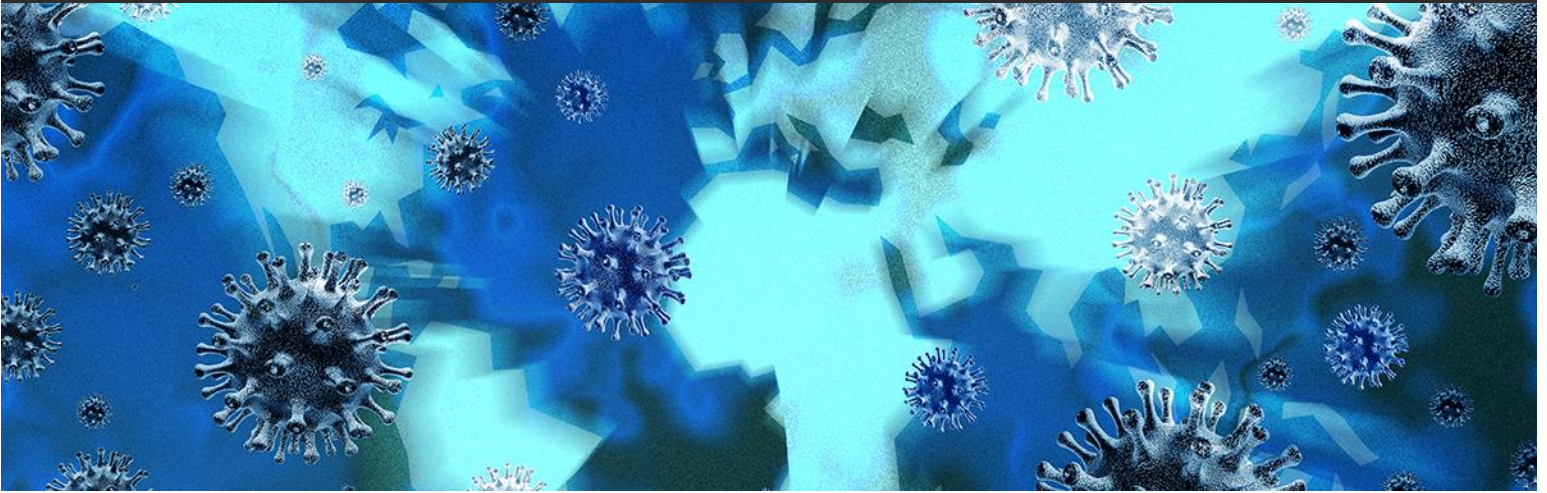


Alert | Health Emergency Preparedness Task Force: Coronavirus Disease 2019



April 15, 2020

For Developers and Owners: How COVID-19 Is Affecting Construction Projects and Actions You Should Consider

The global spread of Coronavirus Disease 2019 (COVID-19) is generating unprecedented delays, disruptions and uncertainty on construction projects. Travel restrictions, social distancing and quarantines are increasingly disrupting supply chains, contractor workforces and the availability of governmental personnel for project inspections, with resulting delays and increased costs. This article offers guidance to developers and owners dealing with projects affected by COVID-19 and highlights actions they should consider to mitigate the project impacts.

Impact of COVID-19 on Construction Projects

COVID-19's impact on construction projects is mixed and varies by state. Many states consider construction an "essential" service, following guidance from the federal Department of Homeland Security, which issued a **non-binding list of 16 "critical infrastructure sectors."** Other states and some local municipalities take a narrower view, requiring virtually all construction to cease.

New York initially exempted most construction from state-mandated restrictions, but as of March 27, 2020 narrowed the definition of "essential" to shut down all projects other than the construction of roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing and homeless shelters, and allowing necessary work to safely secure and shut-down construction sites. In New York,

determinations as to “essential” projects have been delegated to the Empire State Development Corporation and a process has been established for seeking this classification, which will provide further guidance on the boundaries of the current restrictions. The New York State Department of Environmental Conservation issued guidance on essential construction in support of cleanup activities, which is helpful to determine when a remedial construction activity can go forward, as covered in a GT Alert, [New York Environmental Regulator Issues Guidance on Essential Construction in Support of Cleanup Activities](#).

While California has issued no orders specifically limiting construction activities, adopting the federal guidelines, many counties and cities within California have adopted much more restrictive guidelines limiting ongoing construction to housing (especially affordable housing), projects immediately necessary to the maintenance, operation, or repair of Essential Infrastructure, healthcare facilities, etc. and requiring all worksites observe strict construction site COVID-19 protocols.

