

COVID-19: Impacts and Responses in the Construction Industry

As a result of COVID-19, the construction industry has been forced to adapt to significant challenges and formulate project-by-project solutions to mitigate the delays and other impacts caused by COVID-19 whilst protecting commercial interests. This alert discusses how COVID-19 is impacting the construction industry and best practices for owners and developers when responding to these challenges.



1 WORKPLACE SAFETY GUIDELINES

Minimizing the spread of COVID-19 has become a top priority for all responsible participants in construction projects. Thus, key participants (including the owner/developer, general contractor, and key subcontractors) will need to jointly develop a plan that identifies COVID-19 related health and safety precautions to be deployed at the jobsite, as well as the party responsible for implementing these precautions. Local governmental agencies, such as Occupational Safety and Health Administration (United States), Health and Safety Executive (United Kingdom), Department of Occupational Health (China), European Agency for Safety and Health at Work (European Union), Ministry of Labor and Social Affairs (Germany), Ministry of Health (Mexico), among others, have issued guidance specific to construction jobsites to ensure safe and

healthful working conditions during these unprecedented times (although the extent to which such guidance is binding varies).

Owners are recommended to take steps (or at least make sure that their contractors are taking steps) that represent local best practice, including:

- use of cleaning chemicals pre-approved by local agencies for cleaning frequently touched surfaces such as tools, handles, and machines
- screening of all visitors and employees for signs and symptoms of COVID-19
- performing temperature checks and pre-access jobsite questionnaires
- establishing protocols to manage employees displaying symptoms of illness in the workplace

- keeping premises well ventilated
- instructing employees who traveled to high-risk areas to quarantine for an appropriate period.

Of course, compliance with local social distancing and other binding regulations (including site shutdowns, reduced workforces etc.) will be critical. Local governments may require owners and/or contractors to safely secure a jobsite and suspend construction until a corrective action plan is prepared, submitted and approved by an applicable governmental authority. Owners may also be required to appoint an individual responsible for the company's compliance with local guidance and safety orders. In geographic areas where COVID-19 cases have elevated or resurged, local governmental agencies may conduct onsite inspections. In the event of an inspection, owners and/or contractors will likely be asked to produce, among other things, a written pandemic plan, procedures for hazard assessment, protocols for personal protective equipment use, medical records related to worker exposure incidents, and information concerning periodic testing procedures.



2 SYSTEMIC APPROACH IN HANDLING COVID-19 IS KEY

Before developing specific solutions, we recommend project owners, especially those with multi-site (including multi-jurisdictional) construction programs, develop a unified approach on how to handle COVID-19 systematically and effectively.

Starting even before March 2020 (as supply chain disruptions were first being experienced), many contractors have notified project owners of their intention to invoke the doctrine of force majeure as justification for suspension, shutdowns, and possible delays and cost increases on their construction projects. Before responding to these notices and requests, it may be helpful for project owners to take the following steps:

- I. Analyze the contractual position, which would include analysis of the following:
 - A. whether force majeure exists as a contract remedy, and if not, whether there is another term such as "excused delay" which may be triggered by the particular circumstances notified

- B. suspension (and termination) rights and remedies of the parties, including as to different consequences depending on which party exercises such rights
- C. entitlements to additional payment that may arise from force majeure or excused delay (or change in law)
- D. analysis of whether there is any business interruption policy or other insurance which could respond to any of the costs and losses resulting from COVID-19.

We include further comments on these considerations later in this alert.

- II. In addition to examining existing contracts, project owners with multiple projects in different jurisdictions may benefit from a general legal force majeure guidance that would cover the following:

- A. what force majeure means and whether it can be used to excuse non-performance;
- B. differences between common and civil law jurisdictions (e.g., under civil law systems, force majeure generally exists as a doctrine established by a civil code, and force majeure concepts imbedded within that code may actually override the contractual terms agreed

to between the parties in the contract; whereas under common law systems, force majeure will not usually apply automatically as it is rather a creation of a contract and subject to a meeting of the minds as to its consequences)

- C. if project owners did not have force majeure clauses in their existing contracts, they may want to consider preparing standard force majeure language to include in applicable contracts currently under negotiation, at least to incorporate known effects of COVID-19.



3 MAINTAIN RECORD OF IMPACTS

Very often, COVID-19 guidelines and additional work requirements will impact work schedules and the productivity of contractors. In the event a construction site is shut down due to a governmental order, owners should meet with their contractors to determine the status of their projects at the time of the shutdown and the work remaining. Moving forward, owners should request their contractors to submit detailed reports of impacts and real time itemization. Parties to construction contracts should regularly collect data regarding the circumstances affecting the work and their mitigating efforts. This data collection will allow the parties to accurately track impacts and anticipate delays and extra expenditures.



4 DETERMINE COST AND SCHEDULE IMPACT

Parties to contracts predating the outbreak of COVID-19 must analyze the usual time extension and additional cost grounds, as well as any force majeure and change in law provisions, to understand how the risk is allocated between owner and contractor. Some force majeure provisions will extend to pandemics and the typical outcome would therefore be that the contractor is entitled to time extensions but no additional cost (although force majeure remedies are contractual and can therefore vary from contract to contract). Some contracts protect contractors from some or all consequences of change in law, and the contractor may therefore find itself protected against certain regulatory responses to COVID-19, even if not against the direct consequences of COVID-19 itself. In addition, unforeseen circumstances such as COVID-19 may well qualify for certain extensions of time grounds and additional cost through the usual time and cost grounds. In each case, though, it is important to analyze the specific contractual language and to remember that the contractor will be required to mitigate the impacts to secure full contractual entitlements. Where suppliers and subcontractors are the cause of the delays, this may include procuring the materials elsewhere, possibly at higher purchase prices.

