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WHITE PAPER



**WHAT CONTRACTORS SHOULD
KNOW IN A CORONAVIRUS WORLD**

FORCE MAJEURE AND OTHER KEY CONTRACT PROVISIONS

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What Contractors Should Know in a Coronavirus World

Force Majeure and Other Key Contract Provisions

INTRODUCTION

The rapid spread of COVID-19 (also known as coronavirus) has raised questions as to the contractual obligations of parties, particularly in the construction industry where delays or suspensions in projects can result in significant increases in overhead and cost. Contractors and owners need to know how the spread of COVID-19 and the subsequent government shutdowns may affect their projects. This article will discuss notice requirements and the right to time extensions and increases to contract sums under: (1) force majeure clauses; (2) suspension clauses; and (3) emergency clauses in the AIA A201 General Conditions and federal regulations. This article is a general overview for contractors and owners. Contracts for ongoing projects should be reviewed individually to determine your rights and obligations as it relates to claims for additional compensation and/or time due to the threat of COVID-19.

I. FORCE MAJEURE CLAUSES

In the construction context, a force majeure clause refers to “certain circumstances and events that are recognized as being above and beyond the control of contracting parties and that could not reasonably have been foreseen or avoided by the due care of either of the parties.” See William Cary Wright, *Force Majeure Delays*, Construction Lawyer, Fall 2006 (ABA Forum on Construction Law), at 33. Generally, a force majeure event may allow for an extension of time, but typically does not allow for the contractor to recover any losses or damages that will result in the delay of work. *Id.* There may be a claim for force majeure under the general provisions of the AIA A201 and Louisiana contract law.

A. AIA A201 SECTION 8.3.1

The AIA Document A201-2017 contains a general force majeure clause. Specifically, Section 8 of the AIA 201 discusses delays and extension of time for certain events:

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 a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, 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 times as the architect may determine. See AIA Document A201-2017 at § 8.3.1.

If any of the reasons listed above are satisfied, a time extension should be granted. However, the provision does not permit an adjustment to the contract sum. Note that this would be under the standard contract provision. Some individual contracts may provide for an adjustment of damages for delay or contract sums.

Generally under this provision, the contractor must prove: (1) the project was delayed; and (2) the “delay was a result of an act or neglect of the owner, architect or separate contractor; changes in the work; or other causes beyond the contractor’s control.” See *Delays and Extensions of Time (risk allocation)*, 2 Bruner & O’Connor Construction Law § 5:173; *Appeal of G & S Const., Inc.*, 89-2 BCA P 18791 (1986) (stating contractor was entitled to time extension due to weather conditions.). It is important to note that under Section 15.1.2 of the A201-2017 that there is a 21-day notice requirement running from the time of the event.



In *Citadel Builders*, the contractor entered into a construction contract with an owner of the property; however, Hurricane Katrina hit Louisiana not long after construction started. *Citadel Builders v. Transcontinental Realty Inv'rs*, No. 06-cv-7719, 2007 WL 1805666, at *1 (E.D. La. June 22, 2007). The owner attempted to cancel the contract claiming work was impossible or impracticable. *Id.* The contractor filed suit claiming that performance was not impossible, the owner terminated the contract for convenience, and payment was owed for contract sums during delay and lost profits. *Id.* at 2. Although the court did not rule as a matter of law that Katrina and her aftermath were or were not fortuitous events under Louisiana law, the court ultimately denied a summary judgment motion filed by the contractor due to issues of fact surrounding the contractor's ability to complete the project for the price negotiated in the contract. Specifically, the court stated that the contractor "cannot prevail unless it stood ready to honor its own obligations under the contract including completing the project at the pre-Katrina agreed upon price." *Id.* at 4.

In *WinCo Foods*, a grocery store entered into a contract with a general contractor to build a store. *WinCo Foods, LLC v. Crossland Construction Co., Inc.*, 2019 WL 6220987, *4 (W.D. Okla. 2019). The contract was an A201-2007 contract, which provided for an extension of time in the event specific events caused delay in the commencement or progress of the work. *Id.* Weather significantly impacted the progress of the work. *Id.* at *1. Suit was filed over whether the contractor requested an extension of time under the AIA contract. *Id.* The court denied summary judgment on the issue. *Id.* The court reasoned that the contractor was entitled to an extension of time under the contract, but there was a question of fact as to whether the contractor complied with the notice requirements in the contract. *Id.*

Similar to the *Citadel* and *WinCo* contracts, which provided for an extension of time, contracts entered prior to the COVID-19 outbreak would likely have similar provisions providing for extensions of time. Case law has not directly addressed interruptions or events such as an epidemic or pandemic, but most AIA provisions are drafted much broader than an exclusive list of events. In most instances, the contract simply requires that delay not be due to the fault of the contractor. In terms of COVID-19, there could be an interruption in work due to lack of workers, materials, or access to the job site. Thus, it is highly likely that the virus would satisfy the broad terms of the AIA's delay provision.

