

Contract review and preparation in the COVID-19 era

By K. Bradley Mellor

We've all been bombarded with COVID-19 issues, statistics, projections and safety and prevention plans for eight months now. Depending on who you listen to, the declared pandemic is getting better, getting worse or staying about the same. Only the Shadow knows, I guess. One thing that I know without any doubt, the pandemic and the restrictions associated with it, both those imposed by government entities and those adopted by concerned companies and individuals, have disrupted the "business as usual" model with which many of us were very comfortable. Unfortunately for the stability of the business (and construction) world, and human nature being what it is, many people find it easier to react than to anticipate and plan for changes.

Because we already know that this pandemic is here and is having its undeniable effects on businesses of most kinds, let's pretend that we're not really anticipating or planning. That's too complicated. Let's pretend that we're actually just reacting to something that already happened, like we usually do. That would probably make us feel better.

I want to discuss effects of the pandemic on things like schedules, change orders, and design modifications, things that have mattered to the construction industry since forever, and how we might consider reacting today. For most construction lawyers, contracts are the rulebook for a project. If all the parties know the rules and what's expected of them, the



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prospect of a dispute is diminished. The more information we can exchange and agree on in advance, the better our prospect of achieving that construction project nirvana – "on time and on budget." Like anything else in life, we can't anticipate every problem, but we can pay attention to help avoid the ones we know are likely problems. Now we are aware of a couple more.

First Steps

I'm assuming our goal here is to try to avoid problems, rather than simply set up problems we can win. Only a very few contractors I've dealt with over the past 30-plus years make their money winning cases; most make much more building things and avoiding problems. To paraphrase Virgil Sollozzo from "The Godfather," "[l]itigation (rather than blood) is a big expense.' I

know some attorneys who prefer to litigate problems, but wouldn't your clients appreciate you more if you helped them to avoid problems when possible? That's why paying attention to the construction contract before it's signed is important.

Don't be fooled into thinking that any standard "form contract" is appropriate for all projects. A good example arises from this pandemic situation. Look at your force majeure provisions in the contracts you're operating under. Are they adequate for today's world? Wouldn't it be good if you could go back and renegotiate them for the issues you now know have hit?

Look at the standard force majeure clause in the AIA standard documents. Section 8.3.1 of the 2017 A201 General Conditions gives the Contractor a right to additional time (no money) if he encounters "(3) labor disputes, ... unusual delay in deliveries, ... or other causes beyond the Contractor's control, and (5) other causes that the Contractor asserts and the architect determines justify delay." These could arguably provide schedule relief for pandemic-caused delays. But would you feel better if the language provided for relief when something like a pandemic prevents your client from working? And how does the standard provision apply if a contract is entered into after the pandemic has become common knowledge? You knew about it when you signed the contract, so how is it now beyond your control?

If a project shutdown becomes necessary due to government regulation over an employee's exposure, does

that count as "beyond your control" if you could have enacted safety measures to prevent widespread contact? Shouldn't there have been a safety program that requires the employees to stay apart as much as possible? If you know about the pandemic in advance, can you claim force majeure as readily as you would have it was an unknown issue? Will issues like this ever be unexpected again?

How do you deal with provisions like A201 Para. 3.7.2 in this context? That paragraph says that the contractor must comply with "applicable laws, statutes, ordinances, codes, rules, regulations and lawful orders of public authorities applicable to performance of the work." How many of your clients were shut down during the early days of the pandemic when Governor Wolf's orders deemed most construction activities "non-essential"? Did your contracts provide for schedule relief? Should your "force majeure" language include this concept? I'd be surprised if the spring of 2020 is the last time any of us have to deal with similar issues.

And what is covered by your standard clauses? Under the forms we typically see, there is no money for force majeure issues. But what if you have an expensive rented crane on site and some government order from some clueless governor or health secretary or county official shuts down your project for a month or two? Who's paying those crane charges? Would you not be better off if the contractor and owner had discussed

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work life are merged. It's very easy to have mental vertigo and to allow all the neuroticisms that many litigators have to win out over logical problem solving. It's hard, but an overall change of mentality occurs because of lessons learned during COVID, and everyone can have a better life/practice.

