Practical Considerations for Dealing with COVID-19

PRESENTED BY:
Brian S. Wood | Smith, Currie & Hancock LLP
Current State of Pandemic

https://coronavirus.jhu.edu/map.html

Total Confirmed
214,894

Confirmed Cases by Country/Region/Sovereignty
- China: 81,102
- Italy: 35,713
- Iran: 17,361
- Spain: 13,910
- Germany: 12,327
- France: 9,052
- Korea, South: 8,413
- US: 7,769
- Switzerland: 3,028
- United Kingdom: 2,882
- Netherlands: 2,056
- Austria: 1,646
- Norway: 1,550
- Saudi Arabia: 1,494

Total Deaths
8,732

Countries and Regions with Deaths
- China: 3,122
- Italy: 2,978
- Spain: 623
- France: 146
- Germany: 64
- Korea, South: 71
- United Kingdom: 56

Total Recovered
83,313

Countries and Regions with Recovered Cases
- China: 56,927
- Iran: 5,389
- Turkey: 4,625
- Korea, South: 1,540
- Saudi Arabia: 1,513
- Guangdong China: 1,265
- Henan China: 1,104
- Zhejiang China: 1,216
- Beijing China: 541

Sankey Diagram: Visualizing the transition from confirmed cases to active cases and then to recovered cases.
Coronavirus-Related Restrictions Affecting Construction

**CITY OF BOSTON**

The City of Boston (Mayor Walsh) issued an order suspending all regular activity at construction sites in Boston.

**PENNSYLVANIA**

On March 17, Governor Wolf suspended all highway construction projects in Pennsylvania.

**CALIFORNIA**


Sonoma, San Benito, Santa Cruz, Monterey, Mendocino, and Palm Springs have since issued similar orders.

**March 16-18, 2020**
Potential Impacts to Construction

- Delays and disruptions
- Suspensions
- Termination (for convenience)
- Material, equipment, and labor price escalations
- Other cost increases
- Health and safety issues
Delays and Disruptions

- Material supply disruptions
- Equipment supply disruptions
- Unavailability of labor or lost time due to employee illness
  - Actual illness of employee,
  - Quarantine due to exposure,
  - Other government (including OSHA) restrictions, or
  - Owner or Contractor mandated jobsite health and safety restrictions
- Inability to work due to “shelter-in-place” or similar orders
Suspension Concerns

- De-mobilization and re-mobilization costs
- Material, equipment, and labor unavailability upon re-mobilization
- Price escalations upon re-mobilization
- Collective bargaining agreement obligations
- Required to stay on standby mode?
- Unabsorbed home office overhead
Termination for Convenience Concerns

- Full cost recovery for termination (cancelled subcontract and purchase order fees, restocking fees, minimal salvage value for specially manufactured goods, etc.)

- Substantial reduction in unit-priced quantities – very early termination can result in unamortized fixed costs spread over reduced quantities
Health and Safety Concerns

- Balancing contractual duties to perform with contractual and legal duties to keep employees and others safe

- OSH Act General Duty Clause, Section 5(a)(1): Provide employees with a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm”

- Ability to procure PPE (i.e. due to shortages of respirators)

- Difficult decision-making with respect to uncertain exposures (when to quarantine employees, to stop work, etc.)
Subcontract Provisions for Possible Relief

“Force Majeure” clause
Delay provisions (other than force majeure)
Changes and Claims clauses
Suspension of Work clause

Termination for Convenience clause
Escalation clauses (not typical)
Specific inclusions, exclusions, and qualifications in the scope of work
Force Majeure

- “Force Majeure” – translated from French as “superior force”
- Contract provision excusing a party’s performance obligations when certain events or circumstances beyond that party’s control delay performance or make performance commercially impracticable, illegal, inadvisable, or impossible
- Examples of force majeure: war, riots, earthquakes, hurricanes, lightning, explosions, energy blackouts, unexpected legislation, lockouts, slowdowns, and strikes
ConsensusDocs 200, Section 6.3:

