



What Are Your Legal Rights to Recover for COVID-19 Delay and Impacts?

Adrian L. Bastianelli, III
Mark R. Berry
Peckar & Abramson, P.C.
Washington, DC

NEW YORK, NY • RIVER EDGE, NJ • MIAMI, FL • WASHINGTON, D.C. • LOS ANGELES, CA • OAKLAND, CA
CHICAGO, IL • AUSTIN, TX • DALLAS, TX • HOUSTON, TX • WWW.PECKLAW.COM

IMPACT OF COVID 19

- COVID 19 Impacts on Time and Productivity Have Been Immense
- Results from:
 - Orders and Regulations of City and State
 - OSHA Regulations
 - Genuine Concern for Workers
 - Need to Quarantine Workers when Infected Worker
 - Concern with Potential Lawsuits from Workers
 - Etc.
- Prior MCAA Webinar Dealt with Calculating Additional Costs and Delay
- Today, We Will Address Your Legal Right to Recover Time and/or Money for the Delay and Impact

TYPES OF DELAY – RISK ALLOCATION

- No Owner or Contractor Fault – Time Extension No Compensation
- Owner Caused Delay – Time Extension and Compensation
- Contractor Caused Delay – No Time Extension or Compensation
- Concurrent Delay – Time Extension and No Compensation
- What Category Do COVID 19 Delays Fit Into?
- No Damage for Delay or Impact Clauses Particularly in Subcontracts
- When Deciding Whether and How to Pursue a Claim for Delay and Impact, Avoid the Knee-Jerk Reaction and Look at the Specifics of Your Contract

FORCE MAJEURE CLAUSE

- Force Majeure French for the “Greater Force”
- Generally: Applies to Unanticipated Delays Without the Fault and Control of Either Party
- Clauses Have Different Names
- Outcome: Time Extension Only

STANDARD FORCE MAJEURE CLAUSES

- Federal

- FAR 52.249-10 (fixed price construction contracts)

- (b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if – **(1)** The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractor or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractor or suppliers... [Emphasis added]

STANDARD FORCED MAJEURE CLAUSES

- AIA A201 §8.3.1 (2017)

§ 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...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

- ConsensusDOCS, EJCDC, and almost every construction contracts has a similar provision

TIME EXTENSION ONLY

- Are COVID 19 Delays Force Majeure Events for Which a Contractor Is Entitled to a Time Extension?
- What Types of Delay Are Included:
 - New Work Site Safety Protocols, Including Social Distancing, Hand Washing, Etc.
 - Labor and Material Shortages, Interruptions, and Absenteeism
 - Quarantine of Workers when Infected Worker Found
 - Material, Equipment, and Supply Disruption and Delay
 - Lost Productivity
 - Subcontractor and Supplier Defaults and Bankruptcies
 - Standby, Suspensions, and Interruptions of Work
 - Delays in Government and Owner Inspections

BUT HOW DO I GET PAID

- Go Back to Previous Slide
- All of Those Causes Have a Huge Cost Impact
- While a Time Extension Helps – Recovering the Lost Dollars Is Critical
- So How Do You Do That?

SOME POSSIBLE AVENUES FOR RECOVERY OF DAMAGES

- Changes in Law Clause
- Escalation Clause
- Emergency Clauses
- Changes and Extra Work Clause
- Suspension of Work Clause
- Differing Site Conditions/Concealed or Unknown Conditions Clauses
- Termination Clause
- Acceleration
- Cares Act

CHANGES IN LAW CLAUSE

- Contract May Contain a Change In Law Provision that Provides Compensation
- Example: Should any change in law affect the contractor's cost or time of performance, contractor shall receive an adjustment in the price and time for performance caused by such change in law.
- ConsensusDOCS 200 (2016) § 3.21 provides: “The Contract Price or Contract Time shall be equitably adjusted by Change Order for additional costs or time needed resulting from any Change in Law, including increased taxes, enacted after the date of this Agreement (emphasis added).”

ESCALATION CLAUSE

- Contract May Permit Recovery for Cost Escalation of Materials
 - Provision May Establish Pricing Assumptions and Time Limitation on Pricing
 - May Also Include Recovery for Delayed Availability of Materials
 - Operates Similar to Allowances
- Example:
 - ConsensusDOCS Cost Adjustment Clause 200.1
 - ❑ Establishes a Baseline Price for Specifically Identified Materials Potentially Subject to Time and Price Impacts
 - ❑ Either Party Is Entitled to Adjustment for Material Cost Increase or Decrease and Time Extension and Compensation for Any Delay

EMERGENCY CLAUSE

- AIA A201 § 10.4 (2017)

In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury, or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7.

