



Construction Contracts Need Amending Post COVID-19 Shutdowns

By Richard P. Higgins | Thursday, August 13, 2020



No one could have expected the coronavirus pandemic in the beginning of 2020. True, there were rumblings about a sickness in China that was highly contagious and infecting many people. Death tolls began rising as the world watched in disbelief. After all, this is 2020. This is not supposed to happen. We should have been able to control the spread of the virus, but we could not. COVID-19 quickly spread throughout the world causing havoc and economic despair.

While some sectors of the construction industry are not as impacted as others, contractors industry-wide need to consider how COVID-19 will impact their contractual obligations. Depending on what happens and what the government decides to do to stop the spread of the coronavirus, project delays, supply chain distributions, lost productivity and work stoppages may continue for months. All of this will impact the contracts that contractors have with owners. Contractors may not be able to preform according to the terms of the contract through no fault of their own. Owners may no longer qualify for the financing needed to pay for the project.

Force Majeure

According to Investopedia, “force majeure refers to a clause that is included in contracts to remove liability for natural and unavoidable catastrophes that interrupt the expected course of events and prevent participants from fulfilling obligations.”

The COVID-19 pandemic could qualify as a force majeure event. Contractors had no control over the government declaring that some construction projects were nonessential and had to shut down and/or reduce their workforce. This put a strain on contractors to meet project delivery dates according to the terms of their contracts. Delays could also be caused by the closure of government agencies or offices, unavailability of construction materials, supplies or equipment, or shortages or unavailability of labor. COVID-19 has impacted contractors in all these areas.

Under force majeure, a party is not liable for any failure of or delay in the performance of an agreement for the period that such failure or delay is:

- Beyond the reasonable control of a party.
- Materially affects the performance of any of its obligations under an agreement.
- Could not reasonably have been foreseen or provided against.

Force majeure does not come into play for a failure or delay resulting from only general economic conditions or other general market effects.

Responsibility for delays will depend upon the language of the construction contract. In some instances, the common law definition of “impossibility” or “impracticability” of performance may also relieve a party from its obligation to perform.

Other Contract Considerations

Although force majeure might limit a contractor’s exposure under a contract, there are many considerations that a contractor should think about. For example, a contractor might want to add a clause to cover contract delays. Contractors need to protect themselves from possible work stoppages that are out of their control. Regardless if the stoppage is due to government orders, disruptions in the supply chain, labor shortages or another unforeseen reason, contractors need to protect themselves from liability.

Additional safety measures may be required to protect workers and prevent the spread of the virus. Every new contract should specify the contractor’s and owner’s obligation to provide personal protection equipment (PPE) and how the costs will be allocated. This should include the cost of complying with guidelines from the Centers of Disease Control (CDC) and other government or health agencies that may require social distancing, hygiene and sanitizing stations, onsite safety officers, and other protocols.

Contracts should define the circumstances of a price escalation entitlement. Outline the circumstances in which alternative and back-up suppliers can be used to source required materials. Include information on acceptable replacement items if the preferred materials are no longer available. Options for superior and inferior material thresholds should be addressed.

Border restrictions could impact the supply chain. Consider alternative shipping and delivery routes, as well as additional expenses. Include who will be responsible to absorb these costs in contracts.

Contractors and owners need to consider insurance coverage for loss of income or revenue, security costs, loss or delays in the supply chain, worker protection or worker salary protection and measures to accommodate alternative working environments. Consider increasing liability insurance to cover possible lawsuits and claims due to COVID-19. Examine current insurance policies, bonds, guarantees or security agreements, etc. to ensure adequate coverage.

COVID-19 is going to be with us for a while. Contractors and owners need to amend contracts, as appropriate, to protect themselves from incurring unforeseen additional expenses. This should include a clause on when the project should be terminated or paused to protect the interests of both parties.

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