



MAY 7, 2020

Re-Entering the Construction Workplace in the COVID-19 World

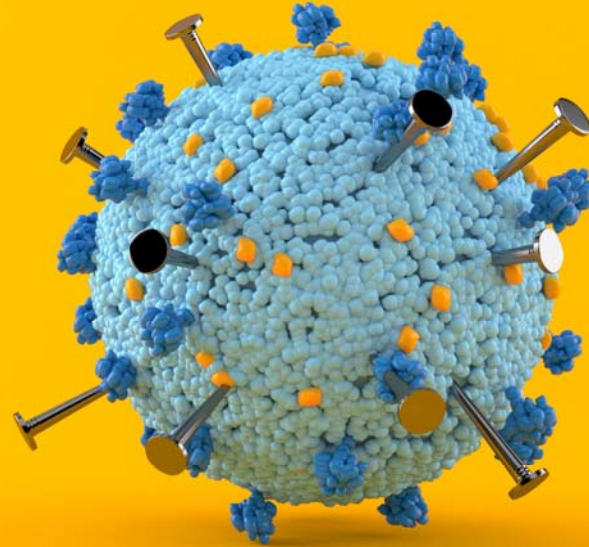
PRESENTED BY:
Smith, Currie & Hancock LLP

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& HANCOCK LLP
CONSTRUCTION AND GOVERNMENT CONTRACT LAW

Today's Agenda

- Implementing safety requirements in the April 29 SIP Orders
- Who pays for all this?
 - Claims of Owner, Contractor, Subcontractors
 - Insurance

Implementing Appendix B-1, B-2, Cal/OSHA, and CDC at the Construction Site



Let's Not Become Austin!



A medic takes the temperature of a construction worker before he enters a Rogers O'Brien Construction job site in Austin. The top public health official in Austin and Travis County said May 5 that the construction industry is becoming a "hotspot" for positive coronavirus cases. [wpxw.com/press/construction](#)

IN THIS ARTICLE

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By Daniel Salazar - Staff Writer, Austin Business Journal
May 5, 2020, 12:53pm CDT Updated May 5, 2020, 2:44pm CDT

In spite of health screenings, temperature checks and other site restrictions to slow the spread of the coronavirus, the construction industry has become a local hotspot for Covid-19 cases - with both workers and their families testing positive, Austin-Travis County's top public health official said May 5.

Entering the Job Site

- Designated Entry and Exit Points
 - Someone must monitor these locations
- Signage
 - OSHA, Appendix B1&2 Notices, DOL
- Check-in:
 - Self-Certification
 - Screening



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Screening

EMPLOYEE COVID-19 CERTIFICATION

By signing below, I certify that:

- I have not tested positive for COVID-19.
- I am not awaiting results from a COVID-19 test taken out of suspicion of having COVID-19 or at the recommendation of a health care provider.
- I am not experiencing now, and have not experienced in the last 14 days, fever, cough, shortness of breath or trouble breathing, persistent chest pain or pressure, extreme fatigue, or unexplained or unusual confusion, and/or bluish lips or face (collectively, "COVID-19 symptoms").
- I have not been exposed to (i.e. come within 6 feet of or collaborated with) someone known to have tested positive for COVID-19.
- I have not been exposed in the last 14 days to someone known to have been exhibiting COVID-19 symptoms, and
- I have not traveled outside the country in the last 14 days.

Employee Name: (PRINT NAME HERE)

Signature: _____

Date: _____

Witness: _____



- Can you take temperatures?
 - Yes, but consider HIPPA, thermometer type, screener, private screening area, & more
 - Remember, practicality is important
- Employee Certification

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On-Site Monitoring

- COVID-19 Safety Compliance Officer (SCO)—Required on all projects.
- Third Party Jobsite Safety Accountability Supervisor (JSAS)—Required only on large projects.