Stay-at-home orders in Ohio, Illinois, Indiana, Minnesota and Wisconsin presently also generally exempt construction.

New Jersey initially exempted construction without specific limits, but on April 8, 2020 prohibited all “non-essential” construction, allowing only projects at hospitals and schools, in transportation and utility sectors, affordable housing, emergency repairs and other limited instances.

Pennsylvania’s mandate to close all “non-life sustaining businesses” effectively stops all construction, with exemptions available to construction supporting health care providers and for emergency repairs.

Boston, Cambridge and other Massachusetts cities halted all construction, but the governor overrode the local orders and deemed all construction “essential,” allowing all projects to continue provided workers follow social distancing, washing hands and other corona protocols. Later, the governor modified that stance, designating construction of office buildings, retail and hotels as non-essential.

In all cases, there may be evolving developments that may further define or change the restrictions and permitted exceptions.

ACTIONS OWNERS AND DEVELOPERS SHOULD CONSIDER

Whether totally shut-down or only delayed and disrupted, many construction projects are being impacted by the pandemic. The owner should consider the following actions to address and mitigate the project impacts.

Action #1: Identify and Assess Relevant Local and State Restrictions on Construction Activities

Initially, the owner should consult appropriate legal counsel and carefully examine the state and local government shut-down orders to identify restrictions on construction activities and only proceed accordingly.

Action #2: Identify and Assess Relevant Contractual Provisions

The owner should carefully examine the construction contract to identify key provisions implicated by the pandemic. Although this article discusses the commonly-used American Institute of Architects (AIA) form contract (A201-2017 edition), a critical caveat is that each situation is fact-specific and contract-specific. While standard contract forms are widely used, the forms often are modified and standard terms and conditions frequently are changed based upon negotiations. Crucial provisions such as those addressing

force majeure, notice time limits, compensable costs resulting from delays, risk allocation and damages limitations may be significantly different from the AIA standard forms and therefore each contract should be carefully reviewed and analyzed.

Action #3: Communicate and Work with the Contractor to Identify, Assess, and Mitigate Project Impacts

The owner should communicate with critical contractors, designers, and suppliers to assess the actual and potential impacts on contract performance and discuss how to potentially mitigate project disruptions, in an effort to achieve the overriding objective – complete the project as soon as possible within or as close as possible to the budgeted costs. COVID-19 may impact design and construction contracts in a variety of ways, including impacts to supply chains, contractor workforces, designer personnel, and the availability of government inspectors.

The owner should consider directing its project management team to confirm that the contractor is taking appropriate site health and safety measures, including adhering to federal, state, and local guidelines as to distancing, cleansing, disinfecting, etc., and that sites are being properly manned and managed considering current circumstances.

The owner should request updated schedules from the contractor and consider setting flexible contract completion dates.

The owner should consider, with the contractor, possibly prioritizing and/or accelerating certain work areas and delaying others, as well as planning to recover delays once the COVID-19-based restrictions are lifted.

Action #4: Consider Contract Notice Requirements and Respond to Notices from the Contractor

Delay Notices from the Contractor

The standard contract requires the contractor to provide notice of delay claims “...within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.”

In responding to delay notices, the owner should consider whether the notice qualifies as a “claim” or merely is an advance warning of potential delays, to which no formal response may be necessary and perhaps should not be given. The owner should not respond unnecessarily in a manner that portrays it as unsympathetic or which could be misconstrued as directing activity that puts anyone at risk or acknowledging a delay claim that has been neither properly submitted nor supported. The contractor bears the burden to establish how a delay has impacted the work and should be regularly informing the owner of project impacts as information becomes available.

Notices from the Owner to the Contractor

When sending notices to the contractor, the owner should consider the need for the notice, how it will be received, and how it may impact the future of the project.

Where concurrent delays exist, the owner should consider putting the contractor on notice of such delays at the earliest possible time.

A timely response by the owner to schedule updates that identify delays may avoid the appearance that the owner accepts the delay or has engaged in a “course of dealing” that modifies the express contract.

The owner should consider putting the contractor on notice of observed safety violations, including deviations from governmental or trade association guidelines for maintaining a safe construction site during the pandemic. Under the standard contract, the contractor is responsible for site safety, compliance with all applicable laws and dealing with emergencies on the site “to prevent threatened damage, injury, or loss.” However, the owner also may be liable for dangerous conditions, at times under statutory or common law, or possibly where it exerts control over the construction site, directs the contractor’s means and methods, or otherwise contributes to an injury. In those instances, the owner may be liable for failing to maintain a safe site, irrespective of contract terms placing primary responsibility on the contractor.

