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The Coronavirus as a Force Majeure Event

A. Introduction:

The full impact of the coronavirus on our lives, businesses and the economy remains to be seen. The purpose of this alert is to discuss the effect of the virus on existing Connecticut construction projects and provide guidelines for the negotiation of future construction contracts so as to protect against possible future pandemics.

B. The Current Connecticut Government Restrictions and Orders:

Presently, since March 12, 2020, Governor Lamont has issued 31 executive orders (Nos. 7 through 7DD) relating to the coronavirus. Perhaps most significant among these orders was 7H, signed on March 20, which prohibited the operation of all “non-essential businesses” unless such operation could be done remotely. Among the many businesses deemed “essential” and thereby not subject to the order was “construction.” Per this order, the Connecticut Department of Economic and Community Development, on March 22, specified that “construction,” as used in order 7H, included:

- all skilled trades such as electricians, HVAC, and plumbers;
- general construction, both commercial and residential;
- other related construction firms and professionals for essential infrastructure or for emergency repair and safety purposes; and
- planning, engineering, design, bridge inspection, and other construction support activities

In the weeks following this order, several neighboring states implemented far stricter restrictions on construction activities. New York, New Jersey and Pennsylvania halted all construction “not related to critical public infrastructure.” Massachusetts similarly exempted public works from restriction and added home construction as exempt as well. The cities of Boston and Cambridge, however, have banned all construction.

But this is not to say that Connecticut’s construction industry has been untouched by coronavirus-related restrictions. On April 8, Governor Lamont, in executive order 7V, imposed additional rules and work site requirements for all essential businesses that remain open during the pandemic. These rules apply to every essential business, including construction work. In addition, they included certain rules specific to construction sites which are as follows:

- Clean portable bathrooms no less than every 2 days;
- Require employees to travel separately to and from, and within, worksites;
- Reschedule work to maximize the amount of work being performed outdoors, limit indoor or work lacking significant fresh air;
- Shift work to limit the size of the crews on the jobsite, especially indoors;
- Rotate lunch and coffee break shifts, requiring workers to follow the CDC social

- distancing guidelines during meals or breaks;
- Follow all safety and health protocols when using an elevator; and
- Provide an adequate supply of PPE, including but not limited to masks, gloves, hand sanitizer.

Notably, these rules provide no guidance as to what constitutes adequate compliance or penalties for their violation. Given this uncertainty and the current climate of heightened concern, it would be prudent to err on the side of over compliance with these rules.

C. What is a Force Majeure Clause?

A force majeure clause allocates risk arising out of an unforeseen or uncontrollable event that impacts a contractor's performance. Its purpose is to set forth the specific events or categories of events beyond the contractor's control, the occurrence of which may excuse a contractor's delay in the performance of its work. Whether a specific event is deemed to be a force majeure event and, if so, whether the contractor is entitled to an equitable adjustment in time, money, or both, depends on the language of the contract and the surrounding facts.

Oftentimes, construction contracts define force majeure events as including acts of God, natural disasters, terrorism, and labor strikes. Less frequently, however, do such clauses specifically mention pandemics, quarantines, or public health emergencies. The party seeking the protection of the force majeure clause bears the burden of proving that the event in question is included within its scope. If a force majeure clause does not specifically reference pandemics or public health emergencies, it is possible that a court may find that such events are not covered and do not excuse the contractor's nonperformance or delayed performance. Furthermore, even if a force majeure clause applies, it may only entitle a contractor to an extension of time, leaving the contractor to bear the attendant costs typically associated with severe disruptions in work such as costs for demobilization, remobilization, labor shortages and material escalation.

D. Force Majeure Impacts on Existing Construction Projects

Unlike the problems unique to a particular business or industry, the coronavirus has impacted all of our lives and businesses in some way. Because of this, it is somewhat unifying. It could even be said that it has instilled a sense of patriotism across much of the country. These factors make it less likely that (1) owners and/or general contractors would attempt to "weaponize" the virus to their advantage against lower tiered participants in the construction process; and, even more importantly; (2) less likely that courts would have a sympathetic ear for any such attempts.