- Daily trainings
- Sanitization and cleaning procedures
- Staggering of start, stop, & break times
- Social Distancing
- Face Mask Requirements
- Personal Protection Equipment and Maintenance
- Prevent all gathering/sharing
- Implementation of COVID procedures.

Sick Employees

- Send them home and advise they seek immediate medical care
- Notify the County and all persons at the jobsite
- Retain a third party to decontaminate and sanitize all locations accessed by the infected worker



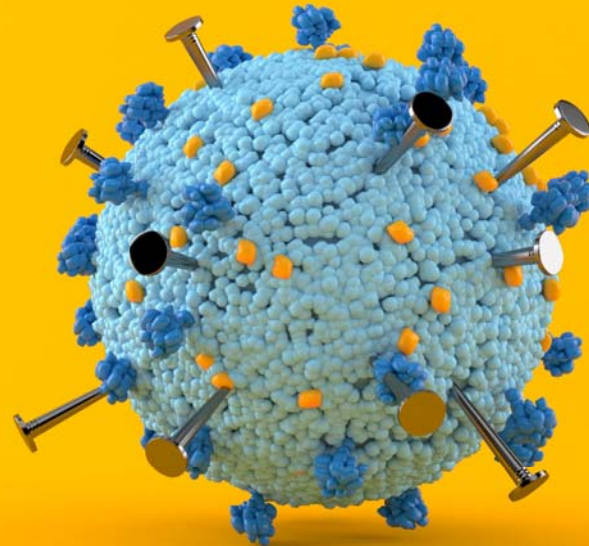
Employer Resources

- Job Site Checklist
- CDC, DOL, and OSHA Postings
- Employee Certification Form
- Summary of Appendix B1 and B2



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**Who Pays
for All
This?!**



Who Pays for All This?

■ Owner Costs

- Carry costs – financing, insurance, taxes, consultants' fees, etc.
- Loss of future income

■ Contractor Costs

- Extended general conditions – supervision, trailer, equipment, etc.
- New safety requirements – JSAS, worker screening, site cleaning, PPE, wash stations, training, signage, etc.

Who Pays for All This?

■ Subcontractor Costs

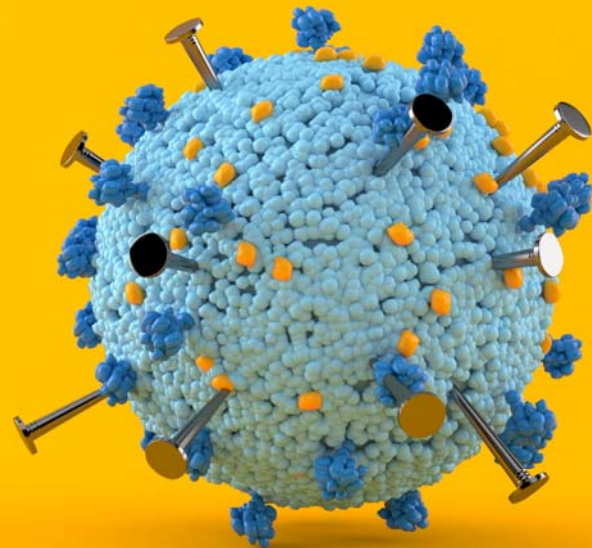
- New safety requirements – worker screening, PPE, training, etc.
- Increased cost to perform/Loss of productivity – reduced workforce, social distancing, staging of work
- Price increases – labor rates, materials costs
- Extended general conditions – supervision, equipment, etc.

Who Pays for All This?

