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Combatting Coronavirus: Key Contract Provisions

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The spread of COVID-19 (Coronavirus) across the United States presents new challenges and concerns for construction professionals on a daily, and sometimes hourly, basis. Issues range from delay in obtaining certain materials – especially materials sourced from China – to suspension of projects. In the last week, our firm has been involved with more than two dozen suspended or cancelled projects as an alleged result of the Coronavirus. This article will discuss the key provisions that can be used to address the effects of Coronavirus, particularly from the perspective of subcontractors.

FORCE MAJEURE/ACTS OF GOD

A typical force majeure clause provides that in the event of a hurricane, earthquake, war, strike or other occurrence beyond the control of the contractor, that performance will be excused, the project will be terminated, or there could be some other form of compensation available for the contractor. A classic example of a force majeure clause is:

FORCE MAJEURE. Any failure or delay by a party in the performance of its obligations under this Agreement is not a default or breach of the Agreement or a ground for termination under this Agreement to the extent the failure or delay is due to elements of nature or Acts of God, acts of war, terrorism, riots, revolutions, or strikes or other factors beyond the reasonable control of a party (each, a "*Force Majeure Event*"). The party failing or delaying due to a Force Majeure Event agrees to give notice to the other party which describes the Force Majeure Event and includes a good faith estimate as to the impact of the Force Majeure Event upon its responsibilities under this Agreement, including, but not limited to, any scheduling changes. However, should any failure to perform or delay in performance due to a Force Majeure Event last longer than thirty (30) days, or should three (3) Force Majeure Events apply to the performance of a party during any calendar year, the party not subject to the Force Majeure Event may terminate this Agreement by notice to the party subject to the Force Majeure Event.

There is a good argument that Coronavirus suspensions or issues with obtaining materials could be classified as an Acts of God under this or similar provisions. Construction professionals should

also consider specifically listing Coronavirus and pandemic in the list of Acts of God on future contracts:

FORCE MAJEURE (INCLUDING PANDEMIC). Any failure or delay by a party in the performance of its obligations under this Agreement is not a default or breach of the Agreement or a ground for termination under this Agreement to the extent the failure or delay is due to elements of nature or Acts of God, acts of war, terrorism, riots, revolutions, *pandemics, medical emergencies that have resulted in a local, state or federal state of emergency, Coronavirus or similar viruses or illnesses requiring quarantine*, strikes or other factors beyond the reasonable control of a party (each, a "*Force Majeure Event*"). The party failing or delaying due to a Force Majeure Event agrees to give notice to the other party which describes the Force Majeure Event and includes a good faith estimate as to the impact of the Force Majeure Event upon its responsibilities under this Agreement, including, but not limited to, any scheduling changes. However, should any failure to perform or delay in performance due to a Force Majeure Event last longer than thirty (30) days, or should three (3) Force Majeure Events apply to the performance of a party during any calendar year, the party not subject to the Force Majeure Event may terminate this Agreement by notice to the party subject to the Force Majeure Event.

PROJECT SUSPENSION AND DELAY

Ideally, you will have a force majeure clause in your contract and can assert that clause. However, many subcontractors have been told by general contractors that Coronavirus is not different than any other delay and they should follow the normal delay provisions in the contract. While we disagree with that assessment, construction professionals should familiarize themselves with the key commercial contract provisions on delay.

The standard AIA A201 (2017), Section 8.3 contains a detailed provision on requesting time and in some cases costs as a result of delay. You must identify if there is a "no damages for delay" clause in the contract which on its face prohibits obtaining additional costs for delay. Regardless, we recommend submitting a claim for delay time and/or costs. Keep in mind there are often legal ways around a "no damages for delay" clause and you can review our firm's past articles on the topic.

More importantly, if there is a provision that covers project suspension, construction professionals should follow that provision and submit a claim to cover demob/remobilization costs, etc. AIA A201 (2017), Section 14.3 governs suspensions for convenience by the owner and details what costs can be pursued as a result of the suspension.

Even if a contract provision does not specifically address suspension/delay costs and/or the contract is silent, the construction professional should submit a claim for equitable adjustment to account for the extended carrying costs of the suspension. Document the impact in writing as soon as possible.

TERMINATIONS FOR CONVENIENCE

Many contracts contain termination provisions for both default and convenience. Terminations for convenience allow the customer to terminate the contract at any time for any reason however, generally, the contract has to pay for the work performed through the date of the termination for

convenience plus reasonable profit and overhead thereon. Normally, the terminated party is not entitled to lost profit and work not performed or other breach of contract type damages. See AIA A201 2017, Section 14.4.

Our firm is experiencing several projects that were terminated for convenience as a result of Coronavirus. In these cases, you must move quickly to submit recoverable costs. It's often true that "The party with the best paper wins the day," so make sure you are providing the required backup to avoid delays in processing.

PRICE ACCELERATION PROVISIONS

Price acceleration provisions allow construction professionals to recover for the increased costs of materials as a result of Acts of God. Although we have not yet seen a big spike in material prices as a result of Coronavirus, having a price acceleration provision in your contract is highly recommended. Here is a sample:

If there is an increase in the actual cost of the labor or materials charged to the Contractor in excess of 5% subsequent to making this Agreement, the price set forth in this Agreement shall be increased without the need for a written change order or amendment to the contract to reflect the price increase and additional direct cost to the Contractor. Contractor will submit written documentation of the increased charges to the Prime Contractor/Owner upon request. As an additional remedy, if the actual cost of any line item increases more than 10% subsequent to the making of this Agreement, Contractor, at its sole discretion, may terminate the contract for convenience.

By having this provision in your contract, you can seek an equitable adjustment without having to go through the normal change order process.

FRUSTRATION OF PURPOSE/IMPOSSIBILITY OF PERFORMANCE

Construction professionals that are unable to perform work because of local, state or federal prohibitions may argue that it is impossible for them to perform or a similar legal theory called "frustration of purpose." Occasionally, you will see a separate provision governing impossibility or frustration but normally they are included in either the Acts of God or Termination/Suspension for Convenience provisions discussed above. An example of a boiler plate impossibility of performance provision is:

Neither party to this Agreement shall be deemed to be in violation of this Agreement if it is prevented from performing any of its obligations hereunder for any reason beyond its control.

Your contract is always your first line of defense but if you lack the terms that are needed to prosecute or defend claims based on Coronavirus, there are a variety of non-contractual defenses that can be asserted. One example we have seen recently is the "large crowd" prohibition issued by some municipalities. The question becomes whether a roofing crew meets the definition of a large crowd when combined with others on a project. In this situation, performance of the contract becomes impossible.

On Friday, March 20, 2020, join Trent Cotney of Cotney Construction Law for a webinar at 9:00 a.m. MDT to go over these arguments and answer your questions on Coronavirus, but also discuss legal issues with scaling and growing your business.

You can sign up here: <https://register.gotowebinar.com/register/7244652834138791949>

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Kate Strauss, Danielle Maya, and January Allen are partners in the Denver office of Cotney Construction Law. Together they counsel and represent clients in all aspects of their construction businesses. With 14 offices across the United States, Cotney Construction Law fights for construction and design professionals nationwide. For more information, please go to www.cotneycl.com