

COVID-19: Key Considerations for Privately Owned Construction Projects

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State and local governments are mandating reduced operations or closings for businesses across the country, leaving owners of private construction projects and their contractors, construction managers, subcontractors, and suppliers working on those projects scrambling to understand their rights and liabilities. This Article discusses contractual and practical considerations for all construction project participants impacted by business interruptions or closures relating to the 2019 novel coronavirus disease (COVID-19) and suggests steps parties may take now to address disruptions.

The evolving 2019 novel coronavirus disease (COVID-19) pandemic is creating uncertainty for privately owned construction projects. Concerns started with the potential impact to the construction supply chain when COVID-19 was first identified and started to spread in Asia. Now that it has reached the US shores, the myriad social distancing guidance and mandatory stay-at-home and closure orders issued by federal, state, and local governments reflect more immediate concerns for work health and safety. These orders have left owners, contractors, construction managers, subcontractors, and suppliers struggling to understand their potential risks in these uncertain times.

This Article provides practical guidance on:

- Putting a team in place to monitor and address COVID-19 impacts.
- Reviewing and evaluating construction contracts, insurance policies, and loan documents.
- Maintaining safe workplaces.

- Providing applicable notices under contracts, insurance policies, and loan documents.
- Initiating a dispute review board or mediation to modify contract terms for continued construction or recommencement.

ESTABLISH A COVID-19 TEAM

All construction project participants should immediately create an internal team, supported by outside counsel and consultants as required, to address COVID-19 related concerns. Specific personnel should be assigned to perform these tasks as required:

- Monitor developments in state and local government orders impacting construction and work rules (see [Determine Whether the Project Can Continue](#)).
- Implement new work rules for office and field personnel consistent with applicable guidelines (see [Health and Safety Protections](#)).
- Determine impacts to supply chains for materials or equipment and whether other sources may be available (see [Material Price Escalations and Duty to Mitigate](#)).
- Review all contracts to identify applicable contract provisions and the associated risk of time and cost impacts (see [Review the Contracts](#)).
- Evaluate the financial impact of project shutdowns, whether as a result of government mandated closures or on a voluntary basis due to a shortage of manpower or other resources (see [Suspensions and Terminations for Convenience](#)).
- Review all insurance policies to determine whether coverage is available for any closures, delays, expenses, or third-party property or personal injury claims (see [Review Insurance Policies](#)).
- Identify, prepare, and deliver any required notices (see [Give All Applicable Notices](#)).
- Document pre-COVID-19 issues impacting construction in anticipation of making or receiving future claims.

DETERMINE WHETHER THE PROJECT CAN CONTINUE

The first consideration is whether an existing construction project must be shut down as a result of a government order applicable

in a specific project location. The question is whether construction in the relevant jurisdiction is considered an “essential” or “non-essential” service. Critical infrastructure projects, such as roadways, utilities, water and sewer treatment plants, hospitals, and other care facilities, are seen as necessary construction projects by their nature. The focus of the COVID-19 response has generally been to:

- Ensure the continued operation of essential services.
- Minimize non-essential activities by:
 - directing anyone not performing an essential service to stay at home, except for necessary trips; and
 - closing or restricting the operation of non-essential businesses.

Most governors have mandated statewide shutdown of businesses deemed non-essential or non-life-sustaining. In other jurisdictions, city or local county officials have issued their own closure orders based on local conditions. Adding to the confusion in some states are governors’ executive orders expressly overriding more stringent local closure orders, only to change course days later.

FEDERAL GUIDELINES

On the federal level, the Cybersecurity and Infrastructure Security Agency (CISA) issued Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response, dated March 19, 2020, and updated on March 28, 2020. CISA identifies a range of operations and services that are viewed as essential to continued critical infrastructure viability, including construction services.

However, this list is expressly advisory in nature and is not a federal directive. State and local governments have the ultimate authority to implement and execute response activities within the communities under their jurisdiction, while the federal government has a supporting role. Many states have adopted closure guidelines issued by CISA, while others have tailored those guidelines to better serve their communities.

STATE AND LOCAL GUIDELINES

The landscape of state and local government action in response to COVID-19 changes on a daily basis as local governments evaluate conditions in their jurisdiction, finetune existing orders, and extend original deadlines.