**DELAYS AND EXTENSIONS OF TIME.**

1) If Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of Constructor include, but are not limited to, the following: (a) acts or omissions of Owner, Design Professional, or Others; (b) changes in the Work or the sequencing of the Work ordered by Owner, or arising from decisions of Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by Owner pending dispute resolution or suspension by Owner under §11.1; (e) transportation delays not reasonably foreseeable; (f) labor disputes not involving Constructor; (g) general labor disputes impacting the Project but not specifically related to the Worksite; (h) fire; (i) Terrorism; (j) epidemics; (k) adverse governmental actions; (l) unavoidable accidents or circumstances; (m) adverse weather conditions not reasonably anticipated. Constructor shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8.
Sample Force Majeure Provision – Private Form Contract

AIA A201-2017

§8.3 Delays and Extensions of Time

§8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by

1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor;

2) by changes ordered in the Work;

3) by labor disputes, fire, unusual delay in delivery, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor’s control;

4) by delay authorized by the Owner pending mediation and binding dispute resolution; or

5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.
Sample Force Majeure Provision – Federal Contract

FAR 52.249-14:

EXCUSABLE DELAYS (APR 1984)

(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms 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, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. Default includes failure to make progress in the work so as to endanger performance.
Sample Force Majeure Provision – Subcontract

“If the Subcontractor’s work is delayed, hindered, suspended, disrupted, interfered with, rendered less efficient or more costly, or adversely affected in any way by any cause whatsoever whether such delays or hindrances are avoidable or unavoidable, anticipated or unanticipated, reasonable or unreasonable (including, but not limited to, acts or omissions of the Contractor or the Owner, the Architect or other subcontractors, by unusually severe weather, by acts of God, by unavoidable casualties, war, strikes, picketing, boycott, lockouts, or by any other reason beyond the Subcontractor’s control and without fault or contribution by the Subcontractor), the sole and exclusive remedy of the Subcontractor shall be to receive from the Contractor an extension of time for each day of proven actual, excusable, and non-concurrent delay to the Subcontractor’s work which, at the time of such delay, was on the Project’s critical path.”
Force Majeure Clause Issues

- If only in the prime contract, is there a flow-down clause?
- Does it cover epidemics/pandemics?
- Excusable, but not compensable, delays (i.e. time extensions, but no additional compensation)
- Impacts must be caused by the event and not other causes
- Was it unforeseeable?
- Was the delay actually caused by the force majeure event or was it caused by an independent act of Owner or Contractor? (could give basis for compensable delay – see delays and changes section)
Delay Clause Issues

- Is it broad enough to cover epidemics/pandemics?
- Does it contain “no damage for delay” language?
- What are the notice provisions?
- Was the delay actually caused by the force majeure event or was it caused by an independent act of Owner or Contractor?
- Was the Coronavirus-caused delay the only delay (i.e. are you responsible for a concurrent delay)
- Is it a critical path delay (i.e. is there float in the schedule?)
- Did you adequately mitigate damages?
Changes Clause Issues

- Most changes and claim provisions address changes or impacts to the work directed or caused by the Owner, Contractor, and parties under their control or by conditions for which the Owner or contractor expressly assume the risk (permitting delays, differing site conditions, utility relocation delays, etc.)

- If the change or impact was caused by an independent act of Owner or Contractor (e.g. restrictions on work hours or conditions that are prudent, but not mandated by the government), subcontractor may be entitled to an equitable adjustment (compensable change)

- If the contract includes qualifications (inclusions, exclusions, terms of performance, etc.), a contractor or subcontractor may be entitled to additional compensation irrespective of whether impact is caused by third parties or a force majeure event

- Changes clauses often contain duty-to-proceed language requiring the contractor or subcontractor to proceed with construction pending a dispute over a change or claim
Suspension of Work Clause Issues

- Does it cover suspensions mandated by government agencies or otherwise caused by a force majeure?
- Some suspension clauses provide excusable time extensions, but no compensation for suspensions.
- Some suspension clauses restrict overhead and profit on suspension costs.
- Many suspension clauses do not address price increases (price escalation) resulting from the suspension.
Termination Clause Issues

- Some termination for convenience clauses provide for compensation for the work performed to the date of termination, but do not address additional costs incurred as a result of the termination. These can include:
  - Termination fees and costs associated with settlement of purchase orders and subcontracts;
  - Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of terminated materials, including, but not limited to, restocking fees and losses incurred in salvage; and
  - Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data.
Other Potential Relief: Common Law

