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Force Majeure Considerations for Contractors

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Below are some of the key provisions in the AIA A201-2017 General Conditions document to keep in mind when considering “force majeure” and other claims related to COVID-19, and possible revisions.

Extensions of Time

- The standard AIA General Conditions excuses any delay caused “by . . . unusual delay in deliveries . . . or other causes beyond the Contractor’s control; or . . . by other causes that the Contractor asserts, and the Architect determines, justify delay” AIA A201-2017 § 8.3.1(3).

Delay-Related Costs

- The AIA General Conditions do not specifically identify which types of delays, if any, might entitle the Contractor to additional compensation or an increase in the contract sum or GMP.
- According to the official AIA commentary to the 2007 version of the A201, “[w]hether such a basis represents a basis for an increase in the contract sum is left to state law.”
- As a general matter, delays not the fault of either the Contractor or the Owner entitle the Contractor only to additional time and not additional money.

Additional Costs Not Related to Delays

- State or local orders enacted after the contract was signed may require the Contractor to build and maintain washing stations, regularly clean surfaces, build additional physical barriers, conduct health screenings, conduct additional training, and provide personal protective equipment to workers.
- Such costs would not have been contemplated at the time of contracting, and may be considered to be additional work. But note that, with the exception of certain tax increases (AIA A201-2017 § 3.6), the standard AIA General Conditions do not directly state that the Contractor is entitled to a change order for additional costs incurred due to changes in the law.

Notice

- The Contractor must provide timely notice to the owner of any claim, including claims for additional time and claims for additional costs. See, *generally*, AIA A201-2017 § 15.1.
- For delay claims, such notice must include an estimate of the time

and cost impacts. AIA A201-2017 § 15.1.6.1.

Termination Rights

- The contractor may terminate the Agreement if the Work is stopped for a period of 30 consecutive days by an act of government, such as a declaration of national emergency, that requires all work to be stopped. AIA A201-2017 § 14.1.1.2. In the event of such a termination by the Contractor, the Contractor is entitled to recover from the Owner payment for Work executed, as well as reasonable overhead and profit on Work not executed, and costs incurred by reason of such termination. AIA A201-2017 § 14.1.3.
- The Owner may terminate the Agreement for its convenience and without cause. AIA A201-2017 § 14.4.1. In the event of such a termination by Owner without cause, the Owner shall pay the Contractor for Work properly executed; costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement. AIA A201-2017 § 14.4.3.
- Depending on whether the parties included a “termination fee” in the Agreement, the financial impact of a termination by the Contractor under Section 14.1.1.2 can be significantly different than a termination by the Owner under Section 14.4.1.

Keep Track of Costs

- If the Contractor maintains, or the parties agree, that the Contractor is entitled to additional costs for impacts related to COVID-19, then the Contractor should keep ample records of all such additional costs, and track such costs separately.
- The parties may wish to enter into an agreement requiring the Contractor to submit all information related to the additional costs on a regular basis.

Contracting in The Future

- For future contracts, beware of attempts by contractors to create a “blank check” for COVID-19 impacts, and attempts by owners to prohibit the recovery of all costs related to unforeseeable COVID-19 impacts.
- The regulatory hurdles to construction associated with COVID-19 are already established. Contractors should be able to estimate the costs of complying with local health orders, and the impact to productivity caused by local restrictions enacted due to COVID-19.
- At the same time, contractors will naturally increase their bids to include the risk of additional costs if they will not be recoverable.
- Any agreement by the parties related to potential COVID-19 impacts should at a minimum address the following:
 - Notice requirements;
 - Requirements for tracking of additional costs;
 - The proper form of any delay analysis;

- Requirement that the contractor take steps to mitigate the impacts; and
- Proof that the increased costs or delays were not foreseeable.