Unlike other businesses that have been specifically directed to close or are covered in broad terms like recreational facilities (such as gyms, nail salons, movie theaters, and eat-in restaurants and bars), orders relating to construction activities are often vague and result in changing guidance about the extent of closures. For example, on March 7, 2020, Executive Order 202 establishing “New York State on PAUSE (Policy that Assures Uniform Safety for Everyone),” identified all construction as essential. Yet revised guidance issued by the Empire State Development on April 9, 2020, limits construction activities to:

- Essential services such as roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters.
- Emergency construction where there is a danger to a structure or its occupants.

For a further discussion of business closures, along with regularly updated closure information in select jurisdictions, see Practice

Notes, COVID-19: Select State and Local Business Closures Tracker (US) ([W-024-7550](#)) and State Resources Chart for COVID-19 Emergency Measures Monitoring ([W-024-8433](#)).

Counsel should consult their state and local government websites on a daily basis and where available, sign up for email notifications to keep abreast of changing guidelines in applicable jurisdictions. Many jurisdictions are imposing fines for non-compliance with COVID-19 orders, which can be substantial. Counsel may also look to trade associations and other law firms that are closely following closures as a starting point for information. However, it is important to confirm that the information is current and review the complete text of government orders to ensure full compliance.

REVIEW THE CONTRACTS

By now most project participants have scoured their contracts looking for force majeure or delay provisions to determine which party is contractually obligated to bear the expenses and delay attributable to COVID-19. However, there are other contractual provisions that should be reviewed and considered including, but not limited to, suspension of work, termination for convenience, and dispute resolution.

Regardless of the contractual allocation of risk, owners should be speaking with other project participants to determine how best to move work forward in the face of:

- Local work restrictions and closures.
- Supply chain disruptions.
- Labor force health concerns.
- Schedule and work sequencing impacts.

FORCE MAJEURE AND DELAY PROVISIONS

Much of the COVID-19 discussion, including in the construction industry, has centered around the applicability and enforcement of force majeure clauses. Force majeure means a superior force that occurs outside the reasonable control of either party which prevents a party from performing the contract. COVID-19 can prevent the contractor from performing the construction and impair the owner’s ability to pay for the performance. Contracts do not have to specify epidemics or pandemics for a force majeure or other delay clause to provide relief to affected parties.

Whether COVID-19 qualifies as a force majeure or an act of God under a construction contract depends on:

- The express terms that include force majeure as an excuse to performance since the term usually will not be implied.
- The specific manner in which COVID-19 affected the project. For example, whether:
 - a government or administrative body issued an order halting the project;
 - necessary materials in the supply chain are delayed or unavailable as a direct result of the pandemic; or
 - project personnel are unable or unavailable to work because of illness, quarantine restrictions, or a government issued stay at home order, including restrictions on the number of workers permitted on the site.

Depending on the language of the contract, force majeure provisions may limit contractors or subcontractors to an extension of the contract time, while not expressly providing for additional compensation associated with the delay. Even if force majeure is not an expressed excuse to performance, a contractor may need to claim implied rights of frustration and impossibility of performance. Contractors may need to invoke other contract provisions to recoup associated costs, which may still be limited to certain categories and not make them whole for losses.

For a detailed discussion of force majeure considerations and their treatment in different standard industry documents, see Article, COVID-19 and Force Majeure Provisions in EPC Contracts and Other Construction Contracts ([W-024-6088](#)).

MATERIAL PRICE ESCALATIONS

While many contractors have already experienced supply chain disruptions, even those who have not may experience material shortages and delivery problems when restrictions are lifted and construction resumes. Whether contractors or subcontractors can invoke contractual protections may depend on when material shortages first manifested themselves and what steps, if any, contractors took to mitigate those supply chain disruptions.

Owners and contractors need to be aware of incidents of price gouging and profiteering in this crisis. Many areas of the country accustomed to natural disasters such as hurricanes and floods have legislation to prohibit such activity. Other jurisdictions have enacted emergency measures to address this concern. Personal protective equipment (PPE) is in even higher demand to keep workers protected.

For additional guidance on addressing supply chain disruptions, see Practice Note, Managing Supply Chain Disruptions in a Crisis ([W-024-5011](#)) and Managing Supply Chain Disruptions in a Crisis Checklist ([W-024-7144](#)).