Although it is clear under Section 8.3.1 of the AIA A201 that time may be extended, increases in contract sums are not likely to be granted absent express contractual provisions. A recent article gave examples of cases where a "force majeure" clause in the AIA will likely not provide for delay payments or increases in the contract sum. The article gave two pertinent examples: (1) a New Jersey highway construction shutdown; and (2) an Illinois stop-work-order construction shutdown. Kim Slowey, *The Dotted Line: How Force Majeure Contract Clauses Can Plan for the Unexpected, Construction Dive* (July 11, 2017). What do both instances have in common? The delay was caused by a government shutdown. *Id.* In these cases, the contractors may receive more time to complete the project but waived all rights for compensable delay. *Id.* Thus, force majeure events under the AIA A201 general provisions only provide for extended time absent any contractual changes by the parties.

B. LOUISIANA AND TITLE 38

Although the general delay provisions of the AIA A201 do not address increase to contract sums or delay damages, some public contracts may require contractors to waive any and all claims arising out of a delay. This is problematic in light of COVID-19, but also because it runs contrary to La. R.S. § 38:2216(H) which provides:

Any provision waiving, releasing, or extinguishing the rights of a contractor to recover cost of damages, or obtain equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or person acting on behalf thereof, is against public policy and is void and unenforceable.



Under the Louisiana Public Bid law, a contractor cannot waive its rights to damages for delay. Thus, if such a contract contained language excluding a right to equitable adjustment or damages, that provision would be null and void.

In *Barber Bros. Contracting*, the court found a waiver clause in a public contract unenforceable under La. R.S. § 38:2216(H). In this case, a contractor entered into a public contract with the DOTD. *Barber Bros. Contracting Co., LLC v. DOTD*, 110 So.3d 1085, 1086-87 (La. App. 1 Cir. 11/8/12). The DOTD delayed construction due to its own fault. *Id.* And although the DOTD and the contractor executed an extension of time for the project, an increase in the contract price due to the delay was not given. *Id.* at 1087. Thus, the contractor filed suit for damages resulting from delay arguing that they could not waive its claims to delay damages under La. R.S. § 38:2216(H). The trial court found in the contractor's favor and precluded waiver. *Id.* On appeal, the court upheld the ruling and found the waiver violated Title 38. *Id.* at 1088-89.

Similar to *Barber Bros.* and other cases which have upheld the prohibition in La. R.S. § 38:2216(H) precluding waiver of delay damages for public projects, any public contract entered into that has a waiver provision for delay damages is null and void if "such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or person acting on behalf thereof." As increases in contract time and amounts are vital when a project is delayed, it is important for contractors to review their public contracts to determine what is allowed as it relates to delays and the exact cause of any delays which may occur as a result of COVID-19.

II. SUSPENSION AND TERMINATION CLAUSES

A contractor may not be able to recover increases in contract sums via the delay provisions in the AIA A201, but a contractor generally can receive both an increase in contract sums and an extension of time for suspensions. The owner has a broad right under the AIA A201 to suspend or terminate a contract for convenience and without cause. See AIA Document A201-2017 at Sections 14.3-14.4. When an owner suspends a contract for convenience, the contractor has a right to adjustment in both time and contract sum for the delay period. See AIA Document A201-2017 at Section 14.3.2 (note the same is true for termination).

Additionally, under an AIA contract, a contractor may terminate if the work has been stopped for a period of 30 consecutive days through no act or fault of the contractor. In these instances, the work must be stopped for: (1) issuance of a court; (2) an act of government; (3) architect's failure to issue a Certificate for Payment; or (4) fault of the Owner. See AIA Document A201-2017 Section 14.1.1. The contractor can also terminate for continued interruptions, delays, or suspensions by the owner. See AIA Document A201-2017 Section 14.1.2. In either instance, the contractor is entitled to payment for work executed, reasonable overhead and profit for work not executed, and cost incurred as a result of termination. See AIA Document A201-2017 at § 14.1.3.

