

## CONSTRUCTION

### CONTRACTORS: ARE YOU PROTECTED FROM THE CORONAVIRUS INFECTING THE PROJECT SCHEDULE?

by Chris Cornwall and Stephen Richman

An ounce of prevention is better than a pound of cure, so the old adage goes. Although contraction of the Coronavirus ("COVID-19") fortunately remains a relatively low risk in the United States, COVID-19 still has the ability to "infect" a project schedule simply by reducing the supply of labor and materials needed to complete the work. To prevent such delays and others like them, contractors should take precautionary measures and factor in possible labor and material delays to schedules, and any corresponding price impact, resulting from the spread of COVID-19. Contractors need to consider impacts not only in the United States, but for imported construction materials as well – especially long lead items or materials from highly infected areas (i.e., Italian marble or Chinese steel). If faced with projects requiring materials from highly affected areas, alternate or substitute materials may be an appropriate approach to stay on schedule.

Contractors should discuss potential delays and cost impacts due to COVID-19 during negotiation of the construction documents. Although it is reasonable to argue delay impacts from COVID-19 is a "force majeure" event that should entitle a contractor to an extension of time, the AIA or ConsensusDocs form agreements do not specifically address pandemic events. To avoid this potential issue, revisions to the standard construction documents are required.

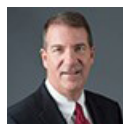
§8.3.1 of the AIA A201 General Conditions identifies circumstances that may be commonly described or accepted as force majeure events, but the term "force majeure" is not used or mentioned in the document. Thus, to avoid future disputes (or worse, litigation) over delays and cost impacts due to COVID-19, we recommend our clients add the following language to the AIA A201 agreement:

**§ 8.3.1 The Contract Time shall be extended and Contractor shall be entitled to an increase in the Contract Sum for its additional General Conditions and increased costs of labor and materials that are attributable to one or more of the following Impacts:** (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 shortages and/or disputes, fire, unusual delay in deliveries, unavoidable casualties; (4) **disruptions in labor or materials resulting from a**

**health crisis regardless of whether an infectious disease, epidemic, pandemic or isolated to areas from which such labor and materials are supplied;** (5) by delay authorized by the Owner pending mediation and binding dispute resolution; (6) by abnormal weather conditions; (7) by other causes beyond the Contractor's control that justify delay; (8) by adverse government actions, including but not limited to tariffs and embargoes; and/or (9) by any Act of God rendering performance of the Contract impossible or impractical. Any time gained by the Contractor on the Project Schedule shall not be offset against any delays as described herein.

§6.3.1(j) of the ConsensusDocs 200 agreement references "epidemics" as a cause beyond the control of a Constructor, but it is wise to expand the definition in a similar manner noted above; to avoid any ambiguity, pandemic events are included as well. Potential price impacts may be addressed in the same section, or separately in the ConsensusDocs 200.1 Amendment No. 1 pertaining to Potentially Time and Price-Impacted Materials.

Paying attention to detail and rapidly adapting to changing circumstances is what we do at Dickinson Wright PLLC. For additional information, please contact any of our offices throughout the United States and in Canada.



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