***ALL PARTIES – GIVE TIMELY NOTICE OF
POTENTIAL CLAIMS***

WORK TOGETHER TO MITIGATE LOSSES

**Owner
Claims**

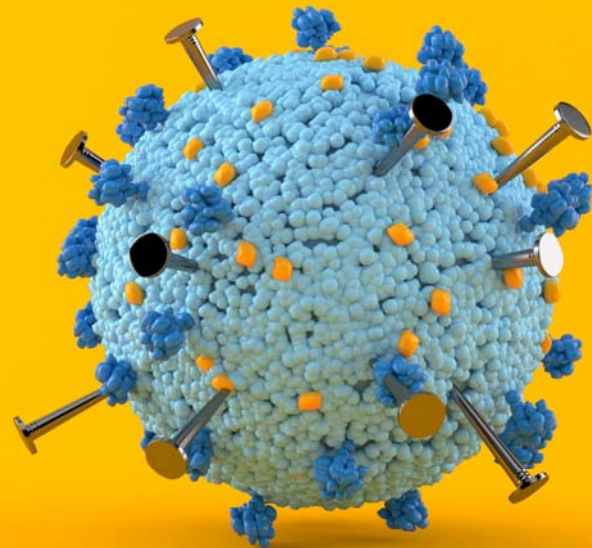


Owner Costs

May Owner recover from Contractor for costs of COVID-19 delay?

- Probably not
 - Differing site conditions clauses generally allow Contractor time adjustment
 - Force majeure clauses generally allow Contractor time adjustment
 - Civil Code section 1511 allows Contractor time adjustment due to SIP Orders

Contractor Claims



Contractor Costs

May Contractor recover from **Owner** for costs of COVID-19 delay and compliance costs?

- Maybe
 - Differing site conditions clauses generally allow for time and price adjustments
 - Force majeure clauses generally allow only time, but may allow for price adjustments
 - **Not** Civil Code section 1511
 - To extent delay caused by Owner, possible right to compensation

Contractor Costs

May Contractor recover from **Subcontractor** for costs of COVID-19 delay?

- Probably not
 - Differing site conditions clauses generally allow subcontractor additional time
 - Force majeure clauses generally allow subcontractor additional time
 - Civil Code section 1511 allows subcontractor additional time due to SIP Orders

Differing Site Conditions

AIA A201 (2017) Owner-Contractor + Flow Down

§ 3.7.4 CONCEALED OR UNKNOWN CONDITIONS If the Contractor **encounters conditions at the site** that are . . . (2) **unknown physical conditions of an unusual nature** that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor shall **promptly provide notice** to the Owner and the Architect before conditions are disturbed and in no event later than **14 days after first observance of the conditions**. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend that an **equitable adjustment be made in the Contract Sum or Contract Time, or both**.

- See also AIA Subcontract A401 (2017) which incorporates the A201

Differing Site Conditions

ConsensusDocs 200 (2018) Owner-Contractor + Flow Down

3.16.2 CONCEALED OR UNKNOWN SITE CONDITIONS If a **condition encountered at the Worksite** is (a) subsurface or other physical condition materially different from those indicated in the Contract Documents, or (b) **unusual and unknown physical condition materially different from conditions ordinarily encountered** and generally recognized as inherent in Work provided for in the Contract Documents, Constructor shall **stop affected Work** after the concealed or unknown condition is first observed and give **prompt written notice** of the condition to Owner and Design Professional. Owner shall investigate and then issue an Interim Directive specifying the extent to which Owner agrees that a concealed or unknown condition exists and directing how Constructor is to proceed. **Constructor shall not be required to perform any Work relating to the condition without the written mutual agreement of the Parties**. Any **change in the Contract Price or the Contract Time** as a result of the condition, including any dispute about its existence or nature, shall be determined as provided in ARTICLE 8.

- See also ConsensusDocs Subcontract 750 section 7.3

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

Statutory Force Majeure Provisions

Civil Code Section 1511:

The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, **is excused** by the following causes, to the extent to which they operate:

1. When such **performance or offer is prevented or delayed** by the act of the creditor, **or by the operation of law**, even though there may have been a stipulation that this shall not be an excuse; however, the parties may expressly require in a contract that the **party relying on the provisions of this paragraph give written notice** to the other party or parties, **within a reasonable time** after the occurrence of the event excusing performance, of an intention to claim an extension of time or of an intention to bring suit or of any other similar or related intent, **provided the requirement of such notice is reasonable and just**;
2. When it is prevented or **delayed by an irresistible, superhuman cause**, or by the act of public enemies of this state or of the United States, **unless the parties have expressly agreed to the contrary**; or,

...