In *re In Roy Frischhertz Const.*, a bankruptcy court declined to award costs due to termination. *In re Roy Frischhertz Const. Co. Inc.*, 401 Fed. Appx. 861, 862 (5th Cir. 2010). However, on appeal the court held the contractor was owed compensation for completed work under Section 14.1.1 or 14.1.2 of the AIA A201. *Id.* The court reasoned because there was proper termination of the contract, the Section "unequivocally entitles [the contractor] to recover the contractually agreed upon compensation for completed work." *Id.*

In *Winmar, Inc.*, a contractor entered into a contract; however, the owner failed to pay, resulting in suspension of the work. *Winmar, Inc. v. Al Jazeera Intern*, 741 F.Supp.2d 165, 170 (D.C. Dist. 2010). Following the suspension, the contractor notified the owner of its intention to terminate the contract. *Id.* at 175. The owner then terminated the contract for convenience. *Id.* Suit was filed and the contractor sought money owed under the contract and monies for termination and suspension. *Id.* at 177-78. The court found that the A201 provided for cost associated with the termination, such as work executed, costs incurred due to termination, and reasonable overhead and profit



for work not executed. *Id.* at 179-81. The court found that under the contract, the contractor was owed payment due to the owner's termination for convenience. *Id.* at 178. Specifically, the court held that the contractor was entitled to payment for work executed and reasonable suspension cost. *Id.* at 196. However, the court found that the contractor did not prove cost associated with reasonable overhead and profit for work not executed, although the A201 provided for such costs. *Id.*

Similar to both cases cited above that awarded adjustment of contract sums for termination and suspension, if a contract is terminated and/or suspended due to COVID-19, extra costs may be allowed as per the A201. Because the general provisions of A201 Article 14 explicitly address the payment of work executed, reasonable overhead/profit for work not executed, and cost incurred for termination, contractors will most likely be entitled to this recovery (if they entered a contract under these general provisions). As mentioned above, it is important to know what each individual contract states to determine entitlement to recovery. Under the general provisions of A201 Article 14, increase in contract sum is available.

III. EMERGENCY CLAUSES

Emergency is defined quite broadly by the AIA A201 and does not provide an exclusive list. An emergency may include any event that may threaten damage, injury, or loss. See Kim Slowey, *The Dotted Line: Legal Steps for Shutting Down a Dangerous Jobsite*, Construction Drive (Jan. 28, 2020). An emergency may also include exposures to hazardous materials. See AIA A201-2017 Section 10.3; Kim Slowey, *The Dotted Line: Legal Steps for Shutting Down a Dangerous Jobsite*, Construction Drive (Jan. 28, 2020). The focus is more on the event endangering life or property than on the actual defined emergency. See Differing site conditions, La. Prac. Constr. Law § 6:2 (stating an emergency endangers life or property).

Under AIA A201 Section 10.4, the contractor has discretion to act in order to prevent threatened damage, injury, or loss. See AIA A201-2017 Section 10.4. In this instance, additional compensation or extension of time can be claimed by the contractor on account of an emergency determined by Article 15 and Article 7 (Article 7 discussing procedure for change orders and Article 15 discussing notice of claims and resolving disputes). See AIA A201-2017 Section 10.4; AIA A201-2017 Article 7. In the event of an emergency affecting safety of persons or property, the contractor has the discretion to act. See Emergencies (risk mitigation), 2 Bruner & O'Connor Construction Law § 5:227 (discretion regarding the stopping/suspending of work for exposure to hazardous material or emergencies affecting life or property).

The AIA approach leaves compensation and time to the claims and disputes processes in the event the parties are unable to agree upon a change to the contract. *Id.* Under this process, a contractor must request a change order for the cost of any additional work and is subject to the normal review and approval process. See AIA A201-2017 Section 10.4. Although the contractor has discretion in this instance, the contractor must give the owner and architect notice. See AIA A201-2017 Section 10.4. Essentially, absent a change order granted between the parties, an increase in contract sum will not be granted without a legal dispute. Kim Slowey, *The Dotted Line: Legal Steps for Shutting Down a Dangerous Jobsite*, Construction Drive (Jan. 28, 2020). In instances where entire job sites are shut down, contractors may be entitled to additional cost related to delays. *Id.*

It is likely that the threat of COVID-19 would: (1) qualify as an emergency; and (2) entitle contractors to get extra time and increase contract sums. Arguably, COVID-19 presents a significant threat to individuals working on the job site. Further, A201-2017 provides a remedy for extended time and increase in contract sums, but the appropriate method must be followed via notice and change orders. These events should not be construed against the contractor because they were neither foreseeable nor due to the contractor's fault. For these reasons, it is likely that contractors would be entitled to additional time and money if the proper procedure is followed in providing notice to the owner and requesting change orders.



