



Navigating the Outbreak: An Eight-Part Webinar Series on the Factors that Construction Companies Need to Consider as They Strive for Business Continuity

March 25, 2020

Part III: The Contractual and Legal Protections and Risks for Construction Companies

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A. OVERVIEW OF CONTRACTUAL AND LEGAL REMEDIES ASSOCIATED WITH DISEASE-RELATED PROJECT IMPACTS

1. Force majeure and related provisions
2. Statutory provisions and UCC
3. Implied in law doctrines
4. Other contractual remedies
5. Sample force majeure and price escalation provisions

INTRODUCTION

1. Force Majeure and Related Provisions

- Legal requirements
- Force majeure and related delay provisions are not well standardized in US construction contracts

1. Force Majeure and Related Provisions - AIA[®]

Comparison of AIA[®], ConsensusDocs[®], EJCDC and Federal Government Provisions

- AIA Document A201[™] - 2017, “General Conditions of the Contract for Construction”

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.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

1. Force Majeure and Related Provisions – ConsensusDocs[©] 200

ConsensusDocs[©] 200, “Standard Agreement and General Conditions Between Owner and Constructor (©2011, Revised May 2017)

- ConsensusDocs[©] describes various force majeure type events in the main agreement between the Owner and Constructor -- but also specifically identifies “epidemics.”

6.3 DELAYS AND EXTENSIONS OF TIME

§ 6.3.1 If Constructor is delayed at any time in the commencement or progress of the Work **by any cause beyond the control of Constructor**, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of Constructor include, but are not limited to, the following: (a) acts or omissions of Owner, Design Professional, or Others; (b) changes in the Work or the sequencing of the Work ordered by Owner, or arising from decisions of Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by Owner pending dispute resolution or suspension by Owner under §11.1; (e) transportation delays not reasonably foreseeable; (f) labor disputes not involving Constructor; (g) general labor disputes impacting the Project but not specifically related to the Worksite; (h) fire; (i) Terrorism; (j) epidemics; (k) adverse governmental actions; (l) unavoidable accidents or circumstances; (m) adverse weather conditions not reasonably anticipated. Constructor shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8.

1. Force Majeure and Related Provisions

– ConsensusDocs[®] 200

6.3 DELAYS AND EXTENSIONS OF TIME (cont.)

§ 6.3.2 In addition, if Constructor incurs additional costs as a result of a delay that is caused by items (a) through (d) immediately above, Constructor shall be entitled to an equitable adjustment in the Contract Price subject to §6.6.

§ 6.3.3 **NOTICE OF DELAYS.** If delays to the Work are encountered for any reason, Constructor shall provide prompt written notice to Owner of the cause of such delays after Constructor first recognizes the delay. The Parties each agree to take reasonable steps to mitigate the effect of such delays.

1. Force Majeure and Related Provisions - EJCDC

Paragraph 12.03 – Delays

A. Where Contractor is prevented from completing any part of the Work within the Contract Times due to delay beyond the control of Contractor, the Contract Times will be extended in an amount equal to the time lost due to such delay if a Claim is made therefor as provided in Paragraph 12.02.A. Delays beyond the control of Contractor shall include, but not be limited to, acts or neglect by Owner, acts or neglect of utility owners or other contractors performing other work as contemplated by Article 7, fires, floods, epidemics, abnormal weather conditions, or acts of God.

B. If Owner, Engineer, or other contractors or utility owners performing other work for Owner as contemplated by Article 7, or anyone for whom Owner is responsible, delays, disrupts, or interferes with the performance or progress of the Work, then Contractor shall be entitled to an equitable adjustment in the Contract Price or the Contract Times, or both. Contractor's entitlement to an adjustment of the Contract Times is conditioned on such adjustment being essential to Contractor's ability to complete the Work within the Contract Times.

1. Force Majeure and Related Provisions - EJCDC

Paragraph 12.03 – Delays (cont.)

