

Client Alert: As Construction Projects Ramp Back Up, What Does Your Contract Say About Who Bears the Costs of Delays?

By Kirk J. McCormick on May 26, 2020



Everyone is aware that the COVID-19 pandemic has substantially disrupted businesses of all types throughout the country, and construction has been no exception. At the project level, the pandemic has impacted construction sites in a wide variety of ways. Some projects were completely shut down, whether by state or local mandate, by unilateral owner decision, by mutual agreement of owner and contractor, or, in some cases, by union shutdowns. Other projects continued apace, albeit with heightened safety, sanitary, and social distancing measures in place. Regardless of the project, however, virtually every project has experienced some impact due to COVID-19.

In light of these delays and impacts, the questions that are (or soon will be) foremost on the minds of the project participants are: Who bears the costs? Are the delays excusable? If so, are they compensable? What about the costs associated with heightened safety precautions? This article will briefly examine the treatment of these issues under some of the contract provisions found in the more common standardized construction contracts, including the American Institute of Architects A201-2017 and the ConsensusDocs 200, as well as several Federal Acquisition Regulation provisions. This article will also provide a quick overview of some excuses for COVID-19-related delays and nonperformance that may be recognized under Massachusetts law in the absence of applicable contract provisions.

American Institute of Architects A201-2017

Likely the most well-known form construction contract documents, at least for private projects, the American Institute of Architects (AIA) documents have been used for over 100 years. The current version of the AIA's General Conditions (the A201-2017) includes several provisions that potentially could be implicated by COVID-19 delays.

For example, Section 8.3 covers extensions of time:

§ 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.

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§ 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.

Note that, unlike some other standard contract provisions (discussed below), Section 8.3 does not specifically call out “epidemic,” “pandemic,” or “quarantine” as causes of excusable delay. Nonetheless, it is likely that Section 8.3.1(3) (“other causes beyond the Contractor’s control”) and, to a lesser extent, Section 8.3.1(5) (“other causes that the Contractor asserts, and the Architect determines, justify delay”), would encompass COVID-19 delays.

Section 8.3.1 only expressly provides for an extension of time to complete the project. While this provision protects a contractor from liability for liquidated damages, it does not, standing alone, require reimbursement for a contractor’s extended overhead costs, mitigation efforts, or other COVID-19 impacts. Similarly, although Section 8.3.3 does not bar recovery of delay costs, it also does not expressly mandate the payment of those costs. Such a mandate must be added to the contract documents, as it is not present in the unmodified AIA A201-2017 form.

Because the AIA forms are usually negotiated and revised by the parties, particular attention needs to be paid to any revisions that impact these issues. For example, although the parties may add a provision that would allow the contractor to recover delay costs incurred due to COVID-19 impacts, it is far more likely that the owner has revised the AIA documents to include “no damage for delay” provisions that will make explicit that a contractor’s only remedy for COVID-19 delays is a time extension.

ConsensusDocs 200

Like the A201-2017, the ConsensusDocs 200, “Standard Agreement and General Conditions Between Owner and Constructor,” allows for an extension of time due to COVID-19 delays. Unlike the A201-2017, the ConsensusDocs 200 explicitly references “epidemics” as justifying a time extension:

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.

This clause also states that “adverse governmental actions” constitute grounds for claiming an excusable delay, and presumably would apply to any pandemic-related, government-required suspension of work. Unfortunately for contractors, however, the ConsensusDocs

200 is similar to the A201-2017 in that it does not expressly allow for compensation for these delays:

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.

Thus, absent modification during the drafting process, the ConsensusDocs 200 will only allow for a time extension, but will not allow for additional compensation for delays except for certain enumerated causes – and “epidemics” and “adverse governmental actions” are not among those enumerated causes.

Federal Acquisition Regulation Provisions

On federal construction projects, there are several Federal Acquisition Regulation (FAR) clauses that potentially could be implicated by COVID-19. For example, FAR 52.249-10 “Default” (Fixed-Price Construction) and FAR 52.249-14 “Excusable Delays” both expressly list “epidemics” and “quarantine restrictions” as potential excuses for a contractor’s delayed performance or failure to perform. Although these provisions potentially may entitle a contractor to an extension of time to account for COVID-19 delays (and thereby shield the contractor from default termination and liability for liquidated damages), they do not entitle the contractor to compensation for such delays.

Depending on the circumstances, however, other FAR provisions may provide the contractor with monetary (in addition to schedule) relief. For example, if the Contracting Officer directs the contractor to implement costly COVID-19 safety protocols, or if the contractor’s access or staffing is restricted due to social distancing requirements, the contractor arguably has a claim under the Changes Clause (FAR 52.243-4). In addition, if the Contracting Officer has suspended work under the Suspension of Work clause (FAR 52.242-14), in certain circumstances the contractor may be entitled to an equitable adjustment, excluding profit. If the Contracting Officer has stopped project work under the Stop Work Order Clause (FAR 52.242-15), the contractor may even be entitled to profit as part of the equitable adjustment. *See Appeal of Rex Systems, Inc.*, 04-2 BCA ¶ 32741, ASBCA No. 54444 (2004).

Notice requirements

Nearly all of the clauses listed above require that the party seeking relief provide notice to the other party. For example, A201-2017 requires a notice of claims within 21 days, and ConsensusDocs 200 requires that a contractor provide “prompt written notice” of the cause of delays. FAR 52.249-10 Default (Fixed-Price Construction) requires the contractor to provide written notice of the causes of the delay within 10 days of the beginning of the delay. Similarly, the FAR’s Changes, Suspension of Work, and Stop Work Order clauses also require timely written notice of any claims for an equitable adjustment.

Massachusetts treatment of force majeure and similar doctrines in the absence of contractual provisions

“Force majeure” (French for “superior force”) is a doctrine under which a party to a contract may be excused from performance if such performance was prevented by certain unforeseeable events, sometimes referred to as “acts of God.” There are few Massachusetts cases discussing force majeure. However, it is apparent that a party seeking to rely on force majeure to excuse contractual nonperformance must show that the intervening cause of nonperformance was “unforeseeable, unanticipated, or uncontrollable.” *See Harper v. North Lancaster, LLC*, 95 Mass. App. Ct. 1119 (2019).

Similar to force majeure, Massachusetts recognizes the related doctrines of impracticability, impossibility, and frustration of purpose. A party claiming that its nonperformance is excused under one of these doctrines generally must show that the event preventing performance was unforeseeable and that the party claiming excuse did not assume the risk of the event. *See Karaa v. Yim*, 86 Mass. App. Ct. 714 (2014).

The sheer scope of the pandemic and the associated worldwide economic and social disruption make it appear likely that a Massachusetts court will view the COVID-19 pandemic as “unforeseeable.” That is not the end of the inquiry, however, as the parties’ contract will ultimately determine the allocation of risk and whether nonperformance is excusable. *See Wagner & Wagner Auto Sales, Inc. v. Land Rover N. Am., Inc.*, 539 F. Supp. 2d 461 (D. Mass. 2008) (performance excused on grounds of impracticability only if the risk was “beyond the agreement made by the parties”). In addition, even if performance is excused, a party will likely remain responsible for providing timely notice if required by their contract. *See Goldman Env’t Consultants, Inc. v. Kids Replica Ballpark, Inc.*, 81 Mass. App. Ct. 1125 (2012) (rejecting force majeure argument where, among other things, nonperforming party did not provide timely contractual notice). Consequently, any analysis of whether COVID-19 delays are excusable or compensable must necessarily begin with the contract itself.

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