

## Force Majeure Provisions in Construction Contracts Amid COVID-19 Concerns

By Kenneth Stallard, Esq. and Matthew D. Berkowitz, Esq.

Amid the COVID-19 crisis, officials in the District, Maryland, Virginia, and the federal government have designated construction as “essential.” All three jurisdictions have also allowed private construction, including home building and commercial projects, to continue. However, there is concern that some builders may not be able to obtain needed building materials because of global shipping slowdowns. In turn, there is concern on how these slowdowns will impact the pace of construction crews and whether project deadlines will have to be extended as a result. There is also the potential for price increases in construction materials as a result of shipping delays and scarcity of materials in the market.

But are there any provisions in standard construction contracts that can protect your construction business because of the delays caused by COVID-19? Contractual provisions that excuse a party when performance is precluded by acts of God, war, government regulation, terrorism, disaster, strikes, civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control, are generally referred to as force majeure provisions. See *National v. Hyatt Regency Washington*, 894 A.2d 471 (D.C. 2006). Force majeure is a Latin phrase that means “superior force.” Such force majeure or “superior force” events, which indeed could include COVID-19, could make continued performance under a contract inadvisable, illegal, and can materially affect a party's ability to perform its obligations under a contract.

Many construction contracts have the potential for addressing these COVID-19-related concerns through force majeure provisions. The popular AIA A201-2017: General Conditions of the Contract for Construction form provides:

### §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.

(Emphasis added).

Similarly, in its Standard Agreement and General Conditions Between Owner and Constructor,

ConsensusDocs 200 provides:

### 6.3 Delays and Extensions of Time

6.3.1 If Constructor is delayed at any time in the commencement of progress of the Work by any cause beyond the control of the Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond control of the 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 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 the 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.

(Emphasis added).

Similar provisions are found in many other construction contracts. These provisions may entitle the contractor to equitable adjustments to the contract price or extensions to the project delivery date. Moreover, contractors should make all reasonable efforts to mitigate the effects of such delays. As always, such claims should be well documented and reported as soon as feasible. Failure, to document and provide notice of these events could result in delay disputes between the contractor and the project owner.

Whether a particular COVID-19-related delay constitutes a force majeure event to excuse timely performance will depend on the particular circumstances, but it seems likely that Initial Decision Makers, Arbitrators, and the courts would find that materials shortages and other delays directly related to the COVID-19 crises are covered within typical force majeure provisions. Accordingly, if a contractor or subcontractor suspects they may have difficulty meeting contractual requirements because of the pandemic, the contractor or subcontractor should carefully review their contracts and consult with experienced counsel to determine whether their contract contains such an enforceable force majeure clause to seek additional contract time and protect them from potential liability.