

COVID-19: Evaluating Contractor Claims and Changes

Gary Jentzen & Don Fredlund

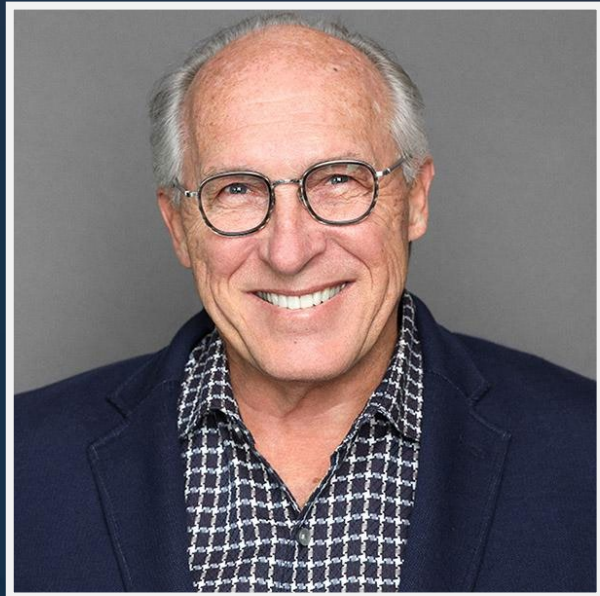
Gary Jentzen and Don Fredlund of PMA Consultants provide basic information surrounding the granting of an extension in contract time or an adjustment in contract price, if any, as a result of the current pandemic. Nothing herein should be construed as legal advice or legal opinions on specific facts.

EXPOSITOR: Gary Jentzen, PE, JD, LEED AP



- ✓ Gary is an expert in large, complex claims and change order analyses, negotiation, and resolution, and in various other forms of dispute resolution. He has significant expertise in and knowledge of all aspects of claims and change avoidance review/evaluations that include cost and schedule administration and control, and scope and change order control. He has provided expert analysis and testimony, and he has significant experience on large, complex claims analysis and dispute resolution assignments and he has testified in dispute forums that include dispute review boards, mediations, arbitrations, and litigation.

EXPOSITOR: Don Fredlund, PMP



- ✓ Don has managed or assisted in evaluating hundreds of change order disputes, time extension requests, requests for equitable adjustment, and claims related to the following types of issues: delay, acceleration, disputed changes, differing site conditions, defective specifications, damage calculations, cost/schedule administration, effects of changes on productivity and schedule performance, and project/construction management practices. Accordingly, he has prepared and published many expert reports and testified as an expert on entitlement and damages related to those issues in many types of venues and dispute resolution processes including: negotiations, mediations, arbitrations, litigation and administrative hearings.