- Similar Clause in ConsensusDOCS
- Requires Contractor to Take Action in Emergency to Protect Workers and the Work
- Provides for Compensation
- Is COVID 19 Covered by this Provision? What If an Infected Person Comes Onsite and You Have?

CHANGES OR EXTRA WORK CLAUSE

- A Changes Clause Is Present in Virtually Every Contract
- Change Must Be Caused by Action of Owner/Government
- Direction, Instruction, Interpretation, or Determination by Representative
 - If Delay or Impact Caused by Sovereign Act then Time Extension Only
 - If Owner/Government Directs You to Do More than Required by Sovereign Act, then May Have Right to Damages
 - Don't volunteer – Seek Clear and Explicit Direction in Writing
 - If Direction Is More Restrictive than State Order May Be Compensable
- Defective Specification
 - The Owner/Government Warrants that the Contract Specifications Are Accurate and Possible to Perform
 - If They Are Not, Contractor Is Entitled to Compensation for the Defective Specification

CHANGES OR EXTRA WORK CLAUSE (CONT'D)

- Change in Sequence of Work
 - Did Contract Provide for a Sequence of Work that Has Changed
- Lack of access
 - Owner/Government Impliedly and Sometimes Explicitly Guarantees Access to All or Part of the Work
- Look for Explicit Contract Terms that Cannot Be Performed or Are Changed by the Direction of the Owner/Government
- Cardinal Change

STOP WORK OR SUSPENSION OF WORK CLAUSE

- FAR 52.242-14(b), Suspension of Work

If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, ... However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

STOP WORK OR SUSPENSION OF WORK CLAUSE (CONT'D)

- AIA A201 § 14.3.1 and .2

§ 14.3 Suspension by the Owner for Convenience

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work...

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension...Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent .1 that performance is, was, or would have been, so suspended, delayed, or interrupted, by another cause for which the Contractor is responsible; or .2 that an equitable adjustment is made or denied under another provision of the Contract.

STOP WORK OR SUSPENSION OF WORK CLAUSE (CONT'D)

- Standard Clause for Collecting Delay Damages
- Can't Recover if Would Have Been Suspended by Delay Under Another Clause or if Equitable Adjustment Is Provided for or Excluded Under Another Clause
- Like Changes Clause, a Suspension Requires an Action of the Owner/Government
- § 14.3 of A201 Is for Convenience of Owner – Is a COVID 19 Suspension for Convenience of Owner?
- Federal vs. AIA – Unreasonable Portion of Delay vs. All Delay and No Profit vs. Profit

DIFFERING SITE CONDITION OR CONCEALED CONDITION CLAUSE

- Clause in Federal, All Form Contracts, and Many Non-Standard Contracts
- Provides Compensation for Subsurface or Concealed Physical Conditions that Differ Materially from:
 - 1) Conditions Indicated by the Contract, or
 - 2) Conditions Normally Inherent in Work of the Character Being Performed and Are Unusual
- Some Case Law that Condition Must Exist at Time of Contracting
- Must Be a Subsurface or Concealed Physical Condition
- Highly Unlikely that You Will Prevail Under this Theory Unless There Is a Specific Representation in the Contract

TERMINATION CLAUSE

- AIA A201 § 14.1.1

- § 14.1 Termination by Contractor

- § 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, for any of the following reasons: .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped; .2 An act of government, such as a declaration of national emergency, that requires all Work to be stopped.

- Federal Contracts Do Not Have a Similar Provision

TERMINATION CLAUSE (CONT'D)

- Contractor Recovery for Termination
 - Payment for Work Performed
 - Profit on Unperformed Work
 - Costs Caused by Termination

GOVERNMENT FURNISHED PROPERTY

- Government Furnished Property FAR 52.245-1d:
 - (2) The delivery and/or performance dates specified in this contract are based upon the expectation that the Government-furnished property will be suitable for contract performance and will be delivered to the Contractor by the dates stated in the contract.
 - (i) If the property is not delivered to the Contractor by the dates stated in the contract, the Contracting Officer shall, upon the Contractor's timely written request, consider an equitable adjustment to the contract.