C. If Contractor is delayed in the performance or progress of the Work by fire, flood, epidemic, abnormal weather conditions, acts of God, acts or failures to act of utility owners not under the control of Owner, or other causes not the fault of and beyond control of Owner and Contractor, then Contractor shall be entitled to an equitable adjustment in Contract Times, if such adjustment is essential to Contractor's ability to complete the Work within the Contract Times. Such an adjustment shall be Contractor's sole and exclusive remedy for the delays described in this Paragraph 12.03.C.

D. Owner, Engineer and their officers, directors, members, partners, employees, agents, consultants or subcontractors shall not be liable to Contractor for any claims, costs, losses, or damages (including but not limited to all fees and charges of Engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) sustained by Contractor on or in connection with any other project or anticipated project.

E. Contractor shall not be entitled to an adjustment in Contract Price or Contract Times for delays within the control of Contractor. Delays attributable to and within the control of a Subcontractor or Supplier shall be deemed to be delays within the control of Contractor.

1. Force Majeure and Related Provisions – FAR Provisions

Federal government contract provisions:

FAR 52.249-14 (cost reimbursement and time and material contracts for supplies, services, construction, and research and development)

EXCUSABLE DELAYS (APR 1984)

(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. *Default* includes failure to make progress in the work so as to endanger performance.

1. Force Majeure and Related Provisions – FAR Provisions

EXCUSABLE DELAYS (cont.)

(b) If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be deemed to be in default, unless -

(1) The subcontracted supplies or services were obtainable from other sources;

(2) The Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and

(3) The Contractor failed to comply reasonably with this order.

(c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised, subject to the rights of the Government under the termination clause of this contract.

1. Force Majeure and Related Provisions – FAR Provisions

FAR 52.249-8 (fixed price supply and service contracts)

DEFAULT (FIXED PRICE SUPPLY AND SERVICE) (APR 1984)

(a)

(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to -

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

1. Force Majeure and Related Provisions – FAR Provisions

DEFAULT (FIXED PRICE SUPPLY AND SERVICE) (APR 1984) (cont.)

(2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

(b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

1. Force Majeure and Related Provisions – FAR Provisions

DEFAULT (FIXED PRICE SUPPLY AND SERVICE) (APR 1984) (cont.)

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(e) If this contract is terminated for default, the Government may require the Contractor to transfer title and deliver to the Government, as directed by the Contracting Officer, any (1) completed supplies, and (2) partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively referred to as manufacturing materials in this clause) that the Contractor has specifically produced or acquired for the terminated portion of this contract. Upon direction of the Contracting Officer, the Contractor shall also protect and preserve property in its possession in which the Government has an interest.

1. Force Majeure and Related Provisions – FAR Provisions

DEFAULT (FIXED PRICE SUPPLY AND SERVICE) (APR 1984) (cont.)

(f) The Government shall pay contract price for completed supplies delivered and accepted. The Contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The Government may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

(h) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

1. Force Majeure and Related Provisions

Selected State Laws Interpreting Force Majeure Provisions

New York:

- New York courts - take a narrow view of defenses to contractual obligations based upon “unforeseen events” outside the control of the parties.
- Typically in NY the party seeking to avoid performance must show that the event in question is specifically set forth in, or of the type expressly contemplated by, the contract’s force majeure clause, and that the event actually prevented its performance.
- For purposes of the impossibility defense, a NY court might find that a viral pandemic is an “act of God” or “act of nature” as defined by New York law.

1. Force Majeure and Related Provisions

California:

- California courts - have applied the doctrine of commercial impracticability set forth in the Second Restatement of Contracts.
- Temporary impossibility or suspension does not excuse or discharge contractual obligations unless the temporary impossibility becomes permanent.
- A mere increase in the cost of performing contractual obligations does not alone render the contract impracticable or the purpose of the contract frustrated, except where there is an “extreme and unreasonable difficulty, expense, injury, or loss involved.”

2. Statutory Provisions & UCC

- 50-state survey – indicated that every state has statutes codifying principles of commercial impracticability with respect to contracts for the sale of movable goods.
- Statutory provisions - modeled after Section 2A of the Uniform Commercial Code (UCC).
- Two possible defenses in breach of a sales contract:

Was delivery of the goods commercially impracticable because the agreed-upon type of carrier or delivery service was unavailable? Then the seller may tender a commercially reasonable substitute if one is available. *See* UCC § 2A-404.