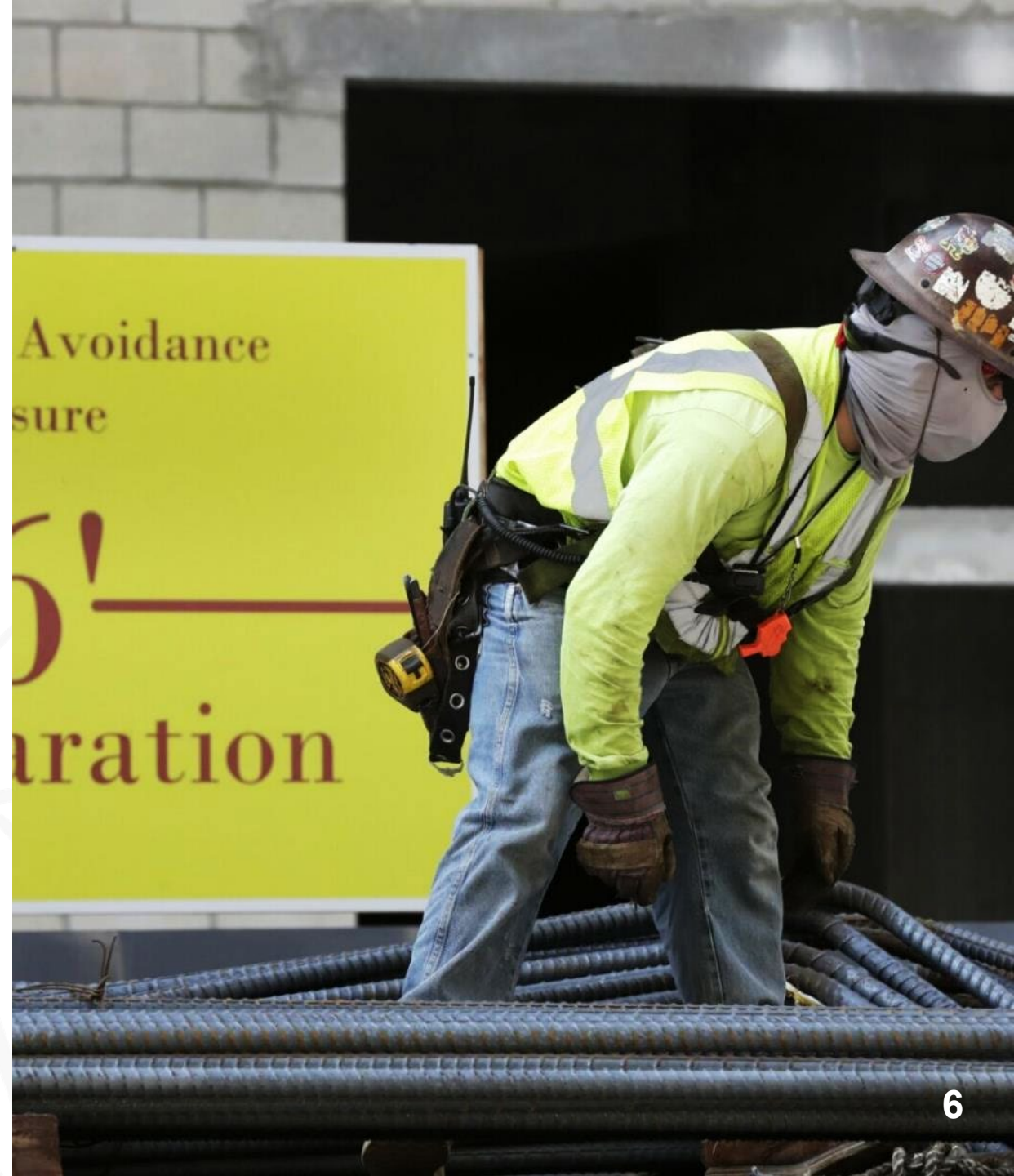
CONTENT

- ❖ Introduction
- ❖ COVID-19: Entitlement to a Time Extension or an Adjustment in Contract Price
- ❖ Request for an Extension in Contract Time
- ❖ Request for an Adjustment in Contract Price
- ❖ Some Typical COVID-19 Contractor Claims
- ❖ Relevant Information for Analyzing a Cost Claim Related to COVID-19
- ❖ Key Takeaways

Introduction

Background

- On March 13, 2020, President Trump declared a nationwide emergency pursuant to Sec. 501(b) of Stafford Act to avoid governors needing to request individual emergency declarations.
- All 50 states, the District of Columbia, and 4 territories have been approved for major disaster declarations to assist with additional needs identified under the nationwide emergency declaration for COVID-19.



Purpose

- The question in regards to construction contracts is how will the effects of this pandemic be dealt with in regards to Contractor's request for extensions in project time as well as adjustments in project cost. In today's pandemic construction world Contractors want to believe that the increase in cost that they might be experiencing because of COVID-19 must be the Owner's responsibility since it is not due to anything they did. In fact, the pandemic is not the fault of either the Owner or the Contractor so the question becomes who is responsible to pay for the impacts on the project caused by the pandemic.
- The purpose of this presentation is to provide basic information surrounding the granting of an extension in contract time or an adjustment in contract price, if any, as a result of the current pandemic. Nothing herein should be construed as legal advice or legal opinions on specific facts.



COVID-19: Entitlement to a Time Extension or an Adjustment in Contract Price

Analyzing a Request for a Change Order or Claim

- As a result of the Covid-19 pandemic, Contractors may be seeking contractual relief for impacted performance of the work.
- Contractors will be looking for a reason to justify its contractual non-performance of its obligation to meet its schedule or meet its cost obligation under the contract.
- The operative issue in regards to this presentation is whether the COVID-19 pandemic and/or ensuing government restrictions excuse the Contractor's non-performance of its contract or amount to a change in the contract; and if so what are the Contractor's remedies.
- When it comes to evaluating whether an extension of contract time or an adjustment in contract price is warranted it is first necessary to determine if the Contractor is entitled to either.
- Entitlement for an adjustment in contract time or price can come from a clause in the contract or state or federal law.
- In determining entitlement the first place to look is the contract between the Owner and Contractor as it governs their relationship.
- The next place would be any applicable state or federal law governing the contract, if any.

Analyzing a Request for a Change Order or Claim

- One thing to remember in determining who pays for COVID-19 issues is that COVID-19 was not caused by either party – not the Owner or the Contractor – so don't assume that because the Contractor's cost have gone up that it is the Owner's obligation to pay for that increase in cost.
- Typically, the Contractor makes a commitment under the contract to maintain a safe work environment which typically requires them to comply with OSHA and any other state requirements. The fact that OSHA requirements change after the start of the job, it does not automatically entitle the Contractor to a change in contract price.
- Contractors need to provide notice, not only of the delay, but any actions they have taken to mitigate the delay.
- It is the Contractors obligation to preserve rights they have under any existing applicable insurance policies they might have.
- Owners need to be careful in responding to Contractor notices regarding COVID-19 as Owner direction may be deemed to entitle Contractor to both cost and schedule relief.

COVID-19's Role in Excusing Contract Performance

- Does the COVID-19 pandemic and ensuing government restrictions excuse non-performance of a contract? The answer depends on the contractual language, the state law governing the contract and the purpose of the contract.
- It also depends on the specific facts of the given case since every situation is different.
- Generally, the key contract clause addressing excusing non-performance would be a “force majeure” clause.
- Force majeure clauses are a negotiated contract clause – not all contracts have them.
- Force majeure clauses are strictly interpreted like other clauses of the contract. If they do not specifically list an event it may or may not be considered included. Events that are on the list of force majeure events that are close but not identical to those listed may or may not be included, e.g., epidemics vs quarantine restrictions vs. pandemics vs. acts of God, depends on the contract and the intent of the parties.
- There typically is an obligation for a party claiming force majeure to provide proper notice and mitigate the effect of the event for it to be in effect.

Remedy Granting Clauses

- In addressing the entitlement to an extension in contract time the Contractor will need to refer to the clauses in the contract dealing with extensions in contract time and/or delays, etc.
- In addressing the entitlement to an adjustment in contract price Contractors will need to refer to the clauses in the contract dealing with changes, safety, changes in the Law, emergency and any other clauses potentially granting the Contractor entitlement to adjustments in the contract price.
- It is apparent that all contracts are not the same so to suggest that there is a standard position regarding changes in time or money is just not correct.
- Entitlement for these issues will be governed by the specific requirements of each contract so to assume that all Contractors are entitled to both a change in contract time and price because of a change in the law is not necessarily a prudent assumption.