AIA Force Majeure Provision

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.**

ConsensusDocs Force Majeure Provision

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.

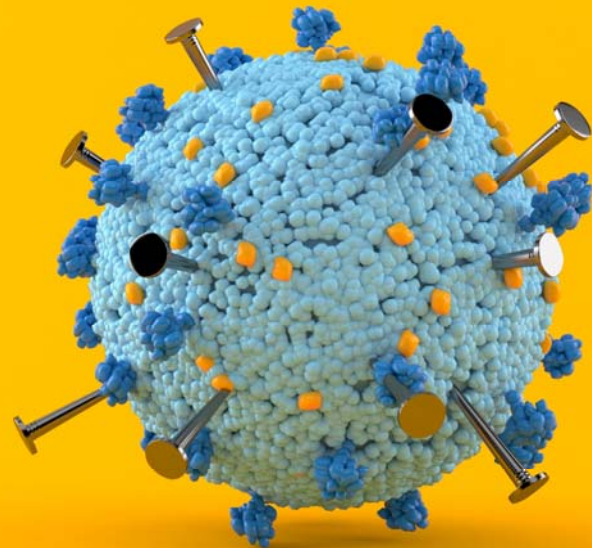
CA Judicial Counsel Force Majeure

“Force Majeure” means a delay which impacts the timely performance of Work which neither Contractor nor the State are liable because such delay or failure to perform was unforeseeable and beyond the control of the party. Acts of Force Majeure include, but are not limited to:

- i. Acts of God or the public enemy;
- ii. Acts or omissions of any government entity;
- iii. Fire or other casualty for which a party is not responsible;
- iv. Quarantine or epidemic;**
- v. Strike or defensive lockout; and,
- vi. Unusually severe weather conditions.

By the Judicial Council of California, a sample of which may be found here:
<https://www.courts.ca.gov/documents/parking-cmjcente-rfp-attache.pdf>

Subcontractor Claims



Subcontractor Costs

May Subcontractor recover from **Contractor for costs of COVID-19 delay and extra costs?**

- Probably not delay, but maybe costs
 - Differing site conditions clauses generally allow subcontractor additional time and money to extent recoverable from Owner
 - Force majeure clauses generally allow subcontractor additional time but not money
 - Civil Code section 1511 allows subcontractor additional time due to SIP Orders but not money

Subcontract Force Majeure Provision

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.

AIA Subcontract “Flow-Down”

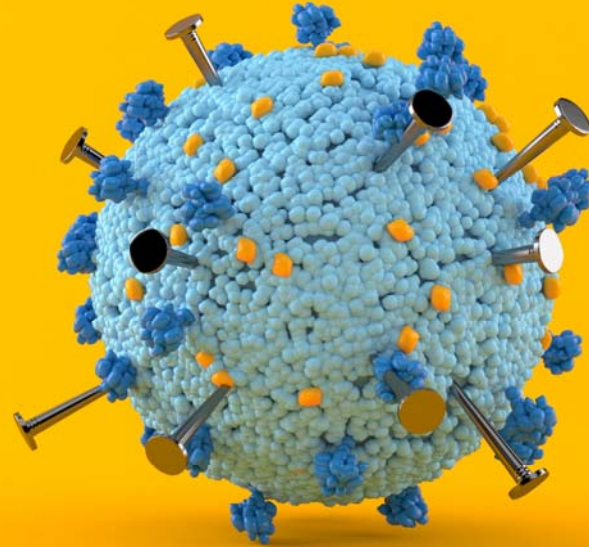
ARTICLE 2 MUTUAL RIGHTS AND RESPONSIBILITIES

The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201–2017 apply to this Agreement pursuant to Section 1.3 and provisions of the Prime Contract apply to the Work of the Subcontractor, ***the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor***, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities that the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies, and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the ***Subcontractor shall have the benefit of all rights, remedies, and redress against the Contractor that the Contractor, under such documents, has against the Owner***, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.

