



Eight Issues to Review when Negotiating Construction Contracts in the COVID-19 World

Over recent months, we have all been inundated with webinars, articles and non-stop updates on COVID-19 and how this unprecedented crisis is impacting the construction industry. The term “Force Majeure” has become a common refrain in the COVID-19 era. The issue is that many construction contracts may not even use this term and even more do not use the term “pandemic” prior to 2020. This article will discuss some contract strategies beyond Force Majeure and the best approach in reviewing or negotiating your construction contracts as we continue through these strange times. I’ve also included a checklist for your next construction contract negotiation.

The bottom line questions being presented from contractors and owners in this new age of the construction industry are:

- (a) how do we negotiate construction contracts under the “cloud” of this extraordinary pandemic (or any other event of Force Majeure for that matter); and
- (b) what can we do to protect ourselves going forward?

While some projects were allowed to continue operations during the initial stages of COVID-19, others were voluntarily suspended and will soon restart based on existing contracts. As many other construction projects are currently in the planning and contract preparation phases, this is the ideal time for owners and contractors planning for new projects to carefully consider the many lessons learned thus far from the pandemic and seek to revise their new contracts accordingly.

First and foremost, don’t assume you are going to get all possible accommodations or a “blank check” to address these issues arising due to COVID-19 because they are abnormal, an “act of God” or out of your control. Every party in the construction chain needs to prepare for push back by way of fights over liquidated damages, excusable or compensable delays or breach of contract claims. Simply put, not every delay or impact is excusable or compensable in every situation and certainly not under all construction contracts. **You need to review your contracts with a keen eye and not just for the Force Majeure provisions.**

Texas law strongly favors interpreting legal disputes by the letter of the contract language (including Force Majeure). Therefore, reviewing and understanding your contract and its’ legal implications is paramount in this pandemic. With that in mind, how should owners and contractors approach construction contract negotiation in these troubled times?

As noted above, do not rely solely on Force Majeure. In the end, both owners and contractors will be well-served by looking beyond Force Majeure and expanding the definition of ‘excusable’ delays to specifically include “pandemics” and “epidemics”.

Although most delays related to COVID-19 were, at least at the outset, thought to be an excusable delay under your contract, many contractors realized a surprising gap: there was no mention of a pandemic. While there is no way to predict the next Force Majeure event, it is especially prudent to fill this gap by specific mention to pandemics and other widespread communicable diseases given the tremendous impacts of COVID-19. In addition, though many owners will have some pause, contractors may consider adding language that allows for adjustments to compensation when faced with a Force Majeure event. However, in my recent experience, some owners prefer to accommodate contractors with specific COVID-19-related provisions (rather than broader Force Majeure clauses) which may allow for COVID-19, but not *all* “Force Majeure” events to be considered excusable, compensable delays.

Unfortunately, the only certainty resulting from this pandemic is an eventual increase in construction litigation, arbitration and insurance claims. Early review and careful negotiation of important construction clauses on new or current projects will help dramatically increase the likelihood of a better outcome in the event a project is impacted by COVID-19 and could potentially decrease the likelihood of any eventual disputes resulting from COVID-19.

In addition to addressing Force Majeure in your construction contracts, here are some additional issues and questions to review during negotiations, in light of this pandemic:

1. **Time Extension/Delays**: Is there general or limited relief for delays, unforeseeable/changed conditions or other time or impact costs? Beware of “no damage for delay” clauses lurking in your “time is of the essence” clauses. What about productivity or sequencing claims?
2. **Changes/Claims**: Review the contractual requirements for making a timely and proper claim for a change. Review your contractual scope inclusions and exclusions. Is there a limited number of mobilizations? Does the contract require uninterrupted access to the site, making COVID-19 disruptions a potential change in scope?
3. **Price Escalation**: Some contracts may include clauses that permit contractors to seek additional costs for increases in price due to high demand or other supply chain issues. This type of clause is rare, but worth reviewing to be sure.
4. **Change in or Compliance with Laws**. Does the contract allow for delays and compensation due to delays or cost impacts due to changes in laws and regulations, or due to an “emergency”? The AIA A201-2017’s “compliance with law” provision is typically silent on which party bears the costs of the contractor complying with a change in law that occurs during contract performance. Some courts have held that where the contract is silent, the risk is on the contractor since the contractor has agreed it shall comply with all Applicable Laws (without qualification). The current COVID-19 crisis has shown us that public authorities will impose additional safety measures on construction and other business operations when confronted with a public health crisis. Therefore, Contractors should take care to include language that addresses the risk of added costs due to a change in law.
5. **Notice**. At the outset of COVID-19, and particularly in reaction to government-mandated stop-work orders, most contractors quickly provided notice of delay to their project owners. Since most administrative staffs were already working from home, emails became the practical way to put owners on notice. However, despite the

circumstances, many construction contracts do not address email as a “proper” notice of claims.

6. **Suspension of Work**. Many contracts have suspension clauses that give owners the right to suspend the project, but also grant the contractor additional time and money in such cases that suspension lasts longer than a specified time.
7. **Termination**. Most construction contracts give the owner the right to terminate the contract for convenience (without cause). In such case, the contractor is usually entitled to payment for work performed to date, plus additional termination expenses (but not profit on work not performed). Many construction contracts only address termination for convenience by the owner and default by the contractor. If a contractor wants the right to terminate the contract due COVID-19, future contracts should appropriately account for such termination rights.
8. **Negotiate a COVID-19 Specific Clause**. As noted above, both parties will benefit from the clarity that can be achieved via the addition of a COVID-19-specific provision. This provision should clearly identify which COVID-related delays will be excusable and stipulate the documentation which a contractor must submit in order to prove entitlement to an extension of time. Such a provision may or may not allow COVID-related impacts to be compensable events, again, provided that contractors document their increased expenses, reasonable mitigation efforts, etc.

This is not a comprehensive list and every contract will require a full analysis to address potential issues.

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