

Practice Update

# Constructing a Contingency Plan for Coronavirus

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Drafting Construction Contracts to Address Potential Risks and Impacts from Infectious Disease

Parties to large commercial and residential construction projects typically enter into complex contract agreements that lay out each party's rights and responsibilities in exacting detail. These agreements – which can be between project owners, contractors, subcontractors, suppliers, architects, and consultants – include contingencies for situations ranging from a basic breach of the contract, to labor strikes, and even floods and storms. One risk that parties to construction contracts frequently ignore, however, is infectious disease. In light of the current outbreak of the coronavirus (COVID-19), parties should draft their construction contracts to address risks and impacts arising from coronavirus and outbreaks of other infectious diseases.

The World Health Organization learned of the first case of what would become known as coronavirus on December 31, 2019, and as of the date of this Article, approximately 89,000 individuals have been diagnosed with coronavirus, with more than 3,000 of those cases proving fatal.[1] While only 60 of these diagnoses have occurred in the United States,[2] there has still been a noticeable impact felt

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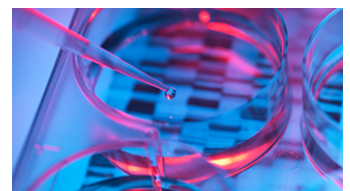
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throughout the country. The stock market has plummeted since the first diagnosis in the country, [3] the federal government has instituted travel restrictions,[4] and supply chains have been interrupted or threatened.[5] Fortunately, there are plenty of steps that individuals or companies can take to protect their interests when negotiating construction contracts in the age of coronavirus. Many of these suggestions also apply more generally to many types of contracts that face risks from infectious disease. Depending upon your role in a project – as an owner, contractor, subcontractor, supplier, architect, or consultant – one or more of these tips may be worth considering.

**1. Include a force majeure clause that expressly includes or excludes coronavirus, infectious disease, epidemic, and pandemic.**

A force majeure clause is a contract provision allocating the risk of loss if performance becomes impossible or impracticable, particularly as a result of an occurrence that the parties could not have anticipated or controlled.[6] These clauses typically excuse one or both parties' contractual performance when certain enumerated circumstances arise. If used, these clauses should be drafted to ensure that performance may be excused only when the party claiming the excuse can prove that an expressly named event has made performance impossible or impracticable. When determining whether to excuse performance under a force majeure clause, courts look to whether the parties should have anticipated the specific circumstances at the time that they negotiated the contract. Accordingly, a court may conclude that parties who entered into a construction contract during or after the current outbreak of coronavirus should have foreseen the potential impacts from coronavirus or infectious disease more generally. Consider specifically naming coronavirus, infectious disease, epidemic, and pandemic in your force majeure clause.

Two of the most common and widely-used forms of general conditions of a contract for construction in the United States – the AIA 201-2017 and ConsensusDocs 200 – do not contain a true force majeure clause. Rather, these contracts enumerate certain occurrences in which a contractor may be entitled to an extension of the contract time and a corresponding increase in the contract price. Consider adding a force majeure clause in these contract forms, and once again, expressly name coronavirus and infectious disease – at least when they have a demonstrable and measurable impact on performance – as events that excuse performance.

**2. Address the contractor’s (or subcontractor, architect, or consultant’s) right to an adjustment of the contract time or price arising from impacts caused by coronavirus.**

Ensure that your construction contracts outline if and when a contractor or lower-tiered subcontractor may be entitled to an adjustment of the contract time and price as a result of impacts caused by coronavirus and infectious disease. Specifically condition any right to an adjustment in price or time to a demonstrable and measurable impact to the project. As mentioned above, the AIA 201-2017 and ConsensusDocs 200 enumerate certain occurrences when a contractor may be entitled to additional contract time or money. AIA 201-2017 does not mention infectious disease, but does include “unavoidable casualties” and “other causes beyond the Contractor’s control.” The ConsensusDocs 200 includes “epidemics” and “unavoidable accidents or circumstances.” It is not clear whether a court would consider impacts caused by coronavirus or another infectious disease to fall within the definition of any of these terms. Here, it is better to be specific. Specifically state whether any impacts caused by coronavirus or infectious disease will entitle the contractor to an adjustment of the contract time or price. Ensure that any clause permitting adjustments to the contract time and sum specifically requires

the contractor to show a demonstrable and measurable impact caused by the disease.

