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Authors:

[C. Michael Shull, III](#)

Coronavirus – Are We in For Historic Construction Delay Claims?

What if a general contractor's completion of its work is delayed due to COVID-19 (coronavirus)? Is the contractor in breach? Or, is the delay in performance due to the virus excused? Does the contractor get additional time to complete work or additional compensation for the delay to its work schedule?

There are many ways that coronavirus can cause delays to a project. The supply chain can be disrupted in many ways. While lumber, steel, concrete and other materials are sourced more locally, others come from overseas, such as marble from Italy and fixtures from China. Currently, Italy and China are two of the nations most affected by the pandemic. Local agency closures may delay the issuance of permits, approvals or inspections necessary for a certificate of occupancy required for substantial completion. And, of course, workers and crews may either become ill or wish to stay home to avoid infection. Who bears this risk of delay?

When in Doubt, Read the Contract

Most construction contracts break delays down into three categories: those caused by the project owner or its design team, those caused by the contractor, and a third category where the delay arises due to neither the actions of the owner nor contractor, but from circumstances beyond either party's control. Whether the general contractor is entitled to an extension of its agreed-upon time for performance (contract time) or an increase in compensation (contract price) in connection with the delay often depends upon the cause of delay's category. Typically, those delays attributable to the contractor's failures warrant neither an increase in the contract time or the contract price. Those delays caused by the owner or its team usually warrant an increase to both. Those delays caused by neither the owner nor the contractor – often referred to as *force majeure* events – will typically warrant an increase in the contract time and therefore relief from any liquidated damages. Still, entitlement to an increase in the contract

price varies greatly from contract to contract.

Common Contractual Language Regarding Delays

Contract forms typically used in the construction industry address the issue of force majeure damages a bit differently. The ConsensusDocs Form 200, for example, drafted for use between an owner and a contractor, lists within Article 6.3 four categories where the delay is essentially due to an owner's action or inaction, and provides both an increase in the contract time and contract price if they occur. For delays caused by force majeure events, an adjustment to the contract time is to be provided, but the provision (6.3.3) neither expressly prohibits nor requires an increase in the contract price. Is the coronavirus such a force majeure event? In fact, the ConsensusDocs 200 specifically mentions "epidemics" as a delay for which the contract time will be equitably adjusted. On March 11, 2020, the World Health Organization (WHO) announced that coronavirus was a pandemic. WHO defines a pandemic as "an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people."

If the coronavirus itself did not fall within the force majeure definitions of a particular contract, and "pandemic" or "epidemic" are not specifically mentioned, then possibly one of its consequences does. For example, force majeure situations under the ConsensusDocs 200 also include "transportation delays not reasonably foreseeable," "adverse governmental actions," and a catch-all "unavoidable accidents or circumstances."

Another popular industry form, the AIA A201 (2017), at Article 8.3.1 offers a contractor an extension of the contract time for delays due to "labor disputes, fire, unusual delay in deliveries, unavoidable casualties . . . or other causes beyond the Contractor's control", as well as "other causes that the Contractor asserts, and the Architect determines, justify delay."

The A201 does not provide for an automatic increase in the contract price for these force majeure delays (or even for delays caused by the owner). Instead, it simply says that damages for delay by either

party are not precluded.

Frequently the standard terms of both the ConsensusDocs 200 and AIA A201 are revised in favor of one of the parties' interests. For example, an owner may revise them to provide for no damages due to delay under any circumstance, even those beyond the contractor's control. But some states have passed legislation declaring void any contract which provides no damages for delay in the event that the owner is the cause of the delay, but leaves open the issue of damages in the case of force majeure events. Even if the contract form does provide for additional time or compensation in such circumstances, however, the contractor will still need to prove that the delay was in fact occasioned by the pandemic, and likely the exact amount of time that the pandemic affected the project's critical path, as well as the lack of available mitigation measures and the provision of notice as required by the contract.