Request for an Extension in Contract Time – Performing a Delay Analysis

Analyzing a Contract Delay Claim

- A delay claim during the pandemic is no different than any other delay claim – the Contractor must comply with the contract by providing the required notice and demonstrate that:
 - 1) there was a delay (was the contract completion date or any project milestones delayed);
 - 2) what caused the delay, e.g., the pandemic (cause);
 - 3) Who is responsible for the delay.
- Any subcontractor claiming a delay would have to do the same.
- There is no automatic assumption that all Contractors are impacted the same by the pandemic and that they are all entitled to a time extension. Each case is different based on the contract and the facts and needs to be addressed individually.
- To the extent that a Contractor cannot provide a schedule analysis demonstrating that the pandemic affects its critical path and caused a delay to the completion of the project they will not be entitled to an excusable delay.

Analyzing a Delay Claim

- The Contractor cannot merely make a statement that it has been delayed because of COVID-19, they must demonstrate it.
- COVID-19 is merely an event that may have caused the delay and every situation is different so the Contractor needs to demonstrate entitlement to time just like any other delay.
- The Contractor must demonstrate that it is the force majeure event that is causing the delay to the contract completion date to justify entitlement.
- Typically, the method of demonstrating justification to an extension in contract time will be addressed in the contract.
- Regardless of the method it needs to start with an accurate schedule that is up-to-date and accurately reflects the plan for the work.

Analyzing a Delay Claim

- If the contract does not have a force majeure clause the Contractor needs to find another clause in the contract that would excuse its delay.
- There may be clauses in the contract addressing delays resulting from other events other than force majeure, e.g., Changes in Law, Restricted Access, Owner directed Changes, Delays and Extension of time, etc.
- There may also be contracts that don't use the term "force majeure" but incorporate that concept by addressing force majeure type events in clauses addressing delays.
- Any delay analysis needs to recognize whether the Contractor was already behind schedule at the time of the pandemic
- Any concurrent delays also need to be recognized in the analysis.

Examples of Contract Delay Clauses

Public Agency Contract

Additionally, the Contractor may be granted an extension of time for any portion of the delay in overall completion of the contract work beyond the time provided in Subsection 107.04 caused by:

- Acts of civil or military authorities, war or riot, or declared national or state emergencies;
- Fire;
- Floods, tidal waves, earthquakes, cyclones, tornadoes, hurricanes, or other cataclysmic natural phenomenon;
- Extreme weather conditions (see paragraph below);
- **Epidemics or quarantine restrictions.**

Examples of Contract Delay Clauses

6.6 DELAY AND SUSPENSION OF WORK

- A. The Engineer has the authority to delay the commencement of the Work and delay or suspend any portion thereof, for such period or periods as it may be deemed necessary, because of conditions beyond the control of the Authority or the Contractor, for the failure of the Contractor to correct conditions unsafe for the general public; for failure to carry out provisions of the Contract; for failure to carry out orders; for causes and conditions considered unsuitable for the prosecution of the Work; for acts of third persons not a party to the Contract; or for any other cause, condition, or reason deemed to be in the public interest.
- B. Upon receipt of written order of the Engineer, the Contractor shall immediately delay the commencement of the Work or delay or suspend any portion thereof in accordance with said order. Work shall not be suspended or delayed without prior written approval or order of the Engineer. The work shall be resumed when conditions warrant or deficiencies have been corrected and the conditions of the Contract satisfied as ordered or approved in writing by the Engineer. The Contractor's attention is also directed to the requirements of Section 01560 - TEMPORARY CONTROLS, Part 1 "Laws to be Observed" Article, and Article 5.21 herein which shall govern during any period of temporary or partial suspension of work.

Public Agency
Delay Clause

Examples of Contract Delay Clauses

6.8 DETERMINATION AND EXTENSION OF CONTRACT TIME FOR COMPLETION

- A. The Contractor shall complete, entirely, and in an acceptable manner, the Work required under the Contract within the time stated in the Bid Form, except that the Contract time for completion shall be adjusted as follows:
1. If the Contract is not awarded as contemplated by Section 00100 of the Contract Specifications, then the number of days allowed for the completion of the Work will be computed from the date of receipt of the Contract by the Contractor or the date on which the Contractor was ordered to commence work whichever is later. For the purpose of this paragraph, the Contractor will be presumed to have received the Contract on the day following the mailing of the executed Contract to the Contractor by the Authority. If the Contract specifies a specific calendar date for completion and the Contract is not awarded as contemplated by Section 00100, of the Contract Specifications then the Contractor will be entitled to an extension of time equivalent to the number of days elapsed from 60 days (45 days if Federal funds are involved) after the opening of bids up to and including the day of receipt of the executed Contract by the Contractor or the date on which the Contractor was ordered to commence Work whichever is later.
 2. In case commencement of work is delayed or any part thereof is delayed or suspended by the Authority (except for unsuitable weather, winter months, or reasons caused by the fault or neglect of the Contractor), the Contractor will be granted an extension of time in which to complete the Work or any portion of the Work required under the Contract equivalent to the duration of the delay less a reasonable period of time within which the Contractor could have done necessary preliminary work.