In-house Counsel/Clients Sets the Rules. The general rule is that clients tell us what to do (within reason), not how to do it. Sometimes, clients and in-house lawyers have been dealing with a problem for so long that they just want it to go away, and in many occasions, that means letting trial counsel fight it out. If clients and in-house counsel send litigation counsel on a mission to assess and settle early and work peacefully, then top-down change can happen.

It's OK to be Good to Your Opponents. COVID taught most of us that nothing is easy, and it's likely people you are working with have a tougher road to pave. It's easy to become frustrated when technology doesn't work or a dog is barking at home, until you have a Zoom mediation and opposing counsel also has to deal with three young children. There is no question that civility is paramount in construction and commercial practice. It is impossible to do business with others if civility isn't at the forefront of everything we do. Granting reasonable extensions, holding back from sending unnecessary missives on Fridays at 5:30, or not unilaterally scheduling depositions without talking to the other side first are good places to start.

None of these ideas are new. But there is an opportunity to make them permanent because of a window of

opportunity created by COVID. We all have the potential to reduce stress and expense at the same time.

Like Rocky said at the end of Rocky IV, "If I can change, and you can change, everybody can change." ■

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those situations in advance and included contract language to address the concern? Maybe you agree to split the risk in some fashion, maybe one party agrees to consciously absorb the risk, or maybe you can negotiate some other reasonable way to deal with the cost of that risk.

I know, I know, you're going to tell me that no one could have anticipated this particular pandemic, and I'd agree with you. But now it's here. And if we're honest with ourselves, we'll admit that these issues don't just relate to the COVID-19 pandemic. For that matter, how sure are we that there won't be something similar in the future? We're construction attorneys, we've learned new things about construction and incorporated the new concepts into our contracts forever – delay damages and waivers, impact claims, home office overhead, safety concerns, lien waivers, chronic failure warranties, and a thousand others. It's our job to help identify new issues, and to help our clients protect themselves from the associated risk. This is a new, perhaps lasting, but certainly potentially recurring, issue that

requires some thought and modification in our contractual relationships.

We should also encourage our clients to spend some time evaluating the contractors, subcontractors, suppliers and professionals who are important to their projects. Too many of our necessary project participants are finding ways to exploit COVID-19 to excuse failures in schedules, material deliveries, and even site labor. If you're negotiating contracts now for performance in the future, you should obviously try to make sure your contract contains force majeure language that actually protects your client. But is that enough? Should we be advising our clients to list out the project participants who are important to project success and try to anticipate potential issues? Would simple pre-contract questions, like the ones that follow, help to avoid unanticipated problems later?

- Describe/provide a copy of your office/shop/field COVID preparedness and compliance program. (I have clients who have suffered serious jobsite work interruptions from site COVID infections when entire workforces were sent home and quarantined, which could have been avoided in the first place with appropriate plans to work in small, manageable groups and carefully observe social distancing. Depending on the size of the jobsite, contact tracing assistance may be useful.)

- What suppliers do you use and where are they located? What is the supplier's COVID-19 prevention plan? Show me a copy.

- Have my suppliers/subcontractors extended their delivery schedule on other projects to date? Get an explanation.

- Tell subs or suppliers giving you prices for their work that your contract

terms will contain this force majeure language. Are they willing to accept?

- Does the design professional who may have to answer RFIs or provide updates have the capability to do so if he has a COVID problem in the office? How will we deal with that?

Existing Contracts

Take the time NOW to review existing contracts to determine your clients' rights and obligations. Make sure you and your clients consider the methods and risks of dealing with safety shutdowns or infections or interferences. What will be the required response if a COVID-19 infection hits some portion of your project? Too often, simple things are missed because no one paid enough attention to potential risks before the emergency hit. The bigger the project, the more important this step is. There's no excuse for failing to anticipate the possibility of rock on an excavation project, and after the wake-up call we're all living through now, there's not much excuse for failing to anticipate the effect of a nationwide or worldwide health problem like COVID-19. ■

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