DUTY TO MITIGATE

If not required by contract, the common law in a particular jurisdiction may generally imply a duty to mitigate damages and delays on a project. Owners and contractors should document when specific actions were taken to mitigate COVID-19 impacts and update their analysis on an ongoing basis. If not, future claims may be attacked with a failure to mitigate defense where parties failed to timely respond to supply chain, social distancing, and other events. Where possible, parties should proactively anticipate and address potential impacts.

SUSPENSIONS AND TERMINATIONS FOR CONVENIENCE

Owners and contractors may be faced with a number of difficult decisions, regardless of whether construction activities are officially suspended by government order. Long-term suspension of construction activity, whether by government order or owner action, may give the contractor a contractual right to terminate. Where the contract remains in effect, an owner may be contractually responsible to reimburse a contractor for its lost productivity or other expenses for an indeterminate time. Therefore, an owner may find it financially beneficial to elect a termination for convenience under the contract.

For a detailed discussion of suspension and termination for convenience provisions, including the treatment of those provisions in different standard industry form documents, see Practice Note, Terminations and Suspensions in Construction Contracts: Drafting Strategies ([0-593-2925](#)).

SUSPENSION OF CONSTRUCTION

Most contracts give an owner the right, in its sole discretion, to suspend, stop, or interrupt work on the project. The suspension can apply to:

- All work on the project.
- A particular scope of work.
- Work at a particular location on the project site.

A work suspension mandated by a government order will automatically suspend all operations. However, where construction operations can continue, owners may choose to suspend specific work to accommodate social distancing requirements or supply chain disruptions. When deciding whether to suspend some or all of the work, owners should consider:

- Whether the suspension of work provision applies where the owner did not unilaterally initiate the suspension.
- Whether advance notice of an intention to suspend work is required.
- Whether a lengthy suspension will require the contractor to incur significant expense to protect work in place, demobilize, and remobilize.
- Whether the contractor may be entitled to reimbursement for other significant costs.
- What rights the contractor has to terminate the contract for a suspension of more than:
 - a certain number of consecutive days, often as little as 30 days in standard industry forms; or
 - a cumulative number of days in a certain period when considering any earlier pre-COVID-19 suspensions.

TERMINATION FOR CONVENIENCE

Owners often negotiate for the right to terminate a construction contract at their discretion (see Practice Note, Terminations and Suspensions in Construction Contracts: Drafting Strategies: Termination for Convenience ([0-593-2925](#))). The contractor, on receiving notice of termination from the owner, may be expected to act as follows:

- Immediately stop all operations.
- Complete any work as directed in the notice before the effective date of termination.
- Take all steps required or as directed by the owner to protect and preserve any work in place.
- Transfer title and deliver to the owner all work in process, materials, and project records and information.
- Refrain from entering into any further agreements for work, materials, or services in connection with the contract or the project.
- Terminate all existing subcontracts and purchase orders, unless the owner has negotiated the right to receive assignments of subcontracts and purchase orders.

Depending on the contract language, the owner may be required to pay the contractor a termination fee in addition to paying for all work performed and materials purchased for the project.

Owners must carefully balance the potential cost savings of a termination for convenience against the potential for contractor unavailability or significant cost increases due to increased demand when construction resumes.

DISPUTE RESOLUTION PROCEDURES

Many construction agreements provide a process for the principals to meet and examine any dispute in an effort to resolve it (see for example, ConsensusDocs 200 Standard Agreement and General Conditions Between Owner and Constructor, § 12.2). Failing settlement, either party may then resort to mediation before seeking to arbitrate or litigate.

All design and construction parties have been equally burdened by this pandemic. All project participants are best served by meeting to review how the project can proceed in light of:

- Labor and material shortages and delays.
- Worker safety issues that impact staffing the job and sequencing the work.
- Adjustments in payments from lenders and investors.
- Business interruption.
- Owner or Contractor Controlled Insurance Programs (OCIP or CCIP).

REVIEW INSURANCE POLICIES

All project participants should consult their internal risk managers or contact their insurance brokers to determine whether any relief is available under applicable insurance policies. Insurance policies for construction project participants to consider and review include:

- Builders Risk.
- Pollution Liability.
- Commercial General Liability (CGL).

The coverage and exclusion language vary in different types of policies and as issued by different insurers. Coverage disputes are likely, either based on existing case law or as claims are made and denied going forward. However, that should not stop parties from making claims under all potentially applicable policies to preserve their rights.

