COVID-19 CONSTRUCTION CONTRACT CONSIDERATIONS

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Stay-at-home orders and the economic disruption caused by the COVID-19 pandemic have taken their toll on several industries, including construction. The impact of the pandemic has made it impossible, or at least more expensive, for projects to proceed on schedule. Contractors experiencing losses or delays because of the COVID-19 pandemic may have a number of options to help them cover or reduce those losses.

Delays in Construction Project Due to COVID-19

First, if your project has been delayed due to stay-at-home orders limiting workforce or supply of critical materials, review your construction contract to determine if the delays entitle you to additional time to complete the project. Commercial construction contracts usually include very specific schedules and dates for substantial completion. In addition, they often include liquidated damages in favor of the owner in the event the contractor does not complete the project within the contractually scheduled time frame.

See for example Section 8.3.1 of the AIA Standard Form Contract Between Owner and Contractor. **However**, they also typically include provisions allowing the contractor to extend the schedule and/or increase the contract amount due to conditions which cause delays and are outside the

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contractor's control. COVID-19 related issues arguably qualify as "outside the contractor's control." To take advantage of such provisions, **contractors must promptly give written notice of the delays and document the causes.** If you believe you are experiencing delays as a result of COVID-19, act immediately to put the owner or higher tier contractors on notice of the delays regarding the language of your contract.

The more specific the information provided to describe the reasons for the delay, the more likely it will convince the other side to accept the resulting delay and more likely that a court or arbitrator will be convinced that it qualifies as a delay under the contract. As the pandemic continues, it will also be critical to update the notices with new information.

COVID-19 and "Commercial Frustration"

Second, even if your contract does not provide relief, certain legal principles may apply. The legal doctrine of "commercial frustration" may apply to delays caused by COVID-19.

See *Howard v. Nicholson, 556 S.W.2d 477* (Mo. App. S.D. 1977). Under the law of most states, a party's performance under a contract may be excused when events outside the control of the party and not foreseeable make performance impossible or commercially impracticable. The courts historically limit application of this doctrine to extreme circumstances and in the months and years to come, there is likely to be extensive litigation over its application to COVID-19 delay claims.

However, like delays justified under the contract language, it is extremely important if you are going to assert that delays or additional expenses are justified under the doctrine of commercial frustration that you give **detailed notice about the nature and cause of the delays.**

COVD-19 Insurance Coverage

Finally, it is also time to pull out your insurance policies and see if they provide coverage for your losses. The most likely candidate is the builder's risk policy covering your project**.**

Coverage under builder's risk policies may vary widely so you will need to **look at the specific language of your policy**.

It is imperative that you put the insurance company on notice of the claim promptly. Insurers may be able to deny an otherwise valid claim if it was not presented to them promptly. Neither the law nor insurance policies typically give hard deadlines for submitting claims, but the wiser course is to submit the claim as soon as you have any reason to believe it exists.

Takeaways

- Review your construction contract to determine if the delays entitle you to additional time to complete the project.

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- If you are going to assert that delays or additional expenses are justified under the doctrine of commercial frustration you should give detailed notice as to the nature and cause of the delays.
- Review your insurance policies and see if they provide coverage for your losses.

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