ACCELERATION

- Constructive Acceleration
 - Owner/Government Does Not Provide a Time Extension
 - Requires Contractor to Meet the Unextended Completion Date
 - Contractor Entitled to Compensation
- More Subtle:
 - Changes in Sequence
 - More Equipment
 - More Workers
- Owner/Government May Make Changes in that Constitute Acceleration Giving Contractor Right to Recover Damages

PREDICTOR OF THINGS TO COME

- *Appeal of Pernix Serka Joint Venture v. Department of State*, CBCA No. 5683 (April 22, 2020)
 - Construction Project in Africa
 - Contractor Impacted by Ebola Outbreak and Had to Shutdown Work and Evacuate Employees
 - US State Department Declined to Provide Guidance to Contractor
 - Contractor Claimed Cardinal Change.
 - CBCA Rejected Cardinal Change, Finding that the Government Never Changed the Description of the Work to be Performed.
 - Board Stated: “Any changes in conditions surrounding performance of the contract arose from the Ebola outbreak and the host country’s reaction to the outbreak,” not the federal agency.
 - Contractor Entitled to Only Time Extension

PREDICTOR OF THINGS TO COME (CONT'D)

- *Conner Bros. Constr. Co., Inc. v. Geren*, 550 F.3d 1368 (Fed. Cir. 2008)
 - Construction of facilities at Fort Benning, GA for U.S. Rangers administered by USACE
 - After 9/11, Contractor Excluded from Site by Ranger Commander While Rangers Trained for Response to Attacks
 - Contractor Sought 41 Days of Extended Overhead for Delay
 - Court Found the Exclusion Order Was a Sovereign Act and Not Compensable, Stating as Follows:
 - ❑ ...the exclusion order was not directed at relieving the government of its contractual obligations; to the contrary, any effect on Conner was incidental to a broader governmental objective relating to national security.

CARES ACT SECTION 3610

- The Coronavirus Aid, Relief, and Economic Security Act (CARES), Section 3610, Permits Government to Reimburse Contractors for Paid Leave to Employee Who:
 - (1) Cannot perform work on a "site that has been approved by the Federal Government " during the coronavirus (COVID-19) public health emergency due to facility closures or other restrictions resulting from effects of pandemic, and
 - (2) Cannot telework because their job duties cannot be performed remotely
 - (3) Employee payment necessary to keep contractor in “ready state” to perform
- OMB Guidance for Managing Government Contracts in Light of Coronavirus States that the Government Should Consider Awarding Allowable and Reasonable Costs Necessary to Protect Health and Safety of Contractor Employees

CARES ACT SECTION 3610 (CONT'D)

- No limitations on Size of Company
- Applied to Contractors and Subcontractors (No Prohibition on Pass Through Claims)
- Applicable Period: January 31, 2020 Through September 30, 2020
 - GSA Guidance Begins Period Starting March 27, 2020
 - GSA Requires Facility Closure or Other Restrictions
- No Duplicate Recovery (Cannot Receive PPP Loan Forgiveness and Section 3610 Contract Adjustment)
- Applies to All Types of Contracts Including Fixed Priced Contracts
- Reimbursement Contingent on Availability of Funds

NOTICE

- All of the Previously Mentioned Clauses Require Timely Notice
- Make Sure to File Timely Written Notice
 - Better Safe than Sorry
 - Report Each Positive Test Up the Ladder
 - Report All Directions that Impact Time or Costs
 - Provide a Template to be Used in the Field for Repetitive Incidences
- May Be Able to Get Around
- It Is Hard Enough to Prevail on Base Claim, Don't Make It Harder

PROOF OF DAMAGES

- Carefully Track Costs and Delays
 - Hot Spot Shutdowns and Quarantine
 - Lost Productivity
- Create a Cost and Schedule Tracking Strategy Now
- Real Time Documentation Better Than After the Fact Calculation
- Segregate and Keep Track of Costs in Discrete Categories
- Hard to Prove
- Document Mitigation Strategies and Efforts
- Early Retention of Experts, If You Don't Have Sufficient In-House Expertise

CONCLUSION

- Time Extension – Force Majeure – Time Extension Easy to Obtain
- Compensation Hard to Obtain
- Look to Specific Contract Terms of Contract
- Look for Owner/Government Directive Under Contract that Is Different than State Order
- Theories to Recover Compensation
 - Changes in Law Clause
 - Escalation Clause
 - Emergency Clauses
 - Changes and Extra Work Clause
 - Suspension of Work Clause
 - Differing Site Conditions/Concealed or Unknown Conditions Clauses
 - Government Furnished Property
 - Termination Clause
 - Acceleration
 - Cares Act