Was the delay or failure to perform a sales contract excused because “performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not the regulation or order later proves to be invalid”? *See* UCC § 2A-405.

3. Implied in Law Doctrines

- Doctrine of Impossibility
- Commercial Impracticability
- Frustration of Intended Purpose

4. Other Contractual Remedies

- Suspension order
- Changes in the work
- Convenience terminations
- Illness of key personnel
- Price escalation

5. Sample Force Majeure and Price Escalation Provisions

Practical issues businesses should consider when reviewing your current their *force majeure* clauses:

- Does your contract specifically include some reference to delay caused by disease, such as quarantine, outbreak of disease, epidemic or pandemic? Or does it only generally reference events that are beyond the parties' control?
- If a *force majeure* event occurs, does it entitle the contractor to an equitable adjustment in the contract time?
- If a *force majeure* event occurs, is the contractor also entitled to an equitable adjustment in the contract price? Should any entitlement to an increase in the contract price be limited to the contractor's direct costs?

Sample Force Majeure Provision

- Sample definition of Force Majeure Event:
“Force Majeure Event includes, but is not limited to, any intervening act of God or public enemy, war, invasion, act of terror, hurricane force winds, tornados, strikes or labor disputes, riot or other public disorder, quarantine restriction, disease outbreak, epidemic, pandemic or other declaration of public health emergency.
- Owners, contractors and subcontractors should carefully negotiate the definition of force majeure to allocate the risk in a commercially reasonable manner.

Sample Price Escalation Provision

ConsensusDocs[®] 200.1: AMENDMENT NO. 1 “POTENTIALLY TIME AND PRICE-IMPACTED MATERIALS”

- For use with ConsensusDocs[®] 200, Standard Agreement and General Conditions Between Owner and Constructor (Lump Sum Price)
- Consider specifically identifying the COVID-19 pandemic and expanding the price impacts to labor and equipment in addition to material:

Sample Price Escalation Provision

POTENTIALLY TIME AND PRICE-IMPACTED LABOR, MATERIAL AND EQUIPMENT. As of the date of this Amendment, certain markets providing essential materials to the Project are experiencing and are anticipated to continue ~~or are expected to~~ experience significant, industry-wide economic fluctuation during the performance of this Agreement due to the COVID-19 pandemic that may impact price, availability and delivery time frames ("Potentially Time and Price-Impacted Labor, Material and Equipment"). This Amendment provides for a fair allocation of the risk of such market conditions between the Owner and the Contractor and shall only apply to the Potentially Time and Price-Impacted Labor, Material(s) and Equipment listed in Schedule A to this Amendment.

* Proposed edits to ConsensusDocs® 200.1: AMENDMENT NO. 1 "POTENTIALLY TIME AND PRICE-IMPACTED MATERIALS"

B. Project Risk Management

COVID-19 Enterprise Risk Management(ERM)

Top Down / Bottom Up ERM

- Senior Leadership Task Force (Safety, HR, Finance, Operations, Risk, Legal, IT, Communications)
- Regional Office / Operations Leadership (regional office and project continuity)

Objectives

Articulate objectives

- Protect people
- Protect operations and project sites
- Protect the business

Practical Risk Management Strategies



Crisis and business continuity management

- Identify and assess most significant risks and current controls (e.g. insurance)
- Establish processes and protocols to help mitigate risks
- Standard guidance for different scenarios
- Track execution with continuous updates
- Ongoing communication plan – internal and external
- Claims notification system
- Stay updated with most current information and available resources - (CDC, WHO, AGC, OSHA)
- Receive support from partners and peers (brokers, carriers, legal advisors, consultants, peers, etc.)