Some states have introduced legislation to mandate coverage even where policies contain pandemic exclusions, but those efforts are guaranteed to meet with significant pushback from the insurance industry. For example, proposed legislation in New Jersey has been permanently tabled (see Legal Update, New York and New Jersey Seek Clarity on Insurance Coverage for COVID-19 Losses and Insureds File the First COVID-19 Coverage Suits ([W-024-5770](#))).

There has also been discussion of establishing a program as part of the federal government's efforts to address the COVID-19 pandemic that will address losses excluded under insurance policies, but it is too early to tell if that will be part of any further relief package.

BUILDERS RISK POLICIES

Builders risk policies are designed to protect against "direct physical damage to property" incurred while buildings are under construction, allowing recovery for costs arising from repairs to property including, but not limited to, materials, supplies, equipment, and often indirect costs. They may also provide coverage for associated business interruption costs, assuming COVID-19 impacts qualify as a property loss. Builders risk insurance is often referred to as "all risks or all perils" coverage, requiring the insurer to have excluded coverage for pandemics or other such environmental hazards as illness. Endorsements may expressly exclude coverage for these losses. It is also unclear from existing case law whether the presence of bacteria or microorganisms constitutes property damage.

POLLUTION LIABILITY POLICIES

Pollution and environmental liability policies may provide both first-party and third-party coverage for losses arising from pollutants, including:

- Bodily injury.
- Property damage, including loss of use (without physical damage).
- Clean-up costs.

Pollution covered by these policies may include infectious disease or viruses under the definition of mold. This could include the cost of decontamination of the project site if a worker tests positive for COVID-19, much as in the case of other industrial hygiene clean-up in the workplace.

COMMERCIAL GENERAL LIABILITY POLICIES

Commercial general liability (CGL) policies are designed to respond to third-party claims against an insured's business (see Practice Note, Managing Construction Risk Through Commercial General Liability Insurance ([8-574-8645](#))). While first-party claims will be a construction business' first concern, CGL policies may answer for later claims of property damage or personal injury, or at least provide a defense to those claims.

BUSINESS INTERRUPTION POLICIES

The now famous example of Wimbledon's significant losses paid under business interruption coverage leaves many regretting the decision not to purchase this coverage. Wimbledon's cumulative premiums of \$2 million annually over 17 years now seem like a bargain as compared to the actual reimbursement of \$141 million in insured losses. Business interruption coverage is often included in a well-structured builders risk policy. However, under builders risk the policy language will be debated as to what constitutes a "direct physical damage to property."

OWNER AND CONTRACTOR CONTROLLED INSURANCE PROGRAMS

Any controlled insurance program that includes worker's compensation and employer liability coverage will allow the owner or contractor to provide an avenue for addressing worker health claims on the project. While such coverage is primarily a matter for the contractor, the owner will benefit from a project claims process to identify and resolve such claims. Cost benefits from additional worker claims will likely be diminished in the short term.

NOTICE OF CLAIM

The coverage and exclusion language vary in different types of policies and as issued by different insurers. Coverage disputes are likely, either based on existing case law or as claims are made and denied going forward. That should not stop parties from making claims under all potentially applicable policies to preserve rights.

When making claims under insurance policies, review the policy language carefully and comply with all insured requirements, including provisions requiring:

- Prompt notice of claims.
- Cooperation with the insurer, including by providing:
 - timely notification of material facts concerning the claim; and
 - prompt responses to all reasonable requests for documents and information.
- Mitigation of damages.

For more information on potential coverage under a number of different business insurance policies and guidance on asserting claims, see Practice Note, COVID-19: Construction Contracts and Potential Claims Under Business Interruption, Civil Authority, and Other Insurance Policies and Endorsements ([W-025-0046](#)) and Insurance Coverage for COVID-19 Losses Chart ([W-024-5319](#)).

HEALTH AND SAFETY PROTECTIONS

The Occupational Safety and Health Administration (OSHA) has issued non-industry-specific Guidance on Preparing Workplaces for COVID-19 including guidance on:

- Developing an infectious disease preparedness and response plan.
- Implementing basic infection prevention methods.
- Developing practices for identifying and isolating sick employees.
- Implementing workplace controls.

Most states have mandated some form of social distancing requirements, which may include:

- Designating six-foot spacing for employees and customers in line to maintain appropriate distance.
- Ensuring hand sanitizer and sanitizing products are readily available for employees and customers.
- Limiting the total number of people who can work or congregate in a specific location, generally to less than ten people.

