

Construction in the Age of COVID-19

An Owner's Checklist for Analyzing Impacts and Strategies on Managing Projects

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With respect to COVID-19 pandemic impacts, each project will have separate business, political, and practical issues that must be considered. The first step in this analysis is to gather the necessary information on a project-by-project basis. Owners should use this outline of Legal, Governmental, Practical, and Business considerations when assessing their construction projects.

Legal

1. What is the governing law?
 - 1.1 Jurisdiction Type
 - 1.1.1 Civil Law?
 - (a) Country?
 - 1.1.2 Common Law?
 - (a) Country?
 - (i) State/Province?
 - 1.2 What is the venue type?
 - 1.2.1 Court
 - (a) Federal
 - (b) State
 - 1.2.2 Arbitration
 - (a) Provider
 - 1.2.3 Other
2. Contract and Work Order
 - 2.1 Changes Provision
 - 2.1.1 Effect of refusal of change request
 - 2.1.2 Time only vs. time and cost

- 2.2 Force Majeure Provision
 - 2.2.1 Does your contract have one?
 - (a) AIA contracts typically do not.
 - (b) Consensus docs do.
 - (c) Proprietary forms?
 - 2.2.2 Are pandemics covered?
- 2.3 Frustration of purpose?
 - 2.3.1 For contracts without force majeure provisions, local law may allow parties to avoid performance where an unforeseen event undermines the purpose of the contract.
- 2.4 Convenience Termination
 - 2.4.1 Notice
 - 2.4.2 Procedure
 - 2.4.3 Payment
 - 2.4.4 Remedies
 - (a) Silent
 - (b) Waived
 - (c) Reserved
- 2.5 Suspension
 - 2.5.1 Grounds
 - 2.5.2 Duration
 - 2.5.3 Payment
 - 2.5.4 Potential for contractor termination after extended suspension
- 2.6 Notice Provisions
 - 2.6.1 Notice Received?
 - 2.6.2 Level of specificity required and evolution of situation
- 2.7 Flow Down Provisions

- 2.8 Damages exclusions
 - 2.8.1 Waiver of delay
 - 2.8.2 Consequential damages
- 2.9 Changes in law clauses
 - 2.9.1 Effect of orders and other governmental mandates
- 2.10 Disputes
 - 2.10.1 Venue
 - 2.10.2 Process
 - 2.10.3 Governing Law

Governmental Action

- 1. Emergency Declaration?
 - 1.1 Substance?
- 2. Shut Down Order?
 - 2.1 Substance?
- 3. Limiting Order?
 - 3.1 Substance
- 4. Governmental Relief?
 - 4.1 Substance

Practical

- 1. Status of Project
 - 1.1 Planning
 - 1.2 Design
 - 1.3 Construction
 - 1.4 Commissioning
 - 1.5 Turnover
 - 1.5.1 Is Owner's facilities staff permitted to work?

2. Status of government approvals
 - 2.1 Are government inspectors and code and permit officers working?
3. Project Criticality
 - 3.1 Critical to an essential business?
 - 3.2 Needed now?
 - 3.3 Possible to wait?
4. Feasibility of:
 - 4.1 Deferral
 - 4.2 Suspension
 - 4.3 Termination
 - 4.4 Resequencing
5. Likelihood of Impact/Suspension if continued
6. Availability of Insurance

Business/Political

1. Relationship with vendors
 - 1.1 Long term relationships
 - 1.2 Likelihood of needing further assistance
 - 1.3 Owner's reputation within the vendor community
2. Adverse publicity