Practical Risk Management Strategies

Contractual Risk Identification

- Review relevant contract provisions – understand rights, responsibilities, and assess risk

						Contract Provisions											
Project Number	Description	Location	% Complete	Contract \$	Backlog \$	Notice Requirements	Force Majeure	Price Escalation	Differing Site Condition	Suspension / Termination	Change in Law	Liquidated Damages	Waiver of Consequential Damages	Owner duty to provide proof of finance	Emergency and Safety Requirements	Claims Resolution / Dispute	Risk Assessment

- Provide compliant notices (develop base templates) and updates
- General guidelines for documenting cost and schedule delay impacts – review contract for specific requirements.
- Ongoing communication between Owner, contractor and subcontractors – keep upstream and downstream parties informed of any delays and/or supply chain disruptions.
- Issue change orders if applicable.

Practical Risk Management Strategies



Supply Chain Risk Identification

- Awareness of challenged subcontractors or suppliers
- Trace critical construction materials back to their raw form fabrication location
- Focus on materials coming from pandemic affected countries such as China, Italy, Spain, etc.
- Develop a simple Supply Chain questionnaire forms that can be completed by our partners – (owners, designers, contractors, subcontractors and suppliers)
- Meet with owners, designers, and subcontractors to discuss risk mitigation plans for identified high risk products or suppliers

Practical Risk Management Strategies

Processes, Protocols, Forms, Guidelines

- Prevention awareness posters
- Entry access questionnaires
- Jobsite signage
- Tool box talks
- Notice form base templates
- Jobsite shutdown plan and checklists
- Claim reporting forms
- “What if” guidelines
- Updated modified industry standard contract forms
- Incident response plan templates
- Project continuity plan template

***Create a COVID-19 Internal
Website Resource Page***

C. Federal Emergency Procurement Procedures

- March 13, 2020 – Emergency Declaration
- Stafford Act
 - Local Hire Preference
 - Government is permitted to set aside solicitations to allow awards only to “offerors residing or doing business primarily in the area affected by ... [a] major disaster or emergency.”
 - Eligibility requirements Federal Acquisition Regulation (“FAR”) 52.226-3(d)
 - Small Business Preference
 - Set Asides
 - Evaluation Preferences
- “Unusual and compelling urgency” exception to the Competition in Contracting Act.
- Emergency Acquisition Flexibilities
- Beta.SAM.gov

White House Guidance

- March 20, 2020 – White House Memo - Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)
 - Encourages communication
 - Encourages telework and performance extensions
- Mitigating Impacts
 - Excusable delays and Requests for Equitable Adjustment
 - Stop Work / Suspension of Work
- Procurement Flexibilities
 - Threshold increases
 - Stafford Act
 - Tracking Activities

National Interest Action

- The General Services Administration (GSA) has added a new National Interest Action (NIA) Code to the NIA field in the Federal Procurement Data System (FPDS) as a means of tracking procurements involved in the response to COVID-19.
- Go to [FPDS.gov](https://www.fpds.gov)
- Enter “COVID-19 2020”
- To find construction-related procurements, enter appropriate NAICS code
 - <https://www.naics.com/six-digit-naics/?code=23>
 - Ex: 236220 (Commercial and Institutional Building Construction)
 - Ex: 237120 (Oil and Gas Pipeline and Related Structures Construction)

Federal Procurement Data System



List Of Contract Actions Matching Your Criteria Results 1 - 21 of 21 as of Mar 24, 2020 8:37:10 AM

Award ID (Mod#):	36C26220P0795 (0) (View)	Award Type:	PURCHASE ORDER
Vendor Name:	JAW CONSTRUCTION, INC.	Contracting Agency:	VETERANS AFFAIRS, DEPARTMENT OF
Date Signed:	March 16, 2020	Action Obligation:	\$250,000
Referenced IDV:		Contracting Office:	262-NETWORK CONTRACT OFC 22(00262)
NAICS (Code):	COMMERCIAL AND INSTITUTIONAL BUILDING CONSTRUCTION (236220)	PSC (Code):	REPAIR OR ALTERATION OF PARKING FACILITIES (Z2LZ)
Vendor City:	CORONA	Vendor DUNS:	830939810
Vendor State:	CA	Vendor ZIP:	923825867
Global Vendor Name:	JAW CONSTRUCTION INC.	Global DUNS Number:	830939810