IV. NOTICE REQUIREMENTS

The AIA A201 also contains notice provisions required to properly make a claim. Notice is defined in AIA A201 as a “writing to the designated representative of the party to whom the notice is addressed and shall be deemed to be duly served if delivered in person, by mail, by courier, or electronic transmission if a method for electronic transmission is set forth in the agreement.” See AIA Document A201-2017. Notice should be sent to the other intended party (i.e., contractor or owner) and the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. See AIA Document A201-2017 Section 15.1.3.1. The AIA A201 imposes a notice requirement with 21 days from when the condition giving rise to the claim was first discovered or 21 days after the occurrence of the event giving rise to such a claim, whichever is first. See AIA Document A201-2017 Section 15.1.3.1.

Thus, there are three main requirements to note: (1) the notice must be in writing and cannot be oral; (2) electronic transmission notices are not automatically available unless agreed upon in the contract; and (3) notice must be provided to the Architect. For these reasons, it is important to understand the notice requirements of the general AIA provisions, and also review your individual contract provisions for any deviations.

V. FEDERAL REGULATIONS

There are several regulations governing federal projects known as Federal Acquisition Regulations (FAR) that may be triggered by COVID-19, including several that specifically reference epidemics. 48 CFR 52.249-10 and -14 state that a contractor is not in default for failure to complete work “if the failure arises from causes beyond the control and without the fault or negligence of the Contractor.” These regulations include “epidemic” as a cause of default that is excusable. If the delay is determined to be excusable—as it would be if the delay is directly related to COVID-19—the contracting officer must grant an extension of contract time under 48 CFR 52.249-14. The contractor must establish that the epidemic “contributed materially to such delay as well as the actual extent of the delay so caused.” *Ace Electronics Associates, Inc., ASBCA No. 11496, 67-2 BCA 6456 (July 18, 1967)*. An equitable adjustment (i.e., request for additional compensation) is not permitted by these regulations.

A contractor may be entitled to reasonable costs as a result of the delay caused by COVID-19 for suspension or stoppage of work by the government. 48 CFR 52.242-14 applies when the government suspends work. This regulation provides that a contractor is entitled to an increase in the contract price if the suspension, delay, or interruption is for an “unreasonable period of time” as a result of the government’s action (assuming the contractor is not at fault). The contractor is entitled to reasonable costs, excluding profit. To preserve its claim, the contractor must give notice to the government “as soon as practicable after the termination of the suspension, delay, or interruption.” In the event of a delay or interruption (but not a suspension), the contractor cannot recover costs incurred more than 20 days before the notice was provided. Regardless, a contractor should give prompt notice to the government upon the suspension, delay, or interruption of work.

48 CFR 52.242-15 applies when the government orders a contractor to stop work. This regulation provides that the government may require a contractor to stop all or part of a project for a period of 90 days. An important difference from the preceding regulation is that profit can be recovered for a stop-work order but not a suspension. When a stop-work order is issued, the contractor must “immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage.” The contracting officer can either cancel the stop-work order or terminate the contract. Under either scenario, a contractor may be entitled to recovery if it establishes it incurred reasonable costs as a result of the work stoppage. Importantly, notice must be provided to the government within 30 days after the end of the work stoppage.



WHAT YOU SHOULD DO RIGHT NOW

Given the nature of COVID-19 and the uncertainty it poses to contractors and owners, the following measures should be taken:

- Review contract language and determine requirements to assert claim under delay/force majeure, suspension, or termination provisions.
- Review notice requirements and deadlines for making claims under the contract.
- Consider current contracts that may be affected by delay or interruption and whether there are any limitations or deadlines to invoke a claim.
- If faced with a claim of force majeure or suspension, seek legal advice before acting or sending notice or claim.
- Inform employees about the hazards of the COVID-19 and the potential risks for those who may be older or have underlying health conditions.

CONCLUSION

This article addresses only a handful of the myriad contractual and legal issues that may arise due to COVID-19, including insurance coverage and labor/employment issues. The spread of COVID-19 is a rapidly evolving situation and it is important to stay informed. We urge you to review all individual contracts to determine what is allowed and required if your project encounters any delays or disruptions. If you have any questions or concerns regarding the issues addressed in this article, we are available to assist in navigating the process.

