

March 14, 2020

PRESS RELEASE

Coronavirus' Effects on Contracts

The COVID-19 Coronavirus pandemic has already had a devastating impact on the economy. As a result of its increased spread, President Trump declared Coronavirus a National Emergency. Several States, including Maryland and Virginia, and the District of Columbia declared a State of Emergencies as well. With many companies closing their businesses for periods between two weeks to a month, a question arises amongst business owners: "How does this impact my current contracts and my contractual obligations?"

Before we discuss the contractual impact, it is important to note that the first priority should be to keep you and your employees safe. The CDC and many organizations are doing a great job of getting information out on how to protect oneself and deter the spread of COVID-19, but once health and safety plans are in place, what's next?

FORCE MAJEURE CLAUSES

Many contracts contain a "force majeure" clause, also known as a "Act of God" clause. A force majeure clause excuses a party's performance of the contract because of some unforeseeable circumstance that is out of the party's control. These causes usually include fires, floods, epidemics, riots, strikes, labor disputes, freight embargoes, electrical outages, computer or communications failures, and severe weather. Governmental activities and legislation can also be considered a force majeure.

Many contractors believe that because of the Coronavirus and the fact that a National Emergency has been declared, that their contracts are unenforceable. This is incorrect. The force majeure has to **actually impact** the contractual performance. For example, if a material could only be sourced from Italy and due to the Coronavirus, the Italian manufacture shut down, this would likely be considered a force majeure. The reason is because it *actually impacted* the performance of the contractor to receive the material for the project.

Another example of what would likely be considered a force majeure would be if the state or local government implemented a ban on having a certain number of people in a gathering at one time. For example, if Virginia declared a ban of people gathering in greater numbers than 20, and a contractor has 50 people working on a project at one time, the contractor would likely be entitled to a delay due to the Virginia ban.

Examples where the contractual obligations of the parties **would not** likely be considered a force majeure would be where the owner did not want the contractor to work on the property because of a “fear”, without any indication of diagnosis or symptoms of Coronavirus, that the workers may be ill. As long as the contractor was willing and able to perform the task, this would not likely be considered a force majeure. If the owner prevented the contractor from coming on the site, the contractor may have a claim of breach of contract against the owner.

On the other hand, if the owner had symptoms or was diagnosed as having the Coronavirus, this would likely be considered a force majeure that would excuse the contractor’s performance of the contract.

As one can see from the above examples, whether a party’s contractual performance is excused because of a force majeure is highly fact specific. It is important to remember that the mere fact that a National Emergency or State of Emergency has been declared, without any direct impact on the project and the performance, does not allow a party to be excused from performing their obligation under the contract. If the owner stops the project without legal justification, the contractor may be entitled to recover time delays to complete the contract and delay costs, such as office overhead, cancellation/rescheduling fees for materials, and increased costs from subcontractors as a result of the breach of contract.

It is critical during this time to have your contracts reviewed by competent legal counsel to ensure that you have an enforceable force majeure clause. Also, it is advisable that you speak to legal counsel before these issues arise to know how to handle certain situations.

WHAT IF I SUFFER LOSSES FROM A CORONAVIRUS RELATED EVENT?

If you are suffering losses due to the Coronavirus, you will want to consult your business insurance policies. Some insurance policies include “Business Interruption Insurance” and/or “Civic Authority Shutdown of Business Insurance”, which will pay a business for the losses as a result of a covered event. Some insurance policies specifically exclude these types of coverage, but it is worth investigating. It is expected that the insurance industry will take a heavy impact as a result of paying out for losses related to the Coronavirus. Therefore, do not accept the insurance companies’ denial of coverage without having a third party, such as an insurance broker or attorney, give you their opinion on your insurance coverage.

CONCLUDING THOUGHTS

It is critical in these early stages of the Coronavirus pandemic for contractors to be as prepared as possible. You should consult your insurance companies/broker to discuss your policy coverages. You should also consult a competent legal counsel to review your contracts for force majeure clauses and their impact, as well as discuss what your contractual obligations are under your current contracts, and examine other business-related aspects of the Coronavirus, including employment issues. Being prepared now can be the difference between keeping a business going through this pandemic or becoming one of the Coronavirus’ victims.