But setting aside such hopes for goodwill among men, what are my legal rights if I am delayed in the performance of my construction work due to the coronavirus? And what about my increased costs due to compliance with enhanced safety requirements? As with virtually every other question of legal rights in the construction context, we must first look to the language of the contract at issue. As every contract may have a different force majeure and delay clause, we will look at two of the more common versions as used in AIA A201-2017 and ConsensusDocs 200: Standard Agreement and General Conditions Between Owner and Constructor.

1. Will I Receive Extensions of Time for Coronavirus Impacts?

A201 provides in relevant part as follows:

§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) or 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 (emphasis added).

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents (emphasis added).

ConsensusDocs 200: Standard Agreement provides in relevant part as follows:

6.3 Delays and Extensions of Time

6.3.1 If Constructor is delayed at any time in the commencement of progress of the Work by any cause beyond the control of the Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond control of the 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 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 the 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** (emphasis added).

Constructor shall submit any requests for equitable extensions of Contract Time in accordance with Article 8 (emphasis added).

6.3.2 In addition, if Constructor incurs additional costs as a result of a delay that is caused by items (a) through (d) immediately above, Constructor shall be entitled to an equitable adjustment in the Contract Price subject to §6.6.

Neither the AIA or ConsensusDocs' clauses are true force majeure clauses. Rather, they are better described as delay clauses with some force majeure elements.

As to the AIA clause, it makes no mention of viruses, epidemics or even government ordered shut downs as bases for an excusable delay. This leaves the contractor with the argument that the virus constitutes a "cause beyond the Contractor's control," or it is a cause that the architect should find justifies delay. In any contract, it is always preferable to have specific language covering a particular contingency rather than general language that one must argue applies to that contingency. Still, whether the clause uses this "beyond the contractor's control" language or the more traditional excuse of "acts of God," it is likely that the coronavirus would qualify as either of these.

But this is only half of the battle. The contractor would still have to show that its delay was actually attributable to the virus. In Connecticut, where construction has not been shut down due to the virus, a contractor necessarily cannot use any shut down as its excuse for delay. Rather, it will have to show something else that is directly related to the virus, such as the unavailability of labor or materials or perhaps a municipal or town ordinance suspending construction due to the virus.

The ConsensusDocs provision more clearly covers the coronavirus with its express reference to "epidemics" as an event beyond contractor's control. The contractor will still, of course, have to clearly link any delays it suffers to the virus as noted above.

2. Can I Recover Increased Costs of Performance Attributable to the Coronavirus?

Delays attributable to the virus would likely be excused as a force majeure event under most force majeure/delay clauses. But what about increased costs of performance as a result of the virus? Suppose, for example, that contractor must purchase masks for all personnel, limit the number of employees in a given area and hire persons to sanitize work areas. Are these costs recoverable from the owner? Again, we must look to the contract language for the answer.

Under A201 (Article 10) and most contracts, the contractor is responsible for site safety and its attendant costs. Site safety is included in A201's definition of "Work" as it is part of the services provided by the contractor to fulfill its contractual obligations.

§ 1.1.3 The Work

*The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment, **and services provided or to be provided by the Contractor to fulfill the Contractor's obligations.** The Work may constitute the whole or a part of the Project (emphasis added).*

Site safety's inclusion in the definition of "Work" brings it within the ambit of change orders (Article 7) as they are appropriate where there have been "Changes in the Work." If the Work must now be performed differently per government order and at a resulting higher cost, then this is certainly a change in the Work. The coronavirus is perhaps most analogous to the discovery of an unforeseen hazardous material such as asbestos. In such a circumstance, a contractor would generally be entitled to a change order covering the cost of personal protective equipment such as hazmat suits and respirators, increased labor costs and an extension of time. The same should hold true with respect to coronavirus costs and impacts as no credible argument can be made that the virus was foreseeable and did not effect a change in the "Work." As such, contractor has an entirely legitimate claim for a Coronavirus-based change order.

The same argument would hold true with respect to the ConsensusDoc contract as its definition of "Work" and change order provision are, for the purpose of this analysis, identical to A201. In addition, the delay clause of the ConsensusDoc contract, expressly provides for the recovery of "additional costs as a result of a delay" (Art. 6.3.2) attributable to, among other things, "endemics."

Accordingly, contractors whose existing contracts are AIA or ConsensusDoc or otherwise include comparable delay, force majeure and change order clauses should be well-positioned to receive time extensions for delay and recover most if not all costs attributable to the coronavirus.

