

The Coronavirus Effect on Construction Projects

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There is increased pressure by federal, state and local governments to minimize gatherings. Many businesses encourage telecommuting in situations such as this. However, that is not feasible on a construction project. Commercial lenders are concerned about the impact that the downturn in the economy has had on the viability of projects already under construction for which they have agreed to lend money. There has been interruption in many supply chains, including that of building components necessary for construction to occur. Manufacturers are having to take precautions within their industrial facilities, which in turn will slow delivery times. Delays on construction projects are inevitable.

Contractors will turn to their lawyers, who in turn will immerse themselves in reviewing contracts to determine remedies for issues which may not be contemplated in most construction documents.

It is anticipated that two of the more prevalent issues which parties to construction contracts will encounter are the applicability of *force majeure* and whether delays constitute “excusable events” which may allow a party to avoid liability for their inability to perform. Additionally, some owners will inevitably look to “cancellation for convenience” clauses and parties will need to balance the risk of proceeding further with the cost of demobilization and remobilization.

FORCE MAJEURE

Force majeure provisions in contracts are ultimately designed to excuse non-performance for various reasons. Typically one associates the force majeure provisions with acts of God, to include natural disasters. There are no known force majeure provisions in standard construction contracts that include pandemics, although you must look at the precise language to determine whether the pandemic would qualify for inclusion as a force majeure event. Naturally, those participants on construction projects that are behind schedule will have an incentive to attribute their delay to coronavirus-related issues. Determinations will need to be made as to whether the pace of performance preceding the coronavirus pandemic was consistent with the pace of performance throughout the period of the pandemic. Virtually every participant on a construction project will have some motivation to consider whether the pandemic is adversely impacting their ability to perform.

If the coronavirus is perceived to be the “new normal” then forward-thinking participants in the construction industry will ensure that pandemics fall within the force majeure definition in all new contracts.

If the party asserts that they have been impacted, lawyers will look to determine whether the impact was direct or incidental. If a direct impact, it is more likely that a party can assert the pandemic as a

genuine reason for non-performance. If an incidental impact, then one cannot reasonably expect that a party will succeed in any subsequent dispute.

Owners may have their unique reasons for not wanting to complete a project under the current economic conditions. It will be more difficult for an owner to assert a force majeure provision, as their obligation is typically only of payment. Those depending on timely payment will need to refresh themselves on the impact of various states' timely payment acts and remedies under lien laws. One argument that may arise will be a party's attempts to mitigate their damages. Vendor suppliers should be aggressively looking for alternative sources of materials and begin to submit to designer alternates as early as possible to avoid delays.

Many of these risks may not be compensable under any insurance policies. Proving business interruption for businesses setting up at new locations can be challenging and many insurance policies do not extend coverage to disease-based outbreaks, but these policies should still be examined by a competent advisor, independent from the insurer itself.

One concern that should be considered early involves whether there are tax incentives that apply to a project. If so, the owner should begin to negotiate with that authority providing tax relief to determine whether delays due to the pandemic can be taken under consideration and result in an extension of time in which to complete the project. During the last recession, innovative lawyers discovered obscure federal laws, including the Interstate Land Sales Act, to avoid obligations for real estate purchasers or to serve as an excuse for homebuyers to avoid obligations to complete the purchase of residences, and this proved to be a thorn in the side for large home builders. One can expect similar opportunistic efforts during this climate as well.

CONCLUSION

While much of the information in the media may be perceived by some as irrational panic, it would be naïve to presume that there will not be impacts. Careful participants in the construction industry will begin to consider these issues now, before they become significant problems in the future.

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If legal advice is sought, no representation is made about the quality of the legal services to be performed or the expertise of the lawyers performing such service.