



COVID-19 Update

March 2020

Top Five Considerations for Construction Projects During the COVID-19 Outbreak

The United States is facing unprecedented change and upheaval as it navigates the COVID-19 pandemic. Thompson Hine is analyzing all the relevant issues to keep you ahead of the curve.

Here are the top five issues that might have an impact on construction projects.

Force Majeure Clauses

Delays caused by force majeure can lead to extensions of time and additional compensation under a construction contract. Look at your contract's definition of force majeure. Does it specifically reference epidemics or pandemics? Are labor shortages covered? Is the provision limited to the "unforeseeable" and how will that be evaluated when it comes to COVID-19? State law may affect the legal interpretation of the provision.

No Damages for Delay

Some contracts include a "no damages for delay" provision, which provides that a contractor's remedy for force majeure delay is an extension of time only, without additional compensation. Most states uphold these provisions, but there are exceptions. What does local law say about the boundaries of this provision?

Changes in Law

Some construction contracts provide that the compensation payable to a contractor is based upon the laws in effect at the time the contract was signed or at the time the amount payable was agreed upon by the parties. Many states have

issued orders and guidelines restricting gatherings and activities. Determine if your jurisdiction has imposed social distancing measures that affect your project, and check your contract's "change in law" provision to see if relief is warranted.

Termination and Suspension

Suspending, or even terminating, a project may be an option or a requirement in many cases, especially in jurisdictions with aggressive social distancing restrictions in place. Many contracts allow an owner to terminate or suspend a contract for convenience, without default. A contractor may also have the right to terminate if a suspension lasts for a certain number of days. Check your contract to evaluate the impacts of termination or suspension. What is the contractor owed after termination or suspension? Most contracts require payment for work performed and reasonable demobilization costs, but some also allow a contractor to recover anticipated profit on unperformed work or some other form of termination fee. Is an owner required to suspend or terminate a project because of social distancing measures imposed by local, state or federal orders? Is a contractor required to shut down a project due to concerns about maintaining a healthy and safe worksite? These are important issues to consider and evaluate over the coming weeks as the situation changes rapidly.

Insurance and Bonds

In limited cases, insurance may be available to mitigate losses. While the policy language must be reviewed, delay

in completion coverage under builder's risk (sometimes referred to as "inland marine") policies typically requires physical loss or damage to property; that is, the delay in completion coverage will not kick in unless the property is damaged by an insured peril. Commercial business interruption insurance may be available outside of the construction context, although most such policies are provided through property policies (which require physical loss or damage) and many expressly exclude coverage in the event of epidemics, pandemics or viruses.

If a work stoppage represents a default by the contractor, performance and payment bonds may respond with relief; however, a work stoppage caused by force majeure events would not constitute a default. In both cases, parties are required to give timely notice of claims.

Parties should carefully review their policies and bond documentation to determine whether any relief is available for COVID-19-related losses.

FOR MORE INFORMATION

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Additional Resources

We have assembled a firmwide multidisciplinary task force to address clients' business and legal concerns and needs related to the COVID-19 pandemic. Please see our [COVID-19 Task Force](#) page for additional information and resources.

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