Public Agency
Delay Clause

Examples of Contract Delay Clauses

3. When delay occurs due to Force Majeure , the time for completion of the Work shall be extended as determined by the Engineer to be equitable.
4. An "Act of God" as used in this Article is understood to imply an earthquake, flood, cyclone, or other cataclysmic phenomenon of nature beyond the power of the Contractor to foresee or make preparation in defense of. A rain, windstorm or other natural phenomenon of normal intensity, based on United States Weather Bureau reports, for the particular locality and for the particular season of the year in which the Work is being prosecuted, shall not be construed as an "Act of God" and no extension of time will be granted for delays resulting therefrom. Within the scope of acts of the Government, consideration will be given to properly documented evidence that the Contractor has been delayed in obtaining any material or class of labor because of any assignment of preference ratings by the Federal Government or its agencies to other defense contracts.
5. In case the Work is delayed by public or private utility owners or municipal agencies, see Article 3.5.
6. Each Extra Work Order or Change Order as issued will include a statement of additional time, if any, that is agreed upon by the Contractor and the Engineer required for the completion of the Contract by reason of this Extra Work Order or Change Order, and no other time allowance due to the performance of the Work covered by such Extra Work Order or Change Order will be allowed.

Public Agency
Delay Clause

Effect of a Force Majeure Clause

Force Majeure Events & Contract Performance

- With the declaration of a pandemic, “force majeure” claims have become the claim of choice to justify non-performance of the project schedule.

Definition of “force majeure”:

1. : an event or effect that cannot be reasonably anticipated or controlled – act of God.
 2. : unforeseeable circumstances that **prevent someone from fulfilling a contract.**
- In order for a party to claim force majeure there must be a force majeure clause in their contract.
 - Either party to the contract can claim a force majeure event and seek being excused for their non-performance of the contract.

Force Majeure Events & Contract Performance

- Just because an event is listed in the force majeure clause does not automatically make it applicable to the Contractor's claimed situation. The Contractor needs to demonstrate that contract performance is impossible – not merely impractical. It must also show that the event was not foreseeable at the time of contract award and that it was this event that caused the parties' damage.
- To determine if a force majeure event has occurred courts frequently consider the following:
 - Whether the language in the force majeure clause specifically references events beyond the parties' control;
 - Evidence that the force majeure event was unforeseeable;
 - Whether the force majeure event caused the party's non-performance; and
 - Evidence that the force majeure event was so severe that contract obligations cannot be performed.

Force Majeure Events & Contract Performance

- Does a pandemic qualify as a force majeure event? Whether a pandemic or Government action as a result of the pandemic are unforeseeable events depends on 1) the facts surrounding the declaration of the pandemic, 2) the timing of the contract award, and 3) the nature of the Government action.
- If the force majeure clause does not specifically list “pandemic” it may or may not be included depending on the interpretation of the contract by the court.
- In the case of a schedule delay, the alleged force majeure event needs to affect the critical path of the schedule in order to justify a time extension.
- Whether a Contractor is entitled to an equitable adjustment in time or cost if it can’t get labor or materials because of the pandemic, will be controlled by the contract and could be affected by the type of contract, i.e., fixed price, GMP, Design-build, etc.

What Does it Mean if Force Majeure Applies?

- It means that a delay to a party's contract performance can be excused.
- The contract typically can be either delayed until the force majeure event ceases or terminated depending on the contract.
- A schedule delay due to a force majeure event typically would be an excusable delay allowing the Contractor a time extension but no compensation. However, some contracts may also allow compensation for the delay.
- The contract may also be termination by the Contractor or Owner depending on the contract.
- If the contract is partly performed by the Contractor, the Owner will be responsible to pay for the portion of the performance completed.
- What must the asserting party demonstrate to prove a force majeure event has impacted its work?
 - The event was not foreseeable;
 - contract performance is impossible;
 - It made an effort to mitigate any effects of the force majeure event; and
 - The party must provide timely notice of the event and schedule impacts with associated support.
- An increase in the contract price if compensable delays are allowed and/or supported.

Example: Excusable Delay

ARTICLE 6.07 EXCUSABLE DELAYS/FORCE MAJEURE

- A. An "Excusable Delay," is a delay that results from an event that is demonstrated by the Contractor to the Owner's satisfaction to be entirely due to some cause beyond the control and without the fault or negligence of the Contractor, the Subcontractors, and Vendors, and that was not foreseeable at the Bid Date, and that meets the prerequisites set forth in Article 6.05 A, above. Any Delay that is not an Excusable Delay shall be a "Non-Excusable Delay."
- B. If there is an Excusable Delay and the Owner determines that the Contractor meets all of the requirements for an extension of time set forth in Article 6.05 – "EXTENSIONS OF TIME", then the Owner shall grant a time extension by changing the relevant Milestone(s) in a Modification. For Non-Compensable Excusable Delays, such time extension, if granted, shall be the Contractor's sole and exclusive remedy.

Example: Excusable Delay

- C. Excusable Delays may be caused by force majeure events, including, but not limited to: delays due to Acts of God, war, whether or not declared, civil war, insurrection, rebellion or revolution, or any act or condition incident to any of the foregoing, acts of the federal government, acts of the State or any political subdivision thereof, acts of municipalities, acts of other public agencies and authorities, acts of public service corporations, acts of other contracting parties over whose acts the Contractor has no control, fires, floods, epidemics; strikes except those caused by improper acts or omissions of the Contractor, the Subcontractors or Vendors, and extraordinary delays in delivery of materials caused by strikes, lockouts, wrecks, or freight embargoes, or excessive inclement weather (based on data from the National Oceanic and Atmospheric Administration).
- D. An "Act of God" as used in this Article means a cataclysmic phenomenon of nature beyond the power of the Contractor to foresee or make preparation in defense of.

What if There is no Force Majeure Clause in the Contract?

