



# LEGALLY SPEAKING

## Protecting Your Rights for Coronavirus Impacts

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Many subcontractors have been severely affected by the coronavirus and have legitimate questions concerning their ability to obtain time extensions as well as their entitlement to recover additional costs. Most states have severely limited business activity since mid-March. In some areas, construction has been shut down altogether. In other locations, construction was exempted from the closures. In still

other places, construction on projects deemed essential or life-sustaining are permitted. Where construction is permitted, required compliance with CDC and OSHA guidelines has changed work conditions, and in many cases, severely reduced productivity. Depending on the trade, certain tasks cannot be performed without violating social distancing requirements or at least requiring additional precautions and protective equipment. Tasks

that can be performed often take more time. Where a project has been completely shut down, delays are easier to establish, at least for the period during which all work was stopped. However, on projects where work was permitted to continue, impacts from diminished productivity, delays at manufacturing and fabrication plants, shortages of building materials, and delays in transportation are equally real but

more difficult to prove. This article is designed to assist subcontractors in protecting their rights and maximizing their ability to obtain relief for the impact of the coronavirus.

## Subcontracts

**Review the Subcontract.** The first step in determining your rights for additional time and compensation is to carefully review the subcontract to identify and understand provisions that address delays and the relief to which you are entitled for delays. Some subcontracts state that the subcontractor is not responsible for delays caused by events or conditions beyond its control or for delays caused by unforeseen conditions or circumstances. These provisions often state that the subcontractor is only entitled to additional time for delays. Such provisions are often referred to as *no damages for delay* clauses, and if your subcontract has one, then your only remedy for coronavirus delays and impacts may be a time extension. Some subcontracts contain *force majeure* clauses providing relief in the event of catastrophes or Acts of God. They often list the types of events that constitute *force*. If there is a *force majeure* clause in the subcontract, carefully review it to determine whether the coronavirus is among the types of events that are listed as a *force majeure* event, and determine what relief the clause affords.

## Flow Down Clauses

Many subcontracts contain *flow down clauses*, which provide that the terms and conditions of the prime contract flow down into and are incorporated by reference in the subcontract. If your subcontract contains such a provision (and it likely does), the prime contract should be carefully reviewed to see what it says regarding delays beyond the contractor's control or for other events. There may be a *force majeure* provision in the prime contract that flows down into the subcontract.

With a flow down clause, you may be entitled to the same relief from the contractor which the contractor is entitled to obtain from the owner. The AIA A401 Subcontract, which is widely used in the construction industry, does not specifically address delays beyond the subcontractor's control. A401 Subcontract contains a flow down clause at Article 1.1. Thus, a subcontractor that has entered into one of these agreements, must carefully scrutinize the prime contract for provisions regarding delays in order to determine the relief to which it is entitled. If the prime contract includes the AIA A201 General Conditions, there are provisions stating that the contractor (and hence the subcontractor) is not responsible for delays, and may be entitled to additional compensation as well. (See Articles 8.3.1 & 8.3.3)

## Notice Provisions

*Follow the Notice Provisions.* Review the subcontract carefully to determine the precise requirements for giving the customer notice of delays and additional costs and comply with them. Most subcontracts contain time limits for giving notice and often require that the notice contain specific information about the delay, its cause and impact on progress. They frequently dictate a specific manner and format in which the notice must be given. Since the coronavirus epidemic began impacting construction projects, many of our subcontractor clients have asked us to assist them in drafting a standard form letter that can be used to give notice of coronavirus delays on all ongoing projects. While the desire to develop a single notice form is understandable, subcontractors are well-advised to customize the notice letter for each project, to ensure that it complies with the particular notice requirements of the applicable subcontract. Make sure that the notice is transmitted via the exact method required by the subcontract. Some subcontracts permit email, while others require

first class mail, certified mail or overnight delivery (FedEx, UPS). They sometimes require that the notice be directed to a specific individual and/or that certain individuals receive a copy. Make sure these requirements are strictly followed, and do not assume that a *one size fits all* notice letter will be sufficient.

Subcontracts often contain harsh provisions stating, in one form or another, that the subcontractor's failure to strictly comply with the notice requirements results in a waiver or forfeiture of the claim. Do not assume that your customer will accept anything less than full compliance with all requirements. The coronavirus is likely to be the most significant event to impact construction costs since the steel shortage in the last decade. We predict that many owners will be looking for reasons to reduce, limit or reject claims for additional time and compensation caused by the coronavirus. Some will seize upon technical non-compliance to reject claims. Take extra care to ensure that your notice strictly complies with the requirements of each individual subcontract, so that you do not provide a basis to reject your claim due to a technical flaw.

