



## Impact of *Force Majeure* in Constructor and Subcontractor Agreements

During this unprecedented time, being there for our agents and customers remains a top priority. As people and businesses across the globe are being impacted by COVID-19, we are committed to sharing information and resources to help you navigate these uncharted waters and aid your customers.

### What is a *Force Majeure*?

*Force majeure* is French, translating as a “superior force.” Black’s Law Dictionary defines force majeure as an “event or effect that can be neither anticipated nor controlled.”

In the construction industry, many contracts and subcontracts contain provisions delaying or even excusing performance in the event of a force majeure event. Contracts may not always use the term *force majeure*, but may instead define acts generally-associated with the concept. Take, for example, the following extract from the ConsensusDocs200 (Standard Agreement and General Conditions Between Owner and Constructor)—

#### 6.3 Delays and Extensions of Time

6.3.1 If Constructor is delayed at any time in the commencement of progress of the Work by any cause beyond the control of the Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond control of the 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 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 the 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.

Would the *pandemic* coronavirus qualify as any of these? As is the nature of contracts, the key is in the wording. And, as is the nature of the law, the key is in the reasoning of the courts. Your customers should seek the assistance of counsel to review their current forms to see if they may specifically cover communicable disease outbreaks, pandemics, and the like, and consider whether the breadth of coverage needs to be expanded—or contracted—as the case may be.

With respect to contracts subject to Federal Acquisition Regulation (FAR), the nature of the remedy may vary depending on the pricing-model used. For example, there are provisions within the FAR that provide for non-compensable delay in

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the event of epidemics and/or quarantine restrictions (see FAR 52.249-14 (federal reimbursable contracts) and FAR 52.249-10 (federal firm-fixed price contracts)).

## What Action Should Be Taken in the Event of Force Majeure?

The contract will dictate the specific actions however, the party seeking to invoke a *force majeure* clause should:

1. Notify the designated individual representing the opposite party, in writing, of the event of delay as soon as it is reasonably possible after the commencement of the delay, setting forth the full particulars;
2. Remedy such occurrence with all reasonable measures (there is always a duty upon parties to a contract to take reasonable measures to mitigate risk and limit losses); and
3. Notify the designated individual representing the opposite party, in writing, of the cessation of the event precluding performance (so that performance may continue *if possible*).

The viability of a force majeure claim will undoubtedly rest, in part, upon the diligence and resolve of the party seeking to invoke it.

## What is the Potential Benefit of Successfully Invoking a Force Majeure Clause?

The particular remedies of the contract will vary. However, many industry-standard agreements permit, at the least, an equitable extension of time for the party unable to perform. In other scenarios, a party unable to perform may be entitled to time and costs (often subject to limitation(s)) or may be excused from performance altogether.

## What if the Contract (or agreement) Lacks a Force Majeure Clause?

Even if the contract lacks a specific clause addressing *force majeure*, there may be room to navigate these difficult events.

The common law doctrine of impossibility of performance can provide for the same performance-nullifying effect of a *force majeure* provision – which requires an event that literally renders further performance of the contract impossible. Some examples include:

- A key performer gets injured with no one to replace them;
- Valuable or irreplaceable property gets lost, stolen, or destroyed;
- Weather conditions prevent a performance or competition;
- Natural disaster prevents the delivery of goods; and
- A government passes a law or decree that makes contract performance illegal.

## Conclusion

With the rapid onset of the coronavirus, the courts have not-yet had an opportunity to fully confront the implications and provide guidance. Disruptions to businesses, and the economy in general, impact everyone. The unforeseeable results and reactions to these disruptions reinforce the need for contractors to be proactive and take reasonable measures to mitigate risk and limit losses. Remember to: carefully read the contract (with the consultation of an attorney if necessary); promptly communicate the circumstances concerning the delay with the appropriate party (in writing); take reasonable measures to mitigate damages; and diligently document efforts.

**This memo is meant purely for informational consideration and should not be treated or relied upon as legal advice. There is no attorney-client relationship created by the issuance of this memo. Westfield urges your customers and clients to seek independent counsel and request a comprehensive review and opinion relative to their specific facts or circumstances.**

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