Product Or Service Information

Product/Service Code:	Z2LZ	Description:	REPAIR OR ALTERATION OF PARKING FACILITIES
Principal NAICS Code:	236220	Description:	COMMERCIAL AND INSTITUTIONAL BUILDING CONSTRU
Bundled Contract:	Not Bundled		
DOD Acquisition Program:		Description:	
Country of Product or Service Origin:	USA		UNITED STATES
Place of Manufacture:	Not a manufactured end product		
Domestic or Foreign Entity:	U.S. Owned Business		
Recovered Materials/Sustainability:	No Clauses Included and No Sustainability Included		OMB Policy on Sustainable Acquisition
InfoTech Commercial Item Category:	Select One		
Claimant Program Code:		Description:	
Sea Transportation:	Select One		
GFP Provided Under This Action:	Transaction does not use GFP		
Use Of EPA Designated Products:	Not Required		
Description Of Requirement: (Limit 250 characters) Current: 42	COVID-19 EMERGENCY PARKING LOT A EXPANSION		

Disaster Response Registry

- The FAR instructs the Contracting Officers to consult the Disaster Response Registry located at [SAM.gov](https://www.acquisition.gov) in order to determine the availability of contractors for the effort associated with disaster or emergency relief. Similarly, contractors wishing to be listed in the Disaster Response Registry should register with the System for Award Management (SAM).
- <https://www.acquisition.gov/disaster-response-registry>

Disaster Response Registry

Disaster Response Registry Search

Structure your search for a contractor participating in the Disaster Response Registry by using a combination of criteria from multiple categories. The checkbox corresponding to each category header expands the accordion to display your options. If you select more than one search term within a category, results can meet either value, i.e. the system applies an OR logic. If you select search terms in multiple categories, results must meet both criteria, i.e. the system applies an AND logic. Any search results returned will only include those entities which have selected to participate in the Disaster Response Registry.

Search Tips:

- You can search by Legal Business Name, DUNS Number, and CAGE Code using the Entity category.
- You can search by location where contractors are able to deliver emergency products and services using the Geographic Area Served category.
- You can search by the contractors' physical address City, State, ZIP Code, and Congressional District using the Location category.
- You will find socio-economic indicators, such as SBA Certified 8(a) and HUBZone, in the Socio-Economic Status category.
- You can conduct a small business search by NAICS Code using the Products and Services category.
- [Search terms are defined in the SAM User Guide Glossary.](#)

Registration Status	<input checked="" type="checkbox"/> Active	<input type="checkbox"/> Inactive
Registrations with an Active Exclusion(s)	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Registrations with Debt Subject to Offset	<input type="checkbox"/> Yes	<input type="checkbox"/> No

Within an accordion, search will be performed with an OR condition. Between accordions, search will be performed with an AND condition. The Geographic Area Served accordion is an exception, as noted below.

<input type="checkbox"/>	Entity
<input type="checkbox"/>	Geographic Area Served
<input type="checkbox"/>	Location
<input type="checkbox"/>	Socio-Economic Status

An Eight Part Webinar Series

The Factors that Construction Companies Need to Consider, as They Strive for Business Continuity

1. Navigating the Outbreak, Part I: Your Federal and State Legal Obligations to Provide Paid and/or Unpaid Leave to Your Employees
2. Navigating the Outbreak, Part II: What the Federal and Many State Labor and Employment Laws Are Likely to Require of You, as You Adjust Your Operations to Meet the Latest Contingencies?
3. The Contractual and Related Legal Protections and Risks for Construction Companies
4. How to Protect Your People and Your Projects
5. The Components of a Comprehensive Project Continuity Plan
6. Insurance Coverage and Claims for Losses Resulting from the Outbreak
7. The Additional Pressure that the Outbreak Could be Putting on Your Information Technology
8. What You Need to Watch, as the Outbreak Continues to Unfold

Questions?



Thank you.

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