E. Future Contracts and Their Provision for Potential Future Pandemics.

Because a contractor's rights and obligations, when faced with pandemic-related delays or work stoppages, will depend on the terms and conditions of their contracts, contractors should take care to refine and clarify future construction contracts to ensure their rights are protected to the greatest extent possible.

First and foremost, contractors should seek to include pandemics, epidemics, wide-spread infectious disease and related governmental actions within their contracts' definition of a "force majeure event." Additionally, the contracting parties should clarify whether a formal declaration of an epidemic or pandemic by federal, state or local government is required for the event to qualify as force majeure.

Second, future contracts should clarify both the allocation of risk between contracting parties in the event of a pandemic and the contractor's rights and obligations under such circumstances. Construction contracts generally require a contractor to continue performing notwithstanding the occurrence of an event which has or will delay their performance and result in additional costs to the contractor. Accordingly, future contracts should clarify whether a contractor, upon giving notice of a pandemic as a

force majeure event, will be required to mitigate the delay and continue performing to the greatest extent possible or whether the obligation to continue performing work will be automatically suspended and, if so, for how long.

If the contractor will be required to continue performing notwithstanding the pandemic (assuming it legally can), the contract should leave no doubt that the contractor will be entitled to both a time extension **and** additional compensation for delays, reduced productivity and any other increased costs attributable to the pandemic. To that end, contract provisions that govern excusable delays, time extensions and “Changes in the Work” should be drafted to include pandemic-related delays as excusable delays that entitle the contractor to an extension of time and resulting costs. Contract language should provide that recoverable costs shall include but not be limited to demobilization, remobilization, material price escalation, reduced productivity, enhanced safety requirements, personal protective equipment and heightened sanitary standards.

Additionally, these contract provisions should be harmonized with any “no damage for delay” clause. Generally, a “no damage for delay” clause allocates the risk of foreseeable delays to the contractor and relieves the owner of the obligation to pay the contractor for its increased costs caused by foreseeable delays. Contractors should consider including specific language in any “no damage for delay” clause that provides that coronavirus and/or other future pandemic-related delays are inherently unforeseeable and thus the clause will not preclude contractor from obtaining reimbursement for increased costs and impacts resulting from pandemic-related delays.

If a contract provides that a pandemic will result in a suspension of the work or that a contractor will be excused from further performance, the contract should include language providing that a pandemic, as a force majeure event, is presumed to result in the contractor’s inability to begin or continue performance of the contractor’s obligations. Doing so will minimize any future dispute over whether the contractor was actually prevented from performing – which is generally a prerequisite to a contracting party’s right to stop working in reliance on a contractual force majeure clause. Additionally, if there will be an automatic and/or indefinite suspension of the contractor’s work, the contract should make clear at what point that suspension shall result in a termination of the contract and provide for the payment to contractor for all work performed up to that point, plus pandemic-related costs incurred.

Finally, the contract’s notice provisions for claims and change orders should be modified to allow the contractor a fair opportunity to preserve and pursue time extensions and changes to the contract price. Notice provisions typically require a contractor to give written notice of a claim for a time extension or change to the contract price within a set time period after the event giving rise to the claim. These contract provisions also customarily require the contractor to provide supporting documentation for its claim at the time of or shortly after its submission. Generally, these contracts provide that a contractor waives its claim if it is not submitted within the time period required by the contract, or without the requisite supporting documentation.

In a pandemic situation, it would be difficult, if not impossible, for a contractor to be able to immediately ascertain the full time and cost impacts of a pandemic. Contracts should therefore include language that tempers any strict notice of claim procedures, so that when giving notice of a pandemic-related claim, the contractor is only required to provide reasonable estimates of both the expected delay and increased costs. This should include a reservation of the contractor’s right to revise and supplement its claim and a provision requiring the parties to, in good faith, attempt to agree to the length of any time extension and/or change to the contract price as a result of the pandemic.

F. Conclusion

While a pandemic like the coronavirus may present a host of challenges to the

construction industry, none are insurmountable. With careful drafting, the risks posed by a pandemic and its attendant costs can be fairly accounted for and allocated in the parties' contract.

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