal or local authority?
- Has progress on contract been impaired by disruptions to labor?
- Has progress on contract been impaired by disruption of material/equipment supply chain?
- Has the account discussed this with their attorney, and given prompt notice of Covid-19 related delays and disruptions per its contract?
- Is the account documenting all stoppages and disruptions on a daily or weekly basis? (This is essential because the final time extension may not be addressed for many months; and documenting this long after the fact is extremely difficult.)



Thank you

