

The contractual environment in the post-COVID-19 world has changed.

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he global COVID-19 pandemic has made our world very different today than it was this time last year. There are few areas of the global business community that have not been impacted by the pandemic, and the construction industry is no exception.

Health and safety regulations have been adjusted to provide for personal protective equipment, social distancing requirements, and enhanced sanitation and cleaning protocols. Work has been reconfigured to reduce traffic on site and within offices. The movement and access to materials and construction personnel has been impaired. More construction projects are tangled in delay and additional cost disputes, and some construction companies face the threat of bankruptcy.

How extensively the pandemic will change the construction industry going forward is open to debate. What is clear, however, is that we are in a new contractual environment in this post-COVID-19 world. The following are

some of the key issues which owners and contractors should consider when writing future construction contracts.

Force majeure

A force majeure event is an unforeseeable, intervening event, outside the control of the contracting parties and capable of delaying the performance of the work. The COVID-19 pandemic is a textbook illustration of this legal definition.

Until the pandemic, force majeure events were relatively uncommon. COVID-19 has awakened the need to consider force majeure provisions in all contracts. Typical force majeure clauses prescribe a list of qualifying events and some feature a basket clause that captures further unspecified events that fit within the legal definition. An example is GC 6.5.3 of the Canadian Construction Documents Committee 2 - 2008 (CCDC 2) stipulated price contract, which lists various delay events such as labour disputes, fire, unusual delay by common carriers, and abnormally

adverse weather conditions. It also covers "any cause beyond the contractor's control."

Unfortunately, some construction contracts fail to cover any force majeure events, thereby exposing the contractor to the entire risk of delay caused by such events. This could include liability for liquidated damages, owner losses that arise from late performance, as well as contract termination.

Monetary compensation for force majeure delay

Force majeure risk is typically shared between owner and contractor. Affording contractors additional time but no money for force majeure events represents what most believed was an equitable sharing of the risk for delays that were the fault of neither party. However, COVID-19 has caused parties to reconsider the wisdom of this risk allocation. In many cases, the pandemic substantially increased the contractor's costs of performance, including costs due to loss of productivity, disruptions in the supply chain, and indirect costs of schedule extension. While such costs may be absorbed over one or two contracts, they could

represent a substantial threat to the contractor's viability when encountered over numerous contracts.

Parties might consider whether some monetary compensation should be available for a force majeure delay and, if so, the kind and extent of such compensation. This benefits owners as well, since no owner wishes to risk the disruption caused by an insolvent contractor.

Another potential route to recovery of additional compensation for a force majeure delay may be found in GC 10.2.7 of the CCDC 2, whereby contractors are entitled to claim additional costs for changes made to "applicable laws, ordinances, rules, regulations, or codes of authorities having jurisdiction which affect the cost of the work" that occur subsequent to bid closing. Note, however, that with COVID-19 a reality and regulations implementing enhanced site safety measures now in place, it may not be possible to rely on this provision since the change in law may have predated the date of bid.

Force majeure versus public authority stop work orders

Contracts often provide varying forms of relief for different delay impacts,

such as owner-caused delays, public authority stop work orders, and force majeure. Parties will want to ensure that there is clarity among the categories of delay impacts to avoid confusion as to what relief is available for each of them.

As an illustration, in GC 6.5.2 of CCDC 2, the contractor gets both an extension of time and monetary compensation for delays arising from public authority stop work orders, while under GC 6.5.3, the contractor gets only extensions of time for force majeure events. Where a stop work order is issued due to COVID-19, the question remains: how should COVID-19 costs be treated given that it was the force majeure event of the pandemic which triggered the public authority stop work order? The need for clarity is apparent.

A COVID-19 clause

Much of the foregoing discussion centered around force majeure events, but it is important to note that the COVID-19 event itself may no longer fall into that category in the absence of it being explicitly identified. COVID-19 is now a foreseeable risk.

While COVID-19 is known, there remains the potential for delay and cost impacts caused by COVID-19 that remain unknown and likely unquantifiable. Parties should therefore consider a specific section of their contract to manage the allocation of these risks. A good COVID-19 clause should include provisions dealing with notice, suspension and termination rights, mitigation, and the calculation and allocation of unforeseen costs. Parties should also consider an enhanced contingency allowance that covers COVID-19 related costs.

Conclusion

These are some of the main considerations that parties will want to take into account as they continue to allocate risk and structure better relationships in the contractual environment in our post-COVID-19 world. The important thing is that they make the effort to do so.

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