



# FAQ: Impacts of COVID-19 on Construction-Related Projects

May 4, 2020

On April 17, we hosted a webinar entitled "*Impacts of COVID-19 on Construction Projects and Contract Drafting.*" The goal of the presentation was to provide a practical, real world discussion around ways owners can address the impacts of COVID-19 on construction projects, including drafting applicable contract provisions before the project starts, real-time mitigation of delay and disruption to active projects, and addressing COVID-19 related contractor claims. A recording of the webinar is available [here](#). Answers to frequently asked questions during the webinar are below.

## Which party is responsible for the delays caused by the COVID-19 pandemic?

It has been almost universally accepted that the current COVID-19 pandemic qualifies as a force majeure event. The generally accepted rule is that a force majeure event entitles the contractor to an extension of time but not to delay costs unless specifically negotiated by the contractor. However, unlike contracts for international or infrastructure projects, it is unusual for a domestic AIA based construction contract to contain an express force majeure provision. Rather, the AIA relies on Article 8 (in the A201 General Conditions), which identifies certain excused delays upon which Contractor may rely. Not surprisingly, the current drafts of the AIA do not list COVID-19 or such similar events (e.g., pandemic, epidemic, public health emergency) as excused delays.

In the absence of an express force majeure provision, most parties have taken the position that COVID-19 related impacts to the schedule fall within the definition of "other causes beyond the Contractor's control" as set out in Article 8.3.1 of AIA 201.<sup>1</sup> As such, the contractor will be entitled to an extension of time for delays caused by the pandemic and the resulting emergency orders (although not specified in the standard AIA, such delays must generally impact critical path). In order to obtain an extension of time for the delays caused by the COVID-19 pandemic (including such emergency orders), contractors must comply with the notice requirements set out in Article 15.

## Is the contractor entitled to additional payments for delays caused by the COVID-19 related shutdowns?

The AIA agreements do not provide for an express obligation to pay contractor for costs solely arising from delay (e.g., extended general conditions costs). However, whether contractors are contractually entitled to be paid for the additional costs, which are made necessary as a result of delays and inefficiencies caused by the pandemic and the governmental responses thereto, is less clear cut.<sup>2</sup> Article 6.7.3 of AIA A133 allows contractors to recover additional costs incurred responding to an emergency. It could be argued that this provision includes the additional costs of complying with stop work and related emergency orders (demobilization and remobilization) and the making safe of the site. Similar relief is also found under the provisions of Article 10.4 of AIA A201.<sup>3</sup> On the other hand, Owners may wish to rely on the provisions of Articles 3.7.2 and 10.2.2 of the A201 General Conditions, which set out a general obligation on the part of the contractor to comply with all applicable laws, to argue that the contractor assumed the risk of any change in applicable laws and is thus not entitled to additional compensation if new regulations result in additional costs. In fact, in the case of Article 10.2.2, such applicable laws and governmental orders specifically concern safety of the Work, persons and the project, which arguably implicates COVID-19 more directly than Article 3.7.2.

As noted above, in terms of the contractor's recovery of pure extended general conditions costs, Article 8.3.3 does not specifically allow the contractor to recover delay damages. However, the language of Article 15.1.6.1 suggests that delay related costs are recoverable if an extension of time is warranted.

We anticipate that claims for additional costs will be significantly more contested than claims for extensions of time, with each dispute turning on the language of the contract, the nature of the additional costs claimed, and the specificity of the contractor's record keeping.

<sup>1</sup> It should be noted that some jurisdictions (e.g., New York) interpret force majeure provisions narrowly and catch-all language like the example noted in this response may not cover specific events.

<sup>2</sup> And will obviously depend on the provisions of the contract they are operating under.

<sup>3</sup> We recognize that the wording of both Article 6.7.2 and Article 10.4 doesn't exactly cover the situation where there is no imminent physical emergency at the project site.

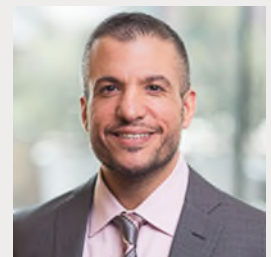
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### Which party bears the risk of inefficiencies which result from labor shortages, disruptions to the supply chain and compliance with COVID-19 related regulations?

As noted above, Articles 3.7.2 and 10.2.2 of A201 (compliance with applicable laws), do not make an exception for future changes in law. Case law supports the argument that in such instances, the contractor will be deemed to have accepted the risk of future changes in law and is not entitled to the additional costs incurred in complying with new laws and regulations, including those related to COVID-19.

With respect to the delay which results from labor shortages, supply delays or productivity disruption, once again, contractors should look to Article 8.3.1. The tension between the requirements of Articles 3.7.2 and 10.2.2 and the suggestion that a contractor may recover for additional costs which result from excusable delays set out in Article 15.1.6.1, is anticipated to be a fertile ground for disputes.

### Should future contracts contain specific force majeure provisions?

Both owners and contractors will be well served to amend their standard form construction contracts in the post COVID-19 world. At a minimum, such revisions should eliminate the contradictions in the standard form AIA contracts identified above.

As a threshold issue, owners must consider whether they will agree to the contractor's recovery of delay and disruption costs incurred as a result force majeure events and prepare themselves for difficult negotiations (and an inevitable increase in the contract sum) if they seek to pass this risk to the contractor. As is industry practice, where the force majeure delay is concurrent with contractor caused delay, Article 8.3.1 should provide that the contractor shall not be entitled to delay damages even where the contract time is extended.

Regardless of the Owner's position on cost recovery, Article 8.3.1 should make it clear that extensions of time will only be permitted for critical path, unavoidable delays where all of the project float, to the extent it existed, has already been used up. The contractor's express obligation to mitigate delay should also be set out in Article 8.3.1. Owners will also be well served to ensure that Article 8.3.1 expressly stipulates that a force majeure caused delay will not excuse prior or contemporaneous contractor delay.

We recommend that Article 15 is also amended to require that the contractor submit an updated critical path schedule at the time a claim is submitted (which will allow the parties to identify prior and concurrent delays and the relevant critical path). In addition, Article 15 should require the contractor to establish and track new cost codes to allow for an exact accounting of the delay and disruption impacts.

Finally, the contract should be revised to provide for the precise mitigation efforts required in connection with a force majeure event, including a catch-all for any commercially reasonable efforts not itemized.

### For More Information

Have additional questions regarding the impact of COVID-19 on construction projects? Please contact Rhian Cull, Peter Bilowz, Jonatan Grippo, Michael Robinson, or your Goulston & Storrs attorney contact.

### Critical Note / Disclaimer

*Everything within these FAQs, both questions and responses, are provided for general informational purposes. Every situation is unique, and the specific contract terms are of paramount significance. In addition, nothing in this publication should be construed as providing legal advice of any manner. It is imperative that you consult with your own legal counsel prior to taking or refraining from taking any actions of the kind discussed herein, and that you not rely on these general FAQs in any such decision making or consideration.*

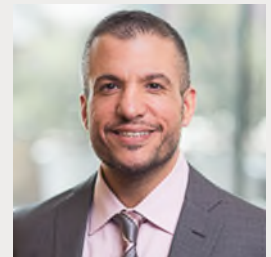
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