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FORCE MAJEURE AND THE IMPACT OF THE CORONAVIRUS PANDEMIC ON CONSTRUCTION CONTRACTS

The spread of COVID-19 and the response from local, state, and federal governments is impacting construction projects throughout the country. Contractors are likely to incur delays, suspensions, lack of materials, labor impacts, and productivity issues because of ongoing and ever-changing guidance from health care professionals. Following is a summary of legal issues contractors may be forced to address during this time.

To the extent contractors can continue performance and make progress for ongoing projects in compliance with applicable restrictions, contractors should do so. Performance should continue until the owner or an applicable governmental authority orders performance to stop, or until the contractor is no longer able to make meaningful progress, due to labor shortages, lack of materials or equipment, or government-imposed restrictions. If a contractor is already unable to make progress under the contract, as described in detail below, they should review the terms of their contract and provide immediate notice to the owner.

FORCE MAJEURE

Many contractors have heard the term “force majeure,” but until now have not experienced a force majeure event, such as the COVID-19 pandemic. Force Majeure is a concept frequently used in contracts to describe a situation where the contract becomes impossible or too onerous to perform, due to events outside the affected parties’ control. The application of a particular force majeure event to a specific contract may be governed by the terms of the contract, common law, or statute. Generally, a force majeure event will excuse a party from performance, however, the scope of remedies may have been limited by agreement between the parties.

FORCE MAJEURE CONTRACT PROVISIONS

Force majeure provisions often appear as a boilerplate clause within a contract. They are frequently referred to as the Act of God provision, covering the occurrence of events outside the parties’ control, such as natural disasters, war and disease. Some force majeure provisions are explicit in their definition whereas others may contain wide sweeping, non-exhaustive language. Where a force majeure provision applies, it will usually control.

Force majeure provisions often prescribe the remedies available to a party if a force majeure event occurs. In construction contracts these provisions are regularly used to limit a parties’ remedy, for instance by granting a time extension where an applicable force majeure event occurs, rather than excusing performance in its entirety. A party’s ability to rely on a force majeure provision may be conditioned upon compliance with certain obligations, such as a duty to provide notice. Whatever the content of the clause, parties should remember that in California, contract is a matter of consent. Courts will generally interpret force majeure clauses according to their plain language, and are usually reluctant to ignore the intent of contracting parties, particularly where this is clear from the face of the contract. →

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IMPOSSIBILITY AND IMPRACTICABILITY

Where there is no applicable force majeure provision, a parties' performance may still be excused under the law of impracticability or impossibility. Impossibility can arise when performance is no longer physically possible. Impracticability on the other hand can excuse a parties' performance where performance can only be accomplished with excessive and unreasonable" cost; performance becomes "impracticable," though still technically possible. There is a high threshold and evidential burden to establish impracticability.

In many construction contracts, the terms require a contractor to continue work, even where costs are disputed. Parties considering the defense of impracticability or impossibility should ensure they keep comprehensive records of the additional costs they incur, the additional challenges they face, and their attempts to overcome these. Contractors should also be aware of the eventuality that their inability to perform (for instance due to the imposition of government-imposed restrictions) is regarded as temporary impossibility. Temporary impossibility usually only suspends the obligation to perform during the time it exists. The impact of COVID-19 changes daily as new information and preventative measures are taken. It is unclear at this stage how long restrictions will last, or what the lasting impact of the virus will be. Contractors are recommended to stay informed daily, and must remember that the obligation to perform may not be excused or discharged by temporary impossibility — it may merely be suspended.

NEXT STEPS

COVID-19 has created an unprecedented disruption to the business environment in the United States. We recommend contractors take the following steps:

■ Review Contracts with All Parties

Contractors should begin by identifying all active contracts that could be affected by the pandemic (i.e. contracts with owners, subcontractors, suppliers, manufacturers, transport, insurance, etc.). Contractors should identify their respective rights and obligations set out in the contract, paying particular attention to:

- (1) the force majeure provisions, and any duty to provide notice of a claim;
- (2) any applicable pass-through provisions; and
- (3) provisions for dealing with disputes, for instance, through ADR or arbitration.

As outlined above, contractors should be aware in some instances they may be under a duty to continue performance, even where costs are disputed.

■ Risk Assessment

Regardless of present ability to perform, contractors should assess their ability to utilize alternative resources (labor, material, and equipment etc.) and the likely overall impact on performance as the COVID-19 situation evolves. The impact of COVID-19 is highly fluid. Restrictions and obligations are changing on a daily basis and so may a contractor's or subcontractor's ability to perform. However, if a contractor can demonstrate that it has explored and attempted to provide for contingencies, it will bolster an argument that performance was either impossible or impracticable.

■ **Mitigate**

Contractors should comply with the contract as far as reasonably possible in order to minimize loss. This may include partial performance, early communication with affected parties and engaging in good faith negotiation for amendments to the contract where appropriate. Contractors should closely monitor the situation as it continues and work within the restrictions. It may be possible to resume performance some time in the future. Parties may come under criticism for unnecessary delay if they fail to remobilize when it is reasonable for them to do so.

■ **Document**

A contractor that wishes to rely on a force majeure provision or impracticability defense will have the burden of proof. It is imperative that issues encountered and attempts to overcome these issues are well documented. Increased costs for labor, materials, equipment, overheads for additional or adapted work environments, etc., should all be documented. As should correspondence with other affected parties, such as owners, subcontractors and suppliers.

Contractors are recommended to stay informed daily, and must remember that the obligation to perform is not excused or discharged by temporary impossibility—it is merely suspended—until the delayed performance becomes materially more burdensome or the temporary impossibility becomes permanent.

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Finch, Thornton & Baird, LLP, continues to monitor the fast-changing legal landscape for your workplace during these unprecedented times. Please visit our website for up-to-date developments or contact us with your legal questions. ■

For more information, please contact Jason R. Thornton, Esq. at (858) 737-3100.

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