Extra-Contractual Doctrines

- If there is no force majeure clause in the contract it may be possible to consider some extra contractual Common Law or Uniform Commercial Code defenses that can apply regardless of whether they are in the contract and include:
 1. Frustration of purpose
 2. Impossibility
 3. Impracticality
- Common Law Principals
 - 1. Doctrine of Frustration of Purpose**
 - If there is no force majeure clause in the contract it is possible to claim the common law principal of frustration of purpose which requires that the party's principal purpose is substantially frustrated without their fault by the occurrence of an event which was the basic assumption of the contract when it was made.
 - Frustration is not available where the event that frustrated the performance was clearly foreseeable.
 - Certain states do not recognize the concept of frustration and instead require the party's performance to become impossible before excusing it.

COVID-19's Role in Excusing Contract Performance

2. Doctrine of Impossibility

- The Doctrine of Impossibility requires the affected party to demonstrate objective impossibility.
- The Doctrine of Impossibility excuses non-performance when: 1) an unexpected intervening event occurs; 2) the event was not foreseeable; and 3) the unexpected event made contractual performance impossible, e.g., an event made impossible “by law”.
- Discharge by impossibility typically puts an end to the obligation although performance can be suspended rather than discharged.

Uniform Commercial Code

3. Doctrine of Impracticality

- The Doctrine of Impracticality besides being a remedy under Common Law is made available in some states by virtue of codification of UCC 2-615 (Uniform Commercial Code).
- The UCC applies to buyers and sellers of goods as compared to the construction contract itself.

COVID-19's Role in Excusing Contract Performance

- UCC 2-615 (A) provides: “Delay in delivery or non-delivery in whole or in part by a seller who complies with divisions (B) and (C) of this section is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”
- To demonstrate impracticality a party asserting such must demonstrate:
 - An unforeseeable event occurred;
 - The non-occurrence of the event was a basic assumption underlying the contract;
 - That event rendered performance impracticable; and
 - The event was due to factors beyond the party's control.

Extra-Contractual Doctrines

- **Impracticability occurs when:**

- Performance becomes significantly more burdensome than anticipated due to an unforeseen event, performance may be excused under the doctrine of impracticability of performance.
- The Restatement (Second) of Contracts (1981) states:

“Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render performance is discharged, unless the language or circumstances indicate the contrary.”

- It is not enough that performance has become economically burdensome, the cause of the burden must be unforeseen and a basic premise of the parties’ agreement.
- If the court finds one of these extra-contractual defenses applicable, the party claiming the defense generally has the balance of its performance excused unless such would provide a windfall to one of the parties.
- These extra-contractual defenses are implied and do not need to be specifically stated in the contract.

Other Clauses That May Provide for a Time Extension

- Other contract clauses that potentially could provide for a time extension include the following:
 - Extension in contract time clause
 - Changes clause
 - Suspension of work clause
 - Stop Work Order clause
 - Changes in the Law clause

Force Majeure Like Clauses

Force Majeure-Like Clauses

- In addition to contracts that do have a specific force majeure clause some contracts go the route of defining what happens in various delay situations which may include addressing delays caused by what are typically addressed in force majeure type clauses.
- Some of these contract clauses may also provide for adjustments in contract price as well as extensions in contract time under various circumstances.

Examples of Force Majeure-Like Clauses

AIA (2007, 2017)

- §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 (3) by...unusual delay and deliveries ... or other causes beyond the Contractor's control; ...or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the contract time shall be extended by Change Order for such reasonable time as the Architect may determine.
- 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.

Monetary delay claims must find their basis under another contract clause, such as the changes clause.

Examples of Force Majeure-Like Clauses

ConsensusDocs–200 (Revised 2019)

§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 Construction include, but are not limited to, the following:

- (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;
- (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.

Examples of Force Majeure-Like Clauses

EJCDC

12.03 Delays

A. Where Contractor is prevented from completing any part of the Work within the contract times due to delay beyond the control of Contractor, the contract times will be extended in an amount equal to the time loss due to such delay if a Claim is made therefor as provided in Paragraph 12.02.A. Delays beyond the control of Contractor shall include, but not be limited to...**epidemics...or acts of God.**

. . . C. If Contractor is delayed in the performance or progress of the Work by...epidemic...acts of God, or other causes not the fault of and beyond the control of Owner and Contractor, **then Contractor shall be entitled to an equitable adjustment in contract times, if such adjustment is essential to Contractor's ability to complete the Work within the contract times. Such an adjustment shall be Contractor's sole and exclusive remedy for delays described in this Paragraph 12.03.C.**

Can Delays Caused by COVID-19 Be Compensable?

What is Basis for Compensability?

- Not all contracts are the same, some could allow for compensation for a delay with or without a force majeure clause.
- In addition, a Contractor may not even claim the pandemic caused its delay rather they may claim that Government action caused the delay.
- The Contractor, depending on the circumstances, claim that it was a change in the law that caused the delay which would possibly be covered under a Changes in Law clause if one is included in the contract rather than a force majeure clause even if one is in the contract.
- It is therefore important for the Contractor to identify on what basis it is claiming entitlement to a compensable delay.

Example: Compensable Delays

ARTICLE 6.08 COMPENSABLE DELAYS

- A. Except as otherwise specifically provided for in this ARTICLE, the Contractor agrees to make no claim for compensation or damages for delay of any kind in the performance of this Contract on behalf of itself, Subcontractors or Vendors whether occasioned by any act or omission of the Contracting Party or the Authority or any of their representatives (whether it is an Excusable Delay within the meaning of Article 6.05 - Extensions of Time or otherwise) and Contractor agrees that any such claim shall be compensated for solely by an extension of time to complete performance of the Work as provided in Article 6.05. In this regard, the Contractor alone hereby specifically assumes the risk of such delays, including without limitation: delays in processing or approving shop drawings, samples or other submittals; or the failure to render determinations, approvals, replies, inspections or tests of the Work, in a timely manner. Notwithstanding any provision of subparagraph (b) below, Contractor shall not be entitled to compensation or damages for delay of any kind relating to the delay of an intermediate milestone date (if such date(s) are provided for in the Contract Documents).
- B. A Delay that entitles the Contractor to an adjustment in Contract price is called a “Compensable Delay.” A Delay that is not a Compensable Delay is a “Non-Compensable Delay.” To be considered as a Compensable Delay a Delay must first meet all prerequisites for extension or increase in time set forth in Article 6.05 -“EXTENSIONS OF TIME”, including the requirement that the delay be an Excusable Delay and then meet all requirements of this Article 6.08. Only Delays of the types set forth in C below are Compensable Delays.