- **Impossibility of Performance**: When performance becomes actually impossible to perform (e.g. law or order prohibits construction)

- **Commercial Impracticability**: When performance is physically possible, but unfeasibly difficult or costly to perform and will result in a substantial hardship to the performing party
  - Will excuse performance where the excused party did not have control over (or was not at fault for) the condition
  - The excused party must not have expressly or impliedly assumed the risk of the duties becoming impracticable
  - **NOTE**: Not all jurisdictions recognize commercial impracticability
Insurance Coverage for Business Interruptions

- Many contractors and subcontractors carry “Business Interruption” insurance policies (a.k.a. business income insurance), that cover the loss of income that a business suffers after a disaster.

- Business interruption policies may contain “civil authority” coverage that covers loss of business income resulting from government-mandated closures of business premises that directly causes loss of revenue. These include business closures due to curfews or other work closures.

- Some contractors carry “contingent business interruption” policies that cover losses due to disruption of a supplier’s business operations and ability to supply project materials.
Business Interruption Coverage Issues

- Potential problems with Business Interruption
  - Requirement for “direct physical loss or damage,” including in “civil authority” and “contingent business interruption” policies
  - Shelter-in-place orders may trigger such coverage, but a question is whether a construction project site would qualify as covered property or “premises”
  - Exclusions for epidemics, pandemics, and viruses
  - “Period of restoration” limits on coverage
- Property insurance policies differ widely and must be read carefully
Recommendations
Recommendations for Current/Pending Contracts

- Closely monitor federal, state, and local government actions that might affect construction in general, and your project(s) in particular.

- Verify sources of supply for all open subcontracts and purchase orders (ask vendors and subcontractors to confirm in writing).

- Review subcontract force majeure, delay, changes, claims, suspension, termination, and notice provisions (and prime contract provisions incorporated by a flow-down clause).

- Immediately notify contractor of any current or potential delays resulting directly or indirectly from COVID-19, including any cost/price impacts.
Recommendations for Current/Pending Contracts

- Track and document all impacts to work and efforts to mitigate, including attempts to find alternative sources and means of performing
- Carefully analyze whether performance is feasible before considering, or claim a right not to proceed
- Review all insurance policies for business interruption coverage and provide notices required by such policy(ies)
Recommendations for Future Subcontracts

- Include provisions specifically addressing delays and cost impacts resulting directly or indirectly from epidemics and pandemics (expressly including COVID-19). Provisions should address:
  - Disruptions to material and/or equipment supply;
  - Illness of Subcontractor’s workforce and/or unavailability of labor;
  - Government quarantines, shelter-in-place orders, closures, or other mandates, restrictions, and/or directives;
  - Owner or Contractor restrictions and/or directives; and/or
  - Fulfillment of Subcontractor’s contractual or legal health and safety obligations associated with COVID-19.
Sample COVID-19 Clause

**Epidemic Rider**

Notwithstanding any provision(s) of this Subcontract, if as a direct or indirect result of any virus, disease, contagion, including but not limited to COVID-19 (individually or collectively, “Epidemic”), Subcontractor’s work is delayed, disrupted, suspended, or otherwise impacted, including, but limited to, by (1) disruptions to material and/or equipment supply; (2) illness of Subcontractor’s workforce and/or unavailability of labor; (3) government quarantines, shelter-in-place orders, closures, or other mandates, restrictions, and/or directives; (4) Owner or Contractor restrictions and/or directives; and/or (5) fulfillment of Subcontractor’s contractual or legal health and safety obligations associated with an Epidemic; then Subcontractor shall be entitled to an equitable adjustment to the Subcontract schedule and duration to account for such disruptions, suspensions, and impacts. To the extent any of the causes identified herein results in an increase in the price of labor, materials, or equipment used in the performance of this Subcontract, or other costs of performance of the Subcontract, Subcontractor shall be entitled to an equitable adjustment to the Subcontract price for such increases, provided Subcontractor presents documentation of such increases (including the original prices and/or estimates) and evidence of Subcontractor’s reasonable efforts to find alternative sources of material or equipment supply and/or labor at the original/non-impacted prices and/or estimates.
Questions?

Brian Wood
202.735.2451
bswood@smithcurrie.com