Federal Government Contracts

Some public contract provisions, such as federal government contracts, have their terms as to delay claims determined by statute and regulation. For example, for federal government construction projects the Federal Acquisition Regulations at 48 CFR §52.249-14 "Excusable Delays" (for insertion in cost-reimbursement construction contracts among others) provide that:

... the Contractor shall not be in default because of any failure to perform its contract under its terms (within the Contract Time) if the failure arises from causes beyond the control and without the fault or negligence of, the Contractor.

Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, ... (5) epidemics, (6) quarantine restrictions ... (8) freight embargoes.

If the contractor's failure is because one of its subcontractor's performance is delayed by such causes, a failure to timely perform likewise will not constitute a default. 52.249-14(c) provides that upon request of the contractor of a schedule extension, the contracting officer will determine whether the contractor's failure to

meet the required schedule does, in fact, flow from one of the enumerated causes, and if so the delivery schedule shall be revised. Additional compensation to the contractor is however, not provided in such instances. The Federal Acquisition Regulation (FAR) provision applicable to fixed-price construction contracts, 48 CFR §52.249-10, likewise provides for an extension of time for completing the work shall be provided, upon adequate proof by the contractor, that the delay in completion is due these same causes.

Relief via a claim of excusable delay due to analogous situations, such an influenza epidemic, however, has not been as easily obtained in the past as one might think. Several claims of excusable delay due to an influenza epidemic have been denied where the contractor has failed to show that the epidemic was the sole cause, not merely a contributing cause, of the performance delay. The contractor must also establish the actual extent of the delay caused by the epidemic. See e.g. *Ace Electronics Associates, Inc.*, ASBCA Nos. 11496, 11781, 67-2 BCA ¶ 6456 (July 18, 1967). Additionally, a contractor will find difficulty alleging that its performance is excused simply because one or more key personnel were affected by an epidemic. *Asa L. Shipman's Sons, Ltd.*, GPOBCA No. 06-95, 1995 WL 818784 (August 29, 1995).

One should also take care to remember that if a delay is otherwise excusable, the failure of a contractor to establish reasons for not obtaining the requisite material(s) from another source can result in a denial of excusable delay and an extension of the time of performance. *Cryer & Parker Elecs., Inc.* ASBCA 15150, 71-2 BCA ¶ 8943.

The word “analogous” is used above hesitantly. Whether the coronavirus pandemic is analogous to anything seen before is surely debatable. Each day brings a fresh set of developments that suggest our current situation is unlike any faced in modern times. Returning to the FAR clauses above, the recitation of epidemics, quarantines, the sovereign action of the government, embargoes, and other circumstances beyond the control of a contractor were likely not listed with the anticipation that they might occur *simultaneously*.

For Contractors: Remember to provide notice. Contractors whose performance is affected by COVID-19 should provide notice as required under their contract, both in the format and within the time required. Suggest a meeting with the owner to discuss this possibility before it even occurs, if possible. Yes, the owner is no doubt aware of the pandemic in general but not yet as to your specific challenges. If a solution to the delay is possible with the owner and the architect's approval, propose it. Owners will be keen to get the project completed as soon as possible. If the pandemic causes a full or partial shutdown of the work, remember to protect it and all materials as best as possible. If such protection requires atypical measures, discuss those with the owner to find a solution and protect materials onsite from the elements.

For Owners: If your contractor puts you on notice of a delay due to the pandemic, schedule a meeting. Identify with the contractor whether the delay is due to workforce or supply chain issues, and determine whether their effects might be mitigated by switching to materials from a different source (i.e., local rather than overseas). If the contractor on your project is already severely behind schedule here at the onset of the coronavirus pandemic, make sure to document the status of the project now in order to avoid the pandemic and its effects being used (or attempted) to excuse performance failures, and perhaps liquidated damages which have already accrued.

For Everyone: Communication on projects will be more important than ever before, because whether due to the virus' effect on the workforce or the government's reaction to it, all participants on a project will need to be flexible and responsive. If you are about to enter into a construction contract, go ahead and address the pandemic and possible ramifications now if you can.

We really are all in this together. Owners are anxious to get their projects completed without delays and additional costs. Contractors are worried about completing their current projects as well and maintaining the safety of their workforce. It is best to try and work mutually towards a solution as each challenge arises.

*To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a **Coronavirus Response Team**. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.*

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