There is a spectrum of risk transfer in construction contracts and scope for varying interpretations of provisions, which do not expressly deal with, but which may be triggered by, COVID-19 and the fallout from it. How a particular owner or contractor approaches negotiations will depend upon its analysis of the relevant contractual provisions and the impacts that COVID-19 has on the project (particularly the economic fall-out) as well as the relationship between the parties. In the early days of COVID-19 and enforced site shutdowns, amidst a general sense of despair about the growing pandemic (which then was not expected to have the longevity now known), we found many parties wanted to collaborate to establish a framework for cost and/or time adjustments. There was a sense in many negotiations that both parties were simply in this together along with everyone else and that the impacts would to some extent be shared. Many contractors recognized that they could not expect full protection in a world where everyone else was taking a hit, whilst of course also still protecting their bottom lines and looking to owners to accept delays in procurement and progress.



As time has gone on and as the industry has adjusted to the new normal, we have seen both owner and contractors taking a firmer position and digging their heels in, leading to continuing uncertainty as to how certain COVID-19 related time and cost claims will ultimately be resolved but often with a resolve to minimize the delays (in part at least due to the uncertainty as to how delay claims will ultimately be resolved).

In addition, owners should review their contractual pricing structures. For cost-plus contracts, owners will often bear all increases to cost of work caused by COVID-19. Possible cost containment actions may include issuing a stop work order or amending budgets and project schedules to provide for the bifurcation of work between suspended on-site work and ongoing planning and design work. As to Guaranteed Maximum Price (**GMP**) contracts, contractors bear cost overruns if GMP has been fixed, as owners have price protection and can leave to contractors the discretion to manage COVID-19 related issues, but the abovementioned contractual provisions may provide for an adjustment to the GMP. It is also important to assess how contingencies are structured, whether they are available to respond to COVID-19 costs and which party controls these. Similar to GMP contracts, fixed sum contracts protect owners since

contractors agree to perform the work for a predetermined amount, regardless of whether costs and expenses such as labor or supplies rise, but the fixed price may be subject to adjustment for certain COVID-19 related impacts. Notwithstanding the agreed pricing structure, owners should work closely with their contractors to try to prevent liquidity issues and should agree any changes in cost or timing in writing (usually by change order) to avoid uncertainty.



5 NEW NEGOTIATION POINTS

Now that the construction industry is adapting to its new normal, with its increased cost-base and productivity and scheduling challenges, many parties are looking to address the impacts of COVID-19 upfront in their contracts to the extent possible. This approach

requires adjustments to standard forms and bespoke contracts, often in the form of a tailored COVID-19 clause. Parties should consider the following issues and provisions in future construction contract negotiations:

- A. Compensation:** there are now known costs associated with social distancing and other COVID-19 related mitigation efforts on construction sites, and these are unlikely to be avoidable in the near future. Contractors will generally allow for such costs in fixed price and GMP amounts, although some contracts include such costs as an allowance item or provide for a reduction in cost if restrictions are lifted sooner than substantial completion. Other COVID-19 related costs, such as delay costs where the delay is not allowed for in the programme and increased costs of procurement due to localized lockdowns may be the subject of additional cost claims, although contractors will often be expected to mitigate these costs and ensure that they have a resilient supply chain (to avoid both such costs and related delays).
- B. Delay entitlements:** many new construction contracts allow for delays that can be anticipated due to COVID-19, but not for further shutdowns of sites, whether due to lockdowns or site personnel testing positive. In most cases, contract terms will then allow for the contractor to claim additional extensions of time.

C. Force majeure: whether contractual force majeure provisions need to be revised to include epidemics, pandemics and related government orders, as well as other methods to mitigate the effects of force majeure events. Often, a pandemic specific clause will better deal with the impacts of COVID-19 rather than a traditional force majeure clause, although some of the provisions may look quite similar.

D. Changes or extra work clauses: whether owners can require contractors to perform changed, new, or extra work. The scope and compensation scheme for additional or changed work should also be incorporated.

E. Changes in applicable law: whether the construction project would be impacted by governmental orders that place restrictions on global supply chain and on the actual construction. Changes in applicable law provisions in construction contracts may

grant contractors a right to an extension of time and compensation for inevitable costs incurred due to the changes in applicable law. The bigger challenge is often with best or expected practice around COVID-19 avoidance and mitigation which is not legally binding in nature. Of course, the expectation is then that the contractor complies, but contract protections may not be properly triggered. Parties should be alive to this in their negotiations.

F. Payment scheme: whether the payment scheme should be adjusted in order to work around the uncertainty of the labor and supply chain markets. For example, owners may want to set a limit on added costs resulting from unforeseen events and any costs beyond such limit may need to be covered by contractors. Owners may also want to pay a percentage of the difference between the actual cost and the maximum price.

This encourages contractors to find labor and materials that meet the industry standards but which are also reasonable priced.

G. Suspension: whether the parties have the right to completely or partially suspend the work and which party will bear the added costs resulting from suspension of work or by increased costs for labor, material, security, additional safety measures, or construction permit extensions. The consequences under many construction contracts will depend on whether the owner or the contractor instructs the suspension, and the consequences should be carefully considered for new contracts.

H. Termination: whether an owner should have the right to re-evaluate the economic feasibility of moving forward with the project and be able to terminate at will.

COVID-19 continues to present challenges to owners and impose new regulatory requirements with respect to workplace health and safety. We are continuing to monitor industry changes and can advise you on the issues above or others you may face related to COVID-19.

For more legal and business challenges posed by COVID-19 view the Baker McKenzie Global COVID-19 Resource Center [here](#).