Action #5: Consider Project Suspension and Termination Options

Suspension or Termination by the Owner

Depending upon a construction project’s specific circumstances, the owner may wish to consider suspending and/or terminating the project due to the impact of COVID-19. Each situation is different and must be considered individually.

The standard contract allows the owner to suspend the contract “for convenience...for such period of time as the owner may determine.” In a convenience suspension, the owner may be responsible for the “cost and time” caused by the suspension, delay or interruption including the contractor’s profit unless the contractor’s performance “...is, was, or would have been, so suspended, delayed, or interrupted, by another cause for which the contractor is responsible...”. The standard contract also allows the owner to terminate the contract for convenience.

The owner should consider that a convenience suspension or termination may require it to pay the contractor’s resulting costs, which typically include demobilization costs and may include payment for goods and materials ordered or in fabrication, as well as lost deposits and termination fees, so the contract terms must be carefully considered. Further, the owner may need to consider the potential ability to quickly restart if the project is suspended or terminated with the intention of restarting later. It also will be critical to consider impacts on performed work, as a convenience termination may invalidate warranties and the owner’s ability to pursue the contractor for defective work.

Termination by the Contractor

Under standard AIA contract forms, the contractor may terminate the contract if the work is stopped for 30 consecutive days by government order or national emergency. In such circumstances, the contractor is entitled to recover “...payment for Work executed, as well as reasonable overhead and profit on Work not executed, and costs incurred by reason of such termination.” These provisions may incentivize the contractor to terminate the contract after a government-ordered 30-day shutdown by allowing recovery from the owner not just for work performed and termination costs, but also anticipated profit on work not performed, particularly where the contractor otherwise would be entitled only to a time extension due to COVID-19-based delays.

Action #6: Consider Contractor Claims for Time Extensions and Delay Damages

The pandemic likely will unleash floods of contractor claims for time extensions, delay damages, project disruptions and labor inefficiencies.

The delays directly caused by COVID-19 may be “excusable” under the contract because the pandemic is a “cause[] beyond the contractor’s control,” A201 Art. 8.3, or under common law theories of frustration of purpose or impossibility/impracticability, see GT Alert “[Risk Allocation for Economic Losses from Coronavirus Disease 2019](#),” entitling the contractor to a time extension to perform the work and potentially to delay and disruption damages.

“No damages for delay” (NDFD) clauses commonly found in construction contracts may or may not protect the owner from the contractor’s delay damage claims. Generally, these clauses are designed to protect the owner from a contractor’s delay damage claim by allowing a time extension, but no additional compensation, in the event of project delays. Courts generally enforce unambiguous NDFD clauses, but there are exceptions, one of which is for “delays not contemplated” by the parties.

Whether a NDFD clause protects the owner from pandemic-based delay damage claims will depend upon the clause’s exact language and is fact-dependent. In some instances, the delays may be deemed unanticipated, rendering the NDFD clause entirely ineffective. However, a limited NDFD clause (e.g., allowing delay damages after the first 30 or 60 days of delay) might be enforced. Also, where the contract specifically allocates the risk of delays caused by a pandemic, those clauses may be upheld, although such provisions are uncommon.

The owner should consider the following steps to address contractor delay and disruption claims. First, the owner should assemble key project documents, including daily reports, meeting minutes, RFI and change order logs, progress reports, etc. These documents will be crucial in evaluating the contractor’s claims.

Second, the owner should consider whether concurrent delays affect the contractor’s claims for project impacts. Under standard contract forms, where a contractor suffers a compensable delay such as that caused by the pandemic, but the contractor is responsible for a concurrent delay, the net effect may be that the delay is excusable but non-compensable, entitling the contractor only to a time extension.

Third, the owner should determine whether the contractor’s delay damage claim is properly documented and limited only to permissible damages. Under standard contract forms, the contractor bears the burden to prove how the delay impacted its work and the steps it took to mitigate damages. Also, the contract may limit the contractor’s delay damages, such as by allowing payment for extended general conditions costs but not increased labor and material costs, or by waiving all “consequential damages” such as office, financing or personnel expenses or claims for lost profit.

Conclusion

These recommendations are offered as general guidance. The facts and circumstances of each project, including considerations such as financing documents, leasing, joint venture partnerships, market conditions and contract terms, may warrant deviations from the general guidance offered herein.

For more information and updates on the developing COVID-19 situation, visit [GT’s Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#).

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