

Coronavirus & Force Majeure

I have received a number of questions on whether coronavirus is a force majeure event. An article from JDSupra is below:

Needless to say, a coronavirus pandemic (or even the threat of such a pandemic) could have significant impacts on ongoing construction projects. A potential or actual pandemic could dramatically affect the labor force and delay the delivery of materials—all of which could cause significant delays to the completion of the project. But who bears the risk of these delays under the widely used AIA contract documents?

The Force Majeure Provisions of AIA A201-2017

The contractor's right to make a claim for delays and extensions of time is governed primarily by Section 8.3.1 of the AIA A201-2017 general conditions. As it is written in the standard form, that provision provides five grounds on which the contractor can make a delay claim:

§ 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 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 time as the Architect may determine.

At least two of these grounds (underlined above)—“unusual delay in deliveries” and “other causes that . . . justify delay” arguably give the contractor a basis for seeking an extension of time under the contract in the event of a coronavirus pandemic. Indeed, unless modified by the parties, Section 8.3.1 usually entitles the contractor to a time extension as a result of any delay that the parties couldn't have anticipated when they entered into the contract—and that would almost certainly be the case with a pandemic.

Moreover, it is worth pointing out that Section 8.3.1 applies “at any time” in the commencement or progress of the work. In others, if a coronavirus pandemic prevents the contractor from commencing the work at the agreed upon time, such as due to lack of permitting, labor or materials, then the contractor will likely be entitled to an extension of the contract time before it has even begun construction. Such an outcome could potentially have a devastating impact on both the overall time and cost of construction, particularly with so much uncertainty as to the extent and duration of a possible coronavirus pandemic.

The Parties' Right to Terminate the AIA Agreement in the Event of a Pandemic

Although the contractor arguably has a broad right to receive time extensions in the event of a pandemic, its ability to terminate the contract altogether is more limited. Under Section 14.1.1 of the A201-2017, as long as the owner continues making timely payment to the contractor, the contractor is still required to complete the project absent “Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped” or “An act of government, such as a declaration of national emergency, that requires all Work to be stopped.” This would be the case, for instance, if federal, national or local authorities imposed quarantine requirements that prohibited work on a project from proceeding.

In contrast, the “owner” has a right under the AIA agreements to suspend or terminate the contractor “for convenience” and without cause, pursuant to Sections 14.3 and 14.4 of the A201-2017, respectively. Under a suspension for convenience, the contractor is compensated via adjustment to both the contract

time and the contract sum for the period of delay; whereas under a termination for convenience, the contractor receives reimbursement for the work performed and costs incurred to date, plus a termination fee (if agreed to by the parties), but otherwise is required to cease performance of the work and cancel all subcontracts. In the event of a coronavirus pandemic, it may become attractive, or even necessary, for the owner to exercise its rights of suspension and/or termination, as a means of controlling the general conditions and other costs of the project, which may otherwise continue accruing indefinitely.

Parties entering into AIA agreements should consider what their rights are given the threat of a pandemic. In most instances, however, while the contractor will have broad latitude in seeking time extensions, it will not have the right to terminate the agreement unless a government order requires the work to be stopped. Owners enjoy broad rights of suspension and termination, the exercise of which could prove a useful way to avoid paying contractors for extended downtime. Finally, some parties who are not yet under contract could consider postponing execution until a later date in order to better gauge what the financial impact may be of a potential or actual coronavirus pandemic—both to the construction project itself, and to the market for which the project is intended.

Because the issues presented in this client alert raise complex legal questions, which are also very fact-dependent, we advise consulting with an attorney to consider how best to address them.

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