Relevant Information for Analyzing a Time Claim Related to COVID-19

1. Has the Contractor made a specific request for an extension in contract time?
2. Has the Contractor provided a time entitlement analysis in accordance with the contract documents?
3. What event/activity has the Contractor claimed delayed the Project?
4. Was the Contractor delayed before this alleged delaying event occurred? If so how much?
5. Are there concurrent delays?
6. Has the Contractor asserted that the delaying event is a force majeure event?
7. Does the contract have a force majeure clause?
8. Does the force majeure clause specifically list this alleged delaying event or something that could arguably include this event?
9. If the Contractor has claimed force majeure is it claiming the event is COVID-19?
If so has it demonstrated that this event is causing a delay to contract completion?

Relevant Information for Analyzing a Time Claim Related to COVID-19

10. If there is no force majeure clause in the contract on what basis is the Contractor claiming entitlement to a time extension?
11. Has the Contractor demonstrated that it has done what it could to mitigate this delay?
12. Do you agree the Contractor is entitled to a time extension? If so how much time? What about other contract Milestones?
13. Is the Contractor asking for compensation for the delay? If so, on what basis is the Contractor's claiming entitlement to compensation?
14. Does the time granting contract clause or some other clause in the contract, i.e., no damages for delay clause, preclude recovery of compensation for this delay?
15. If the Contractor is entitled to compensation for the delay have they submitted a proposal in accordance with the contract documents? If so is it consistent with the contract documents?
16. Does the contract address how much the Contractor gets paid for delay?
17. Are the claimed delay costs all time related?
18. Does the contract allow for profit on delay costs?

Request for Adjustments in Contract Price

Adjustments in Contract Price

- The first step in determining if a Contractor is entitled to an adjustment in contract price is to determine if there is any entitlement to the Contractor's demand.
- In order to get an adjustment on contract price the Contractor must demonstrate that it is entitled to an increase by virtue of some clause in the contract.
- Depending on the contract, these issues may or may not be addressed specifically in the contract.
- If the Contractor request a change as compared to an Owner directed change, the Contractor is obligated under the contract to demonstrate why the work it is claiming is not included in its contract.
- Other Contractor cost impacts allegedly caused by COVID-19, besides delay, can also potentially be covered by a force majeure clause in the contract.

Adjustments in Contract Price

- Some Potential contract clauses that might provide for an adjustment in contract price include:
 1. Changes
 2. Changes in the Law
 3. Suspension/Stop work
 4. Safety regulations
 5. Differing Site Conditions
 6. Emergency
- Until the Contractor demonstrates entitlement, any information documenting an increase in contract price or time is not relevant.
- Once the Contractor does demonstrate entitlement, the Contractor needs to provide detailed information, as required by the contract, demonstrating the basis for the proposed increase in contract price.

Example of Force Majeure Clause – Delay +

- Force majeure can apply to other situations – not just delay although in construction contracts delay seems to be more typical similar to a liquidated damages clause.

Section 10.04 Force Majeure

A. For purposes of this Agreement, a force majeure event is an act or event beyond the control and without any fault or negligence of the Contractor (“Force Majeure Event”). Such events may include, but are not limited to, fire, flood, earthquake, storm or other natural disaster, civil commotion, war, terrorism, riot, and labor disputes not brought about by any act or omission of the Contractor.

B. In the event the Contractor cannot comply with the terms of the Agreement (including any failure by the Contractor to make progress in the performance of the services) because of a Force Majeure Event, then the Contractor may ask the Commissioner to excuse the nonperformance and/or terminate the Agreement. If the Commissioner, in his or her reasonable discretion, determines that the Contractor cannot comply with the terms of the Agreement because of a Force Majeure Event, then the Commissioner shall excuse the nonperformance and may terminate the Agreement. Such a termination shall be deemed to be without cause.

Force Majeure Events & Contract Performance

- With the declaration of a pandemic, “force majeure” claims have become the claim of choice to justify non-performance of the project schedule.

Definition of “force majeure”:

1. : an event or effect that cannot be reasonably anticipated or controlled – act of God.
 2. : unforeseeable circumstances that **prevent someone from fulfilling a contract.**
- In order for a party to claim force majeure there must be a force majeure clause in their contract.
 - Either party to the contract can claim a force majeure event and seek being excused for their non-performance of the contract.
 - Remember “force majeure” is intended to excuse contract performance.

1. Changes Clause

- A typical Changes Clause allows the Owner to make changes as spelled out in FAR 52.243-4.

52.243-4 Changes.

As prescribed in [43.205\(d\)](#), insert the following clause: The 30-day period may be varied according to agency procedures.

CHANGES (JUNE 2007)

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes-

- (1) In the specifications (including drawings and designs);
- (2) In the method or manner of performance of the work;
- (3) In the Government-furnished property or services; or
- (4) Directing acceleration in the performance of the work.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; Provided, that the Contractor gives the Contracting Officer written notice stating-

- (1) The date, circumstances, and source of the order; and
- (2) That the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.

