Construction in a Pandemic World and State of Emergency

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Hopefully the abstract world we live in as of late will be back to normal before too long. However, in the meantime, it is important to keep focused on successful completion of your projects. Impacts to supply chains, directions from heads of state to practice "social distancing", and school closures may have an effect on the timeliness and cost of projects. According to a blog post on the National Law Review dated March 13th, Dun & Bradstreet reported, "at least 51,000 (163 Fortune 1000) companies around the world have one or more direct or Tier 1 suppliers in the impacted regions, and at least five million companies (938 Fortune 1000) around the world have one or more Tier 2 suppliers in the impacted region." Factory closings, transportation restrictions and general concerns about the Covid 19 pandemic are causing shortages of critical supplies and labor and are testing the bounds and obligations of various purchase orders entered into between suppliers and contractors.

While it is always best practice to know what is in your contract and how the clauses may affect you, it has been some time since force majeure clauses have come into play. Generally speaking, force majeure clauses operate to relieve one or both parties of some or all of their contractual obligations if an unforeseeable event beyond either party's control prevents or delays full or partial performance of obligations under the contract. Keep in mind, however, that parties are free to define what a force majeure event is in the contract, and it is thus important to read your contract to understand whether local, state or federal directives in response to the Covid 19 pandemic might fall under the force majeure clause. While all contracts do not specifically reference "force majeure," some contract provisions broadly provide that contractors will not be held liable for delays beyond their control. By way of example, we recently reviewed a contract with the following language:

Where Contractor is prevented from completing any part of the work within the Contract Times due to delay beyond the control of Contractor, the Contract Times will be extended in an amount equal to the time lost due to such delay........Delays beyond the control of Contractor shall include, but not be limited to, acts or neglect by Owner, acts or neglect of utility owners or other contractors performing other work, fires, floods, epidemics, abnormal weather conditions, or acts of God. Such an adjustment shall be Contractor's sole and exclusive remedy for the delays.

You should also be aware that not all contracts contain a force majeure clause. If your operative contract does not, check to see if a contract above yours (i.e., if you are a subcontractor, the prime contract) contains such a clause that might by operation of law flow down to your contract. If not, the doctrine of frustration of purpose might come into play.
Frustration of purpose occurs when, after the contract is made, an event occurs (without either party's fault and for which the contract makes no sufficient provision) which so significantly changes the nature of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time it was made, that it would be unjust, in the new circumstances, to hold them to its literal wording. Performance that is only more expensive or more difficult is not enough to meet this burden.

Whether the coronavirus outbreak constitutes a force majeure event or frustration of purpose, and whether you are able to recoup compensation for escalated material and labor costs will depend on the language of your contract and the circumstances at issue, the relationship between the pandemic and nonperformance, and the state or federal law applicable to your project.

Given the recently announced state of emergency, it is likely that contractors will experience labor shortages and increased material costs. Some contracts contain escalation provisions which allow for adjustments in fees, wages, or other payments to account for fluctuations in the costs of raw materials or labor. For example, many contracts include escalation provisions for fuel due to ever changing oil prices. If you encounter a significant cost increase for labor or materials and do not have an escalation clause in your contract, all is not necessarily lost. The doctrine of impracticability may come into play and excuse performance that is no longer financially feasible. Traditionally, the doctrine applies if performance has become excessively burdensome (i.e., impracticable) by a supervening event that was not caused by the party seeking to be excused, and that is inconsistent with the basic assumption of the parties at the time the contract was entered. Historically, courts have been reluctant to apply the doctrine of impracticability; showing that performance is significantly more expensive is typically not enough. However, given the pandemic and state of emergency, courts may apply the doctrine more liberally.

Additionally, Article 2 of the Uniform Commercial Code (UCC) governs contracts that are predominantly for the sale of goods. The UCC contains provisions that sometimes excuse performance for events which are not foreseeable (again, when performance becomes impractical) provided that certain conditions are met, and proper notice is provided. Thus, whether your suppliers are excused from their obligations to timely deliver materials under existing contracts may depend on standard provisions in the UCC.

To assess your rights, obligations, and remedies, you should:

- **Review your contract.** Determine whether your contract includes a force majeure clause, and if so, whether the definition might include the Covid19 pandemic as it applies to your situation. If not, review the upstream contracts and assess whether you can flow one down into your contract. Locate your notice of claims provisions and make sure you strictly adhere to them.

- **Manage your risk.** If a subcontractor or supplier sends you a notice claiming force majeure, be sure to timely pass that notice up the chain of command. If your contract requires that you provide notice of increased material and labor costs, be sure to do so. Review your contracts to determine if any breach, termination, cancellation, or repudiation terms exist that may be applicable under the circumstances.
• **Seek the advice of a construction law attorney.** Ask your lawyer to determine what law governs the contract and how the *force majeure* clause is interpreted in the jurisdiction to which you are subject. If your contract does not include a *force majeure* clause, ask your lawyer to provide you with an analysis of the doctrine of *frustration of purpose* and how it might provide relief in your circumstances.

The ultimate question to be answered will be whether the Covid19 pandemic is the cause of yours or some other entity’s nonperformance. Consider whether the party could have timely performed if the outbreak did not occur or a state of emergency not declared. Keep in mind too, that parties may try to take advantage of the state of emergency and attempt to obtain relief under the *force majeure* clause, frustration, or *impracticability* doctrines. If other factors contributed to nonperformance, a *force majeure* clause or the doctrine of *frustration of purpose* may not be applicable. Keep in mind too, that all parties have an obligation to mitigate their damages. If there are other means through which a party might perform, that party will likely be required to take reasonable steps to perform through such other means, and it will not be relieved of its contractual obligations.

All in the construction industry need to be situationally aware of how the pandemic (including the governmental responses to it and all ripple effects) may impact the successful completion of their projects. Depending on your contract and case specific facts, there may be multiple avenues to address impacts arising from the pandemic. Having knowledge of your contract and seeking the advice of a knowledgeable construction attorney will go a long way to choosing the best path forward and managing your risks.