Construction companies face different challenges for the workforce in their offices and on their jobsites. Telecommuting may be possible for office workers but is not an option for workers performing physical construction on project sites. Where construction operations can continue, social distancing requirements present unique challenges for workers who often work in close quarters or in teams, and who may share equipment. Contractors should consider implementing these measures to the extent possible:

- Ensure adequate numbers of handwashing stations with soap and running water near commodes and break areas. Make hand sanitizer available in locations where running water cannot be made available or provide hand sanitizer to all workers.
- Provide each employee with their own PPE that does not have to be shared and make sure that the contractor requires them to wear it.

- Sanitize shared equipment and tools frequently and on a regular schedule.
- Keep workers at least six feet apart whenever possible while working together or supervising each other.
- Modify work sequences to work in spaces that allow fewer workers and more distancing.
- Stagger schedules and trade contractors whenever possible.
- Confirm that all workers know that if they are feeling ill, they should stay home. If they are diagnosed as having COVID-19, human resources personnel should be advised.
- Hold site meetings outdoors if possible to allow for more social distancing.

For more information on workplace guidance in light of COVID-19, see Practice Note, COVID-19: Employment Law and Development Tracker ([W-024-5500](#)) and Expert Q&A: COVID-19 and Employment ([W-024-4643](#)).

REVIEW LOAN AGREEMENTS

Owners should review their loan documents for any force majeure or other provisions that may excuse or delay performance obligations due to construction slowdowns or shutdowns. If necessary, approach lenders about a moratorium on payment obligations, such as debt service that is not otherwise excused. Since force majeure provisions in loan documents are customarily limited to between 90 and 180 days, owners should start a conversation with their lender due to the uncertain length of business disruption. As with the construction agreement, owners should document their performance of covenants prior to the pandemic's impact to avoid a technical default.

Depending on the terms of their funding agreements, funding for certain expenses may not be available during a construction shutdown, leaving owners to personally fund more of their projects than anticipated.

For more information on construction financing, Practice Note, Construction Financing: Overview ([W-001-8974](#)).

GIVE ALL APPLICABLE NOTICES

Parties should promptly give all notices relating to COVID-19 impacts to reserve their rights under their contracts and all applicable insurance policies. Many contracts have strict notice requirements, requiring notices to be given within a set time period after a party becomes aware of the cause of the impact. Parties should not assume that everyone is aware of the conditions in the project jurisdiction and forego notices. Even if a notice window has passed, parties should send notices as soon as possible.

Tips for sending contractor or subcontractor notices include:

- Review all applicable contract provisions and identify the required timing and content of notices. Different provisions may have different requirements.
- Know who must receive each notice. Contracts routinely identify who is to receive all contract notices, but certain provisions may specify additional individuals to receive notice of specific occurrences or claims.
- Provide as much specificity as possible of the cause of delay. Don't just say COVID-19 impacts since some impacts may only

trigger a time extension, while others may entitle the contractor to additional compensation. To the extent applicable, specify:

- government closures, including start and end dates;
 - labor impacts, such as mandatory workforce reductions due to social distancing or employee absenteeism;
 - schedule impacts mandated by the need to stagger trades or work in open rather than confined spaces; and
 - material shortages or inability to receive deliveries.
- Provide as much information as is available on the time and cost impacts of the events, even if it is too early to fully evaluate the impact. This will enable the owner to evaluate its potential exposure and respond accordingly.
 - Provide supplemental or updated notices as events change or more information becomes available.

PREPARE FOR THE FUTURE

Construction parties have a duty to cooperate with each other, especially at this time when everyone is impacted by the pandemic and when all parties' economic and safety interests are aligned.

Each party must examine all options for continued performance and, if required, recommencement of construction after the COVID-19 risk passes. Safeguards established on the construction site now can serve the parties even after the economy opens up again, by instituting precautionary advice from healthcare professionals who warn against prematurely returning to a state of "normalcy" and re-igniting the virus' spread.

Best practices include convening a meeting of the parties and, if the contract anticipates, even a mediation to examine how the project can move forward. Contracts can be amended, or "re-baselined" to:

- Document current conditions.
- Establish the material impacts on all parties.
- Examine market conditions.
- Determine the most cost-effective manner for continuing construction.

For a collection of resources to assist counsel with managing the evolving COVID-19 pandemic, see Global Coronavirus Toolkit ([W-024-3138](#)).

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