

LEGAL PERSPECTIVE

FORCE MAJEURE CONSIDERATIONS IN CONSTRUCTION CONTRACTS

BY DANNY P. CERRONE JR.

The declaration of a global pandemic in March 2020 and the subsequent directives and orders issued by the federal and state governments have significantly affected the construction industry. There are many questions and concerns surrounding these directives and orders, and many are specifically wondering about force majeure clauses in contracts and whether such clauses apply to impacts from COVID-19.

A force majeure clause relieves one party from performing a contractual obligation under certain circumstances that make performance impractical, impossible, or potentially illegal. Force majeure translates to “superior force.” Such translation is a good indicator of when a force majeure clause comes into play: when superior, external forces affect a party’s ability to successfully complete a contractual obligation in a complete and timely manner on a construction project. Generally, a force majeure event may exist if the event is unforeseeable and outside the contractor’s control. COVID-19 appears to fit within such general description—although the difference between an epidemic and pandemic may be important to consider. Whether a court or arbitration panel agrees with

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such assessment will only be resolved as claims make their way through the dispute resolution process.

Always consult the contract before taking any action. Consider these critical questions in planning near-term action and pondering long-term strategy and potential consequences:

1. Do the impacts from COVID-19 constitute a force

majeure event under the contract?

2. Is epidemic, pandemic, or illness specifically identified in the contract?
3. If epidemic, pandemic, or illness is not specifically identified, does COVID-19 fall under some of the other event, such as an “act of God,” “natural disaster,” or something beyond a party’s control?
4. What steps can be taken now to preserve rights?

Standard form construction contracts from the American Institute of Architects (“AIA”) and ConsensusDocs do not have specific force majeure clauses. The AIA and ConsensusDocs contracts, however, contain excusable delay clauses that may apply to COVID-19. The relief offered in these contracts could potentially be a time extension and the opportunity to terminate the contract for either party.

The AIA A201-2017 standard General Conditions do not use the term “force majeure.” However, Section 8.3.1 includes expansive language that may provide a basis for time extension, and may very well cover the impacts of COVID-19:

If the Contractor is delayed at any time in the commencement or progress of 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**; ... 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 (emphasis added).

COVID-19 could fall into several of these categories in AIA A201-2017, such as “unusual delay in deliveries,” “unavoidable casualties,” and “other causes beyond the Contractor’s control.” In the event that COVID-19 falls within one of these categories, Article 14.1.1.2 potentially provides the contractor with the right to terminate the contract if the work is stopped for a period of thirty consecutive days, through no fault of the contractor for, “An act of government,

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such as declaration of national emergency, that requires all work to be stopped.” A contractor may be able to terminate the contract based on a lengthy work stoppage required by government or other health order that prohibits construction or an order that has such effect. Similarly, an owner could invoke the suspension or termination for convenience clause. Article 14.3 provides that if the contract is suspended for convenience, a contractor would be entitled to an increased adjustment to the contract value, including profit. Article 14.4 provides that if the contract is terminated for convenience, the owner must pay the contractor for work properly executed. This includes costs incurred by reason of termination, costs attributable to termination of subcontracts, and any other, previously agreed upon, contractual termination fees.

The ConsensusDocs standard contract should grant contractors with relief from the impacts of COVID-19. Article 6.3 of the ConsensusDocs 200-2017, Standard Agreement between Owner and Contractor, identifies “epidemics,” as an excusable delay and provides the contractor with the right to an equitable extension of time under the contract. Article 11.5 contemplates “national emergency or other governmental act,” as a basis for the contractor to terminate and entitles the contractor to recover costs for executed work and for proven losses, costs, or expenses, including demobilization costs, plus overhead and profit on work not performed. Similarly, if the owner elects to invoke a termination for convenience, under Article 11.4, the contractor could still recover (a) payment for work performed to date, including overhead and profit, (b) demobilization costs and costs incurred from termination, but not overhead and profit on work not performed, (c) reasonable attorneys’ fees and costs related to termination and (d) a premium — if initially agreed to by the parties.

Not all contracts are created equally, and it is important to fully understand your contractual rights as COVID-19 impacts continue to unfold. It is critical to follow the contractual requirements to invoke force majeure. Even if there is no timing requirement, it is better to communicate sooner rather than later, even if on a preliminary basis.

For companies that already have force majeure clauses in their typical contracts, it would still be wise to review such clauses to ensure they provide clear and adequate protections. Consider the inclusion of “epidemic,” “pandemic,” or “public health emergency,” in the contracts. With proper attention to the upfront documents, you could be better protected in the future. **BG**

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