

LEGAL UPDATES

Addressing Pandemic Risk In New Construction Contracts

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COVID-19 and related governmental shut-down orders, and new safety protocols have triggered circumstances, risks and ramifications that existing construction contracts never contemplated. To account for these new circumstances, risks and ramifications, change is needed. Parties entering into new contracts should negotiate more specific provisions designed to intentionally allocate the risks flowing from COVID-19 and other possible pandemics. Embracing this need for change, this alert reviews the top construction contract provisions to modify.

- **FORCE MAJEURE.** The run-of-the-mill force majeure clause ("act of God" clause) will likely not be applicable to future impacts of COVID-19 as it would be difficult to assert such impacts are, at this point, unforeseeable. Consequently, consider modifying that clause to incorporate a specifically negotiated list of force majeure events, such as epidemics, pandemics, quarantines, governmental restriction on activities resulting in suspension of in the Work or delay in the critical path for more than a specified number of days and disruption in supply chains that delay procurement for more than a specified number of days. Make sure the clause specifies the remedy should one of the listed force majeure events occur, e.g., equitable cost adjustment and/or extension of time to perform.
- **ESCALATION CLAUSE.** Consider including a specifically negotiated escalation clause permitting an adjustment in the event of an increase in cost of materials that exceeds a stated percentage per annum which is caused by unusual fluctuations in market cost of materials (including due to tariffs on such materials or costs of transporting such materials).
- **SUBCONTRACTOR DEFAULT INSURANCE.** Given the increasing economic challenges resulting from COVID-19, subcontractor default insurance ("SDI") can be an effective means of addressing the risk of subcontractor non-performance. Accordingly, SDI should be considered and its cost should be incorporated as a cost of the work.
- **PERFORMANCE BONDS.** Timely notice of payment and performance bond claims may be challenging, but essential, to determine in light of lack of clarity

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with governmental orders and jobsites potentially shutting down multiple times due to infected workers.

- **SUSPENSION RIGHTS.** Because of the potential for another COVID-19 spike or other pandemic that could lead to SIP Orders, suspension provisions should be reviewed carefully to intentionally allocate risks associated with suspensions like those recently experienced. The contract language should: (i) allocate all appropriate costs of demobilization, remobilization and maintaining and supporting a suspended project; and (ii) allow contractor termination if suspension extends beyond a stated number of days. In the event of suspension, contractors should keep track of exercising mechanics lien rights within statutory periods.
- **TERMINATION RIGHTS.** Termination provisions also should be reviewed to ensure costs of demobilization and termination are thoughtfully and intentionally allocated. This is an area to consider automatic termination resulting from an agreed suspension duration. Specifically negotiate any termination fee in addition to such costs. Ensure that contractor has a termination right on Owner default (define an Owner default) and upon an extended suspension.
- **NOTICE PROVISIONS.** Many construction contract forms include multiple and sometimes conflicting notice provisions (e.g., applying to Change Orders as opposed to Claims). Ensure that there is a single notice provision that permits the same type of notice regardless of differing notice time periods under various provisions of the contract.
- **INDEMNITIES, LIMITS OF LIABILITY AND WAIVERS OF CONSEQUENTIAL DAMAGES.** Construction contracts customarily include indemnities by the contractor, limitations of liability arising from certain events or activities and a mutual waiver of consequential damages. Review these provisions in light of risks resulting from COVID-19 and specifically negotiate the potential allocation of these risks under these provisions.
- **LIQUIDATED DELAY DAMAGES.** Not much to say but “PROCEED WITH CAUTION.”

We recommend that parties to new contracts openly discuss and reasonably address the risks resulting from COVID-19, rather than approaching risk allocation as a zero sum game. An intentional allocation of risk will more likely result in a successful project for all parties.

We continue to work with many clients on these issues and are available to assist your business as needed. If you have questions about your contractual/legal rights and remedies regarding contracts, please reach out to one of our construction attorneys listed below:

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