1. Changes Clause

- Changes can allow for an adjustment in contract time and contract price if entitled FAR 52.243-1.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

1. Examples of Changes Clause

Public Agency Changes Clause

- The Owner may, at any time, without notice to the sureties and without invalidating the contract, make any change in the Work within the general scope of the contract including, but not limited to, changes:
- in the contract documents, including but not limited to the Specifications, contract Drawings, technical requirements, and administrative requirements;
- in the method, manner, or sequence of performance of the Work;
- in the Owner-furnished facilities, services, materials, equipment or sites;
- directing acceleration of the performance of the Work or extension in the schedule; and
- modifying the contract Schedule, Milestones or Access Restraints.

1. Examples of Changes Clause

- Another Public Agency's Changes Clause

2.2 CHANGES IN THE WORK

- A.** The Authority reserves the right at any time during the progress of the Work to make alterations to, deviations from, additions, to, and deletions from the Contract Drawings and Specifications. Such changes shall not invalidate the Contract nor release the surety. The Contractor agrees to accept the Work as changed, the same as if it had been a part of the original Contract. Such changes will be authorized in writing by the Engineer. The Contractor shall accept as full compensation for Work, except as specified in Paragraphs B. and C., the Contract unit prices stipulated in the Contract for the actual quantity of work provided in an acceptable manner. Such changes shall not invalidate the Contract, nor any part thereof.

2. Changes in the Law Clause

- Some contracts will have a Changes in the Law clause setting forth the parties' obligations and remedies if a change in the law occurs after contract award.
- To the extent that the Contractor is required to follow new or revised orders, regulations or laws from the government, Contractor's are claiming these government actions as a change in the law.
- Some claims related to COVID-19 government action that Contractors are making to justify an adjustment in contract price include the following:
 - Direction that causes a change to Contractor's schedule for the work
 - Direction that requires more costly performance methods, e.g., social distancing, extra cleaning, limitation in number of people who can work on jobsite, safety checks entering the jobsite, etc.
 - Cost for providing required safety resources, e.g., on-site hand washing stations, additional PPE, additional cleaning, etc.

2. Changes in the Law Clause

- Whether these claims will justify an increase in contract price will be a function of the specific contract language dealing with changes in the law.
- If there is no Changes in the Law clause in the contract, the Contractor may have to look for another clause in the contract to justify entitlement to an adjustment in contract price such as changes dealing with general changes, safety, emergency, etc.
- The following Public Agency's Changes in Law clause indicates that the Contractor is obligated to observe and comply with "all such existing and future laws, ordinances, regulations, orders and decrees." – it does not address whether that supports a claim for an increase in the contract price.

2. (cont.) Example–Changes in Law Clause

Example of Changes in Law Clause:

- Laws to be Observed

The Contractor shall keep her/himself fully informed of all existing and future state and national laws and municipal ordinances and regulations in any manner affecting those engaged or employed in the Work, or the materials used in the Work, or in any way affecting the conduct of the Work, and of all such orders and decrees of bodies or tribunals having any jurisdiction or authority over the same. If any discrepancy or inconsistency is discovered in the contract for this Work in relation to any such law, ordinance, regulation, order, or decree, s/he shall forthwith report the same to the Engineer in writing. S/He shall at all times observe and comply with, and shall cause all agents and employees to observe and comply with, all such existing and future laws, ordinances, regulations, orders and decrees.

2. (cont.) Changes in Law

ARTICLE 8.10 CHANGES IN LAWS

- A. The Contractor shall keep itself fully informed of all Laws affecting the Work or those engaged in the Work. If any discrepancy or inconsistency is discovered in the Contract in relation to any Laws, the Contractor shall report the same to the Owner's Authorized Representative in writing. The Contractor, its agents and employees shall at all times observe and comply with, and shall cause all of its Subcontractors and Vendors, and their agents and employees to observe and comply with all such Laws.
- B. If during the term of this Contract there are changes to the Laws or new Laws enacted not known or foreseeable at the time of the Award Date ("Change in Law"), such change shall be considered under Article 8.02 – "CHANGES," as if resulting from an Order, if:
1. the Change in Law requires or results in a change in the Contract documents, including, but not limited to, the Specifications, Contract Drawings, technical requirements, and administrative requirements or in the Owner-furnished facilities, services, materials, equipment or sites; and

2. (cont.) Changes in Law

2. the Change in Law affects the Total Contract Amount or the Milestones; and
3. the Contractor files a Notice of Change within five (5) Days of becoming aware of the Change in Law.

- C. A Change in Law may result in an Excusable Delay in accordance with Chapter 6, but shall not result in entitlement to an equitable Adjustment in Price or to a Compensable Delay, if it:
1. affects the Contractor's method, manner, or sequence of execution of the Work; or
 2. results in acceleration or extension of the Work; or
 3. results in modifying the Contract Schedule, Milestones or Access Restraints; and
 4. does not also require or result in a Change as set forth in Article 8.02 – "CHANGES."

3. Suspension/Stop Work Order

- To the extent that the Owner issues the Contractor a directive to suspend or stop work they could be responsible for the cost and schedule impact associated with that direction, depending on any language in the contract addressing these situations.

Example: Temporary Suspension of Work

The Engineer shall have the authority to suspend the Work wholly, or any part thereof, for such period as he shall deem necessary, because of unsuitable weather conditions, or for such other causes as are considered unfavorable for the satisfactory prosecution of the Work, or for such time as s/he may deem necessary due to the failure of the Contractor to carry out orders given or to perform any provisions of the contract. Upon receipt of written order from the Engineer, the Contractor shall immediately suspend the Work or such part thereof in accordance with the order. No Work shall be suspended without the written permission of the Engineer. The Work shall be resumed when conditions so warrant or deficiencies have been corrected and the conditions of the contract satisfied as ordered or approved in writing by the Engineer. No allowance of any kind will be made for suspension of Work by order of the Engineer except as provided in Article 69 [Extensions of Time].

