

Coronavirus and the Construction Industry: How to Handle an Inevitable Delay

Summary

COVID-19 may affect construction materials and labor. Now's the time to check contract language and supplier agreements for force majeure clauses, and develop a plan in the event of a labor shortage.

Since the beginning of 2020, hardly a day has gone by without the coronavirus (now called COVID-19 by the World Health Organization) appearing in headlines. Cases have now appeared on every populated continent. Higher incidence rates have occurred in China, Korea, Iran and Italy. COVID-19 has arrived in the United States and there have already been multiple deaths on the West Coast. In highly impacted areas such as China, plants have been closed and workers told to stay home. Companies are imposing travel restrictions on their employees. Some predict these trends will get worse, before they get better.

What does COVID-19 have to do with construction projects? The answer is two-fold: supplies and labor.

For starters, construction materials are frequently imported. Imported products can range from structural steel down to light fixtures and fasteners. If foreign or domestic manufacturers of construction materials and components stop or slow production because of fears surrounding COVID-19, the lack of production could quickly turn into material shortages or rationing. Under the Uniform Commercial Code provisions governing the sale of goods, a seller impacted by events rendering performance impossible or impractical has an obligation to “allocate production and deliveries among his customers.” Obviously, material shortages can quickly translate into construction delays, particularly if the installation of the missing materials is on the critical path.

There are some simple steps to follow if projects may be affected by material shortages linked to the COVID-19 “pandemic.” As with all things construction, timing is everything.

Force Majeure

First, most construction contracts contain some form of *force majeure* clause. If it is not in the contract itself, check the general conditions and division 1 specifications (general requirements). *Force majeure* translates to irresistible or superior force. Though the words “*force majeure*” may not actually appear in the clause, look for language that provides for a time extension in the event of delays caused by an act of god, act of government or other events beyond the reasonable control of the contractor. Generally, these clauses provide for a time extension without additional compensation to the contractor.

For example, AIA’s A201 (2017) General Conditions § 8.3.1 authorizes a time extension when critical progress is delayed by “labor disputes,” “unusual delays in deliveries,” “unavoidable casualties” or “other causes beyond the Contractor’s control,” among other things.

As a best practice, make sure specific terms such as pandemic and disease are enumerated as a force majeure event or excused delays. For contractors currently negotiating an agreement, specifically naming COVID-19 with the force majeure language would be ideal.

Supplier Agreements

Many, if not most supplier agreements, will contain language that excuse the supplier’s performance due to force majeure events or disruptions in the supply chain, obligate the contractor to pay for increased pricing, or prevent the contractor from terminating the supply agreement and seeking alternative sources.

Timely and Ongoing Communication

Give the owner timely notice of the material delivery delay. Under AIA A201, notice of the delay must be given not later than 21 days after the delay comes to the contractor’s attention or the claim for time may be waived¹.

The A201 notice requirement is fairly generous. Many construction contracts have much tighter notice requirements. Failure to give timely notice may result in the contractor waiving its contract right to additional time caused by the delay, no matter the reason, including a global pandemic. Even if the construction contract does not provide for time extensions due to delays caused by events beyond the

control of the contractor, notify the owner anyway. There are common law doctrines such as impracticality or impossibility of performance that may provide the contractor with relief from delay damages in the event work is critically delayed due to flood, fire, injunction or global pandemic.

In addition to notice of delay, keep the owner apprised of any additional developments or progress. If the ETA for missing materials changes (improves or worsens), let the owner know. If materials from another source are available, consider switching suppliers, particularly if the owner is willing to pay any additional cost associated with the change. If the owner refuses time, acceleration could become an issue. Be prepared to track the cost of acceleration and its impact on production rates.

Labor Shortages

While materials are an immediate area of concern, COVID-19 could turn into a domestic labor issue - both at plants and large job sights. As of March 9, there have been diagnoses in 33 states. Government, owner or contractor instructions could slow down or suspend work. Fearful workers may decide to stay home with a cooler of Coronas rather than risk exposure to COVID-19 in crowded spaces. The same general rules apply to labor shortages too.

If projects could be delayed by COVID-19 or other unforeseeable events, consider consulting a construction lawyer and developing a plan to deal with the problem based on the actual owner/supplier contracts and circumstances.

Resources

1. See § 15.1.3.1.

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