Do not avoid or delay giving notice simply because you do not know the exact number of days you need, or cannot precisely quantify your additional costs. Inform the customer in the notice letter that you are presently unable to identify the time and cost impact, but you will update them as soon as they can be better assessed. Make sure the tone is professional and cooperative. Do not be discouraged if your customer responds to your notice letter by criticizing it or telling you that it is insufficiently specific. Such pushback is to be expected whenever a subcontractor requests additional time or money, where the GC is not yet sure whether it will obtain similar relief from the owner. Many prudent general contractors will forward delay notices

from subcontractors to the owner in support of their own requests for an equitable adjustment under the prime contract. Give them the ammunition they need to get relief from the project owner.

## Cost and Schedule Impact

*Document the Cost and Schedule Impact.* The mere fact that the coronavirus required a shut down or modification of work activities, methods and sequences to comply with OSHA, CDC and other guidelines will not, in and of itself, entitle you to time and/or money. **Subcontractors will need to prove the delays and impacts to their work.** You must be able to precisely demonstrate how the coronavirus delays impacted you. You will need to show clearly that the delay was caused by the coronavirus rather than other factors, and you will likely need to show how the critical path of the project was delayed. Supporting the additional costs with precision is frequently overlooked by subcontractors who often find it easier to just estimate the added costs rather than compile actual costs. Identifying your actual costs will be crucial. Consider setting up a cost code to track additional time that activities are taking. If compliance with OSHA and CDC guidelines are reducing productivity (which is likely), make sure it is noted in your daily logs and other similar documents. Consider adding a section to your daily logs specifically noting coronavirus impacts. For example, if certain work requires two or more workers to be in close proximity to one another, note that the activity must be postponed, that it will require additional setups or mobilizations, and the impact that the postponement of that activity will have on other construction. These contemporaneous records will be critical later if dispute resolution becomes necessary.

Familiarize yourself with the concept of the “**measured mile**,” which is a method of quantifying claims based on lost productivity. While this short article cannot begin to address the measured mile method in detail, the measured mile method compares the cost of “impacted” work with the cost incurred to perform the same or similar “unimpacted” work on the same project. Subcontractors may be able to identify areas of a project constructed before the coronavirus outbreak which were on budget, and compare their costs incurred on a similar portion of the project where work was not as efficient, due to the new social distancing requirements that had to be followed. The difference between the two is the amount of the claim. Of course, you will have to address any other factors that could have caused the additional costs and show that they did not cause the reduction in efficiency.

## Future Contracts

Subcontractors that are bidding on or negotiating for future projects should insist on the inclusion of provisions that provide relief for impacts of the coronavirus. Even after the coronavirus restrictions ease there are likely to continue to be impacts, such as delays in procurement of materials due to shortages and the like. The exact language will need to be tailored for the particular project, but such a subcontract provision could look something like the following:

Notwithstanding any provision(s) of this Subcontract, if as a direct or indirect result of any virus, disease, contagion, including but not limited to COVID-19 (individually or collectively, “Epidemic”), Subcontractor’s work is delayed, disrupted, suspended, or otherwise impacted, including, but not limited to, by (1) disruptions to material and/or equipment supply; (2) illness of Subcontractor’s workforce and/or unavailability of labor; (3) government quarantines, shelter-in-place orders, closures, or other mandates, restrictions, and/or directives; (4) Owner or Contractor restrictions and/or directives; and/or (5) fulfillment of Subcontractor’s contractual or legal health and safety obligations associated with an Epidemic; then Subcontractor shall be entitled to an

equitable adjustment to the Subcontract schedule and duration to account for such disruptions, suspensions, and impacts. To the extent COVID-19 and the impacts thereof result in an increase in the price of labor, materials, or equipment used in the performance of this Subcontract, Subcontractor shall be entitled to an equitable adjustment to the Subcontract price for such increases, provided Subcontractor presents satisfactory documentation of such increases and evidence of Subcontractor’s reasonable efforts to find alternative sources of material or equipment supply and/or labor at the original/non-impacted prices and/or estimates.

Absent a specific subcontract provision in future subcontracts, it will be difficult to obtain relief because the coronavirus and its impacts are now foreseeable, and customers faced with future claims will likely reject them on the basis that the coronavirus and the issues it presents were foreseeable at the time the subcontract was signed.

## Conclusion

The impacts of coronavirus are still not known, as the situation remains very fluid. It is certain, though, that the financial consequences of the virus to the construction industry will be enormous. Subcontractors need to protect their economic interests by following the requirements of the subcontract and carefully tracking extra costs. Good recordkeeping will be essential as is the case in every potential claim situation. Subcontractors following these recommendations will maximize their chances of obtaining equitable relief to help them get through this predicament.

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