ConsensusDocs Subcontract “Flow-Down”

3.1 OBLIGATIONS The Parties are mutually bound by the terms of this Agreement. To the extent the terms of the prime agreement apply to the Subcontract Work, then ***Constructor assumes toward Subcontractor all the obligations, rights, duties, and redress that Owner*** under the prime agreement assumes toward Constructor. In an identical way, ***Subcontractor hereby assumes toward Constructor all the same obligations, rights, duties, and redress that Constructor assumes toward Owner*** and Design Professional under the prime contract. In the event of an inconsistency among the documents, the specific terms of this Agreement shall govern.

Make Insurance Pay?



Premises Coverage

- **Owner, Contractor, or Subcontractor, as to premises they own or rent**
 - **“Business Interruption” insurance** policies may cover loss of income *at the premises* due to disaster
 - **BI “civil authority” coverage** may cover loss of business income *at the premises* due to government-mandated closures of business premises
 - Possible **“contingent business interruption” coverage** for losses due to disruption of a *supplier's business operations* and ability to supply project materials

Premises Policy Coverage Issues

- 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

Builder's Risk Basics

A. COVERAGE

We will pay for *direct physical loss* to Covered Property from any *Covered Cause of Loss* described in this Coverage Form.

3 COVERED CAUSE OF LOSS

Covered Cause of Loss means *risk of direct physical loss* to Covered Property, *except* those causes of loss listed in the *Exclusions*.

2. Loss means *accidental loss* and accidental *damage*.

Sample Builder's Risk Loss of Income and Soft Costs Coverage

Earnings, Rents and Soft Costs [for site owner]:

We cover *loss of earnings and rental values* you lose, or soft costs you incur *because of a covered cause of loss* under the Policy. Soft costs are limited to the following:

1. Additional *interest* expense on money you borrow to finance construction or repair.
2. Additional realty *taxes* and other assessments which you incur for the period of time that construction has been extended beyond the projected completion date that existed before the loss occurred.
3. Additional *advertising* and promotional expenses which become necessary as a result of a covered loss; and
4. Additional *costs*, such as commissions, which result from renegotiation of leases and other similar extra expenses incurred following an interruption to the project.

Sample Builder's Risk Ordinance or Law Provision

Ordinance or Law

Exclusion a. Ordinance or Law under B.1. Exclusions is deleted.

Ordinance or Law coverage is provided for loss or damage caused by or resulting from the enforcement of any ordinance or law:

- (1) Regulating the construction, **use** or repair of **any property**; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris; **and**
- (3) **That is in force at the time of the loss or damage.**

This extension of coverage **does not apply to the following:**

- (1) An ordinance or law that is in force even if the property has not been damaged; or
- (2) **The increased costs incurred to comply with an ordinance or law in the course of construction,** repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss or damage to that property.

Sample Virus Exclusion

j. **Virus Or Bacteria**

- (1) Any **virus**, bacterium or other microorganism that induces or is **capable of inducing physical distress, illness or disease.**
- (2) However, the exclusion in Paragraph (1) does not apply to loss or damage caused by or resulting from "fungi", wet rot or dry rot. Such loss or damage is addressed in Exclusion i.;
- (3) With respect to any loss or damage subject to the exclusion in Paragraph (1), such exclusion supersedes any exclusion relating to "pollutants".

Sample Government Action Exclusion

3. *We will not pay for a loss caused by or resulting from any of the following.* But if loss by a Covered Cause of Loss results, we will pay for the resulting loss caused by that Covered Cause of Loss.

b. *Acts or decisions*, including the failure to act or decide, of any person, group, or organization representing a *governmental, regulatory or controlling body*.

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