

COVID-19's Impact on Construction Contracts

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Owners/developers who either are parties to a construction contract or intend to enter into new contracts for the development or construction of real estate projects should be analyzing their construction documents as to COVID-19's impact on these projects.

Following are critical contract provisions that may be implicated in light of COVID-19. The contract references used in this post are from the commonly used American Institute of Architects (AIA) form A-201 (2017)-General Conditions of the Contract for Construction. However, many of the provisions contained in the A-201 often arise and should be addressed in construction agreements based on other forms.

I. Section 8.3.1 - Delays and Extensions of Time (i.e. Force Majeure)

A. "If the Contractor is delayed by...

1. changes ordered in the Work
2. unusual delay in deliveries...or
3. other causes beyond the Contractor's control...

then the Contract Time shall be extended for such reasonable time as the Architect may determine."

- B. Although the A201 does not expressly allow for increase in the Contract Sum, Section 8.3.3 provides that "This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents." Other Contract provisions upon which the Contractor may base a "damage for delay" claim should be reviewed.
- C. Excusable delay may be compensable and/or non-compensable delay. Contractor should establish the occurrence of an excusable delay, that such occurrence contributed materially to such delay, and the actual extent of the delay so caused, as well as any compensation to which Contractor may be entitled as a result of the proven excusable delay.

II. Section 10.4 - Emergencies §10.4

- A. "In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damages, injury or loss".
- B. "Additional compensation or extension of

time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7."

- C. Issues - is COVID-19 an emergency; State and Presidential measures and proclamations may proclaim an "emergency".
- D. The Contractor may be able to claim additional compensation or extension of time by a Construction Change Directive (Section 7.3.1) or pursuant to the Claims procedure under Article 15.

III. Section 6.2.3 - Delays Caused By Others

"The Owner shall be responsible to the Contractor for costs the Contractor incurs because of a separate Contractor's delays, improperly timed activities, damage to the Work or defective construction."

IV. Section 7.3.1 - Construction Change Directives

- A. "A construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the

Contract Sum or Contract Time or both."

- B. "The Owner may by Construction Change Directive... order changes in the Work within the general scope of the Contract consisting of additions, deletions, or other revisions, the Contract Sum and Contract Time being adjusted accordingly."

V. Section 10.2 - Safety of Persons and Property

- A. "The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury, or loss to..... employees on the work, and other persons or property and other persons who may be affected thereby" (§10.2.1.1)
- B. The Contractor is also required to comply with all applicable laws, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.
- C. Accordingly, these obligations may extend to formulating and implementing protocols and conditions, at the Contractor's cost, such as social distancing, limiting access to Work site, staggered work hours, testing employees and mandatory quarantine

provisions.

- D. The Owner should consider inserting COVID-19 - related protocols and conditions which the Contractor and subcontractors, and their respective employees must follow.

VI. Section 14.3 - Suspension by the Owner-for Convenience

- A. §14.3.1-"The Owner may, without cause order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine."
- B. §14.3.2-"The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption under Section 14.3.1 Adjustment shall include profit."
- C. Owner should require that there are no payments to the Contractor for profit nor for overhead and general conditions for unperformed work.
- D. No adjustment should be made to the extent (i) performance was suspended, delayed or interrupted by another cause for which the Contractor is responsible, or (ii) an equitable adjustment is made or denied under another provision of the Contract.

VII. Section 14.4 - Termination by the Owner for Convenience

- A. §14.4.1 - "The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause."
- B. §14.4.3 -Owner shall pay the Contractor " for Work properly executed; costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement. Termination fee, if any, must be negotiated separately. Owner shared consider that there are no payments for profit nor for overhead and general conditions for unperformed work.
- C. Any agreed upon adjustments of Contact Time or Contract Sum are to be covered by change orders.

VIII. Section 2.2.1 - Evidence of the Owner's Financial Arrangements

- A. After commencement of the work, the Contractor may request Owner provide reasonable evidence that Owner has made financial arrangements to fulfill owner's obligations under the Contract if "(2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the

Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to... continuation of the Work or the portion of the work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor."

- B. This provision should either be deleted or closely reviewed and coordinated with Owner's loan documents.

For more resources and LP's response to COVID-19, [visit this webpage](#).