### **3. Address which party to the contract bears the risk of supply chain impacts.**

One of the key risks to construction projects caused by coronavirus and infectious disease is the impact on goods and material supply chains. Construction projects invariably rely upon goods and materials that are delivered from other states and countries. This includes bricks, blocks, cement, lumber, steels and other metals, glass, and electric and electronic components. Contractors have already begun to deal with situations where goods and materials are being held up, and *The Harvard Business Review* predicts that the impact to supply chains from coronavirus will reach its peak in mid-March.[7] Ensure that your construction contracts address which party bears the risk that necessary supply chains may be interrupted or halted by coronavirus and other infectious diseases. Specifically state whether a supply chain impact will entitle the contractor to any additional contract time or funds. Consider requiring bidders or offerors to propose two or more varied sources for critical goods and materials, so that the parties will already have a backup plan in place if supply chains are impacted. Make sure that these backup plans always cover who will be responsible for any additional costs or delays caused by supply chain impacts.

### **4. Consider requiring or procuring insurance policies that cover business interruption caused by coronavirus and infectious disease.**

Coronavirus has interrupted or threatened the interruption of businesses worldwide. As discussed above, in the construction context this can include shortages or unavailability of materials, goods, and labor. Consider procuring or requiring a counterparty to your contract to procure business interruption insurance that covers impacts caused by coronavirus and infectious disease. Note that

many business interruption insurance policies may not by their terms cover impacts caused by coronavirus, and many policies even contain a specific communicable/infectious disease exclusion. In response to the coronavirus outbreak, the Insurance Services Office (ISO) has issued endorsements for certain insurance forms that include coverage for certain civil authority orders relating to coronavirus. To the extent possible and practicable, ensure that you and your contractors, subcontractors, suppliers, and consultants are properly covered by available business interruption insurance.

**5. Include provisions outlining who must do what, and when, in the event of an outbreak in the project city/state.**

We all hope for the best, but must prepare for the worst. In the event of an outbreak of coronavirus or other infectious disease in the city or state where your project is located, you must have a plan and clear delineation of responsibilities. Who is responsible for keeping informed of the situation, providing notices to all other parties, and for deciding whether and when to suspend or cancel the project? Consider including a specific provision for the suspension of work in the event the project is threatened by an outbreak of coronavirus. Ensure that this provision spells out the compensation owed to each party, and continuing rights and remedies available to each. Also require contractors, subcontractors, and consultants to institute best practices for reducing the spread of coronavirus or any other infectious disease on the project.

## Conclusion

To date, the United States has been lucky to avoid the worst of the coronavirus, and we hope it stays that way. However, prudent business owners and parties to a construction project would be wise to draft their contracts in a way that accounts for all reasonably foreseeable events that may impact the project.



Unfortunately, the current outbreak of coronavirus highlights the risks and impacts that infectious diseases pose to a construction project. Be proactive and vigilant, and specifically address these risks and impacts in your contract by implementing one or more of the suggestions above.

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[1]World Health Organization, *Coronavirus Disease (COVID-2019) Situation Report – 1*, [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10\\_4](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10_4) (Jan. 21, 2020); World Health Organization, *Coronavirus Disease (COVID-2019) Situation Report – 42*, [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200302-sitrep-42-covid-19.pdf?sfvrsn=edd4f123\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200302-sitrep-42-covid-19.pdf?sfvrsn=edd4f123_2) (March 2, 2020).

[2]Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19) in the U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-in-us.html> (Updated March 3, 2020).

[3]*Coronavirus fears are clobbering the stock market – is it doing the same to your retirement?*, MarketWatch, <https://www.marketwatch.com/story/coronavirus-fears-are-clobbering-the-stock-market-is-it-doing-the-same-to-your-retirement-2020-02-27> (Feb. 29, 2020).

[4]*Travelers will face new restrictions and cancellations as coronavirus cases grow in the US*, CNN, <https://www.cnn.com/travel/article/coronavirus-travel-restrictions/index.html> (March 2, 2020).

[5]*94% of the Fortune 1000 are seeing coronavirus supply chain disruptions*: Report, Fortune, <https://fortune.com/2020/02/21/fortune-1000-coronavirus-china-supply-chain-impact/> (Feb. 21, 2020).

[6]Black's Law Dictionary (11th Ed. 2019).

[7]*How Coronavirus Could Impact the Global Supply Chain by Mid-March*, Harvard Business Review, <https://hbr.org/2020/02/how-coronavirus-could-impact-the-global-supply-chain-by-mid-march> (Feb. 28, 2020).

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