

CLIENT ALERT

The Effect of the COVID-19 Coronavirus on Construction

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The COVID-19 coronavirus is impacting every aspect of the economy, and construction will not be exempt. Materials and deliveries may be slowed, crews quarantined and unavailable, and projects delayed. We view COVID-19 as an event beyond the control of a party (an “act of G-d”), falling within the force majeure provision of most contracts. Some standard form construction agreements already define “force majeure” in such a way as to expressly include “epidemics” (which the COVID-19 coronavirus is). Contracts published by ConsensusDocs, DBIA, and The Engineers Joint Contract Document Committee all include “epidemics” within the scope of events that support an “excusable delay.”

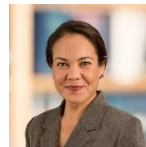
As a force majeure event, the impact of COVID-19 may be deemed an excusable, but non-compensable, delay. Contractors will likely be entitled to an extension of time to perform but not additional compensation (although they possibly may be reimbursed for acceleration costs if a schedule cannot be extended – assuming that is even possible).

Contractors will want to send notice promptly after becoming aware that COVID-19 has affected materials deliveries, labor availability, or other aspects of a project, in strict accordance with the contractual notice requirements, advising of the delay. Likely, the extent of the delay will be unknown, as it may not be clear when restrictions will be lifted, when travel and deliveries will be reinstated, or when crews will be healthy and available. Contractors would be mistaken to do nothing and presume that the customer will be reasonable. It is far more prudent to send a simple notice explaining the delay, stating that the duration will be unknown, and stating that the contractor is requesting an extension of the contract performance time. Contractors should be sure to check the precise contractual provisions relating to providing notice of delay, because some contracts require contractors to waive their rights to an extension of time to perform if they fail to provide notice in strict accordance with the terms of the contract. Contractors will also want to track and be able to document delivery delays and crew and material availability in order to support the full extent of any requested extension.

Owners, landlords, and lenders affected by these delays will also need to be reasonable in terms of modifying schedules and expectations. The full extent and impact of COVID-19 will not be known for some time, and all members of the industry will be well-advised to exercise patience as we navigate these uncertain waters.



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