3. (cont.) Example Suspension/Stop Work Order

ARTICLE 6.09 STOP WORK ORDER (SUSPENSION OF WORK)

A. The Owner may, at any time, by Notice to the Contractor, require the Contractor to stop or suspend all, or any part, of the Work for a period of one hundred eighty (180) days (or any lesser period), commencing upon receipt of such Notice and for any further period to which the parties may agree. Any such Notice shall be specifically identified as a "Stop Work Order" issued pursuant to this Article 6.09. Within the period of one hundred eighty (180) days (or the lesser period specified) after a Stop Work Order is delivered to the Contractor, or within any extension of that period, the Owner shall either:

1. cancel the Stop Work Order, or
2. terminate the portion of the Work covered by such Stop Work Order as provided in Article 8.08 – "TERMINATION FOR CONVENIENCE BY OWNER."

3. (cont.) Example Suspension/Stop Work Order

Example:

STOP WORK ORDER (SUSPENSION OF WORK)

- C. The Contractor's entitlement to adjustments in Milestones and Contract Price as a result of a written Stop Work Order shall be limited to the following:
1. an adjustment in the Milestones, in accordance with all requirements set forth in Article 6.05, "EXTENSIONS OF TIME"; and
 2. an Equitable Adjustment in price under Article 8.04C; except that no profit mark-up will be allowable on, or as part of, any such price adjustment.

4. Jobsite Safety Clause

- Jobsite safety is typically the Contractor's responsibility.
- As a part of that responsibility the Contractor is typically directed to follow the current law regarding jobsite safety include complying with OSHA and following all state and local requirements.
- The requirements from the various governmental entities to socially distance, wear face mask, quarantine, provide PPE, provide handwash stations, etc. is being interpreted by Contractors as a change in the law.
- Whether the Contractor gets paid for any changes in these laws after the execution of the contract or complying with its contractual obligation to provide a safe work environment, is a function of the contract requirements.

4. Example Jobsite Safety Clause

ARTICLE 5.02 SAFETY AND HEALTH

- A. The Contractor shall be solely responsible for conducting operations under this Contract to avoid risk of harm to the health and safety of the public and to persons (including but not limited to all personnel) and property at the Work Site, and for inspecting and monitoring all equipment, materials and work practices to ensure compliance with its obligations under this Contract. Such measures shall include, but not be limited to, providing protection barriers and barricades, signs, navigation lights and buoys where marine work may be involved, and any additional measures required to comply with this Contract and the Laws.
- B. The Contractor's responsibility for safety shall apply continuously twenty-four (24) hours per day, every day, during the term of this Contract; the Contractor's responsibility for safety shall not be limited to normal working hours.
- C. The Contractor shall, together with other contractors, coordinate all safety planning and emergency response on multi-contractor Work Sites.

4. (cont.) Example Jobsite Safety Clause

- D. Contractor shall be solely responsible for developing and implementing a Construction Safety and Health Plan (CSHP) pursuant to the terms of this Contract. The Contractor's CSHP Plan shall, at a minimum, conform and comply with:
1. all Laws governing safety and health in the workplace; and
 2. Specification Section 01545 – “Construction Safety and Health”, including revisions thereto. If the Contractor considers any such revision made after award to be a change affecting its cost or schedule, then the Contractor may seek relief pursuant to Chapter 8 – "CHANGES."
 3. Specification Section 01540 – “Planning and Supervision” including revisions thereto. If the Contractor considers any such revision made after award to be a change affecting its cost or schedule, then the Contractor may seek relief pursuant to Chapter 8 – “CHANGES.”

5. Differing Site Conditions Clause

- Conditions associated with the pandemic most likely will not be treated as differing site condition as a differing site conditions involves “physical conditions at the site” which is not a pandemic.
- While working conditions may have changed, e.g., social distancing, the effects of the pandemic are not considered “physical conditions at the site.”

ARTICLE 8. 06 DIFFERING SITE CONDITIONS

- A. The Contractor shall promptly, but no later than forty-eight (48) hours after first encountering or discovering conditions that the Contractor believes to be a Differing Site Condition, and before such conditions are disturbed, notify MTA’s Authorized Representative in writing of: (i) latent physical conditions at the site differing materially from those conditions indicated in the Contract (“Type 1 Condition”), or (ii) physical conditions at the Work Site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as occurring in work of the character provided for in this Contract but unknown to the Contractor until encountered during performance of the Work (“Type 2 Condition”). The Contractor’s Notice shall identify the conditions encountered and how they differ from those indicated in the Contract or ordinarily encountered or generally recognized, and shall also explain if and how the conditions encountered will cause a material increase in the cost and/or time required for performance of the Work.

Conclusions

Conclusions

- The pandemic does not change the Contract.
- Entitlement starts with the Contract – don't assume entitlement because of the pandemic.
- Force Majeure is not a given it must be in the Contract – it is a negotiated Contract term – if it is not there it does not apply.
- The impact of an alleged force majeure must be demonstrated.
- If the force majeure event is not the activity causing the critical path delay then it is not the reason for the delay.
- It makes a difference as to who required changes to the work the government or the owner.
- Don't assume that the owner is responsible for the effects of the pandemic.

9° Congreso

AACE Internacional
de Ingeniería de Costos



Questions **?**
comments ●

9° Congreso

AACE Internacional
de Ingeniería de Costos

Thanks.