

NECA Overview

Understanding Contract Rights Related to Construction Impacts from the COVID-19 Pandemic

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

The National Electrical Contractors Association (“NECA”) and Faegre Drinker Biddle & Reath LLP (“Faegre Drinker”) have prepared this information sheet to help your company better understand its contract rights and obligations as they relate to the COVID-19 pandemic.¹

Step 1: Gather written contracts

- Gather your signed contracts and utilize this guide and your company’s legal counsel to commence review of provisions addressing delays, force majeure, change order rights and termination.

Step 2: Review the language of the written contracts

- Force majeure clauses are often found in the excused/excusable delay or in the change order sections of a contract. The clause may not use the term “force majeure” but may simply refer to delays beyond the control of the contractor/subcontractor.
- Force majeure contract clauses typically provide varying forms of relief for events outside the contractor/subcontractor’s reasonable control that prevent it from performing its contractual obligations (i.e., constructing the project). The nature of your remedy may be specified in your contract/subcontract.
- If the contract does include a force majeure clause (or any other provision on excused delays) → look at the specific language of the clause for:
 - A. A list of triggering events
 - B. Any catch-all or non-exclusive language
 - C. Any language describing the required impact
 - D. The nature of the relief afforded (time or money)

Triggering Events

- Specified examples may include: acts of God, terrorism, pandemic, natural disaster, war, embargo, industry-wide labor disputes, abnormally extreme weather
- Events that are not covered by a limited list of triggering events typically will not be viewed as force majeure events, unless there is a broad catch-all provision (see below)
- If a clause lists triggering events as including only weather-related events, then the COVID-19 pandemic is not likely to be considered a triggering event as it is not a weather event. However, pay attention to clauses including “acts of government” or “state action” as COVID-19 impacts could fall under these events

Catch-all Language

- If the force majeure clause lists triggering events and then includes broad catch-all language, such as “any other delay beyond the control of the contractor”, this can be used to cover impacts from COVID-19

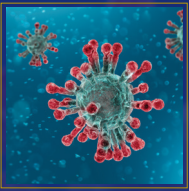


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Required Impact

- Some clauses state the event must prevent total or partial performance, while others set forth a lower standard for an event to constitute a force majeure event, such as significantly interfering with, hindering or otherwise making the invoking party's performance substantially more onerous than originally anticipated

Relief Afforded

- Some clauses allow only for time extensions; other clauses also allow for the recovery of additional costs caused by the delay
- Some subcontracts only grant a remedy (time extension or cost adjustment) to the extent the prime contractor is granted a remedy from the owner

Step 3: Follow process and procedures required under the contract

■ Comply with notice requirements

- There are likely specific process requirements you must follow in order to obtain relief under the force majeure clause, including notice requirements contained in the agreement.
- **Strictly comply with these process and notice requirements in order to preserve your claim. Failure to adhere to contract notice requirements can result in the waiver of a claim.**

■ Assert claims

- Assert any claims under the force majeure clause as broadly as the contract allows and expressly reserve all rights under the contract.
- Identify the type of relief you are requesting – excused performance, additional time and/or additional money. If the full scope of the impact from COVID-19 is not yet known, say that.
- Follow up with regular updated notices as the full impact of COVID-19 on your work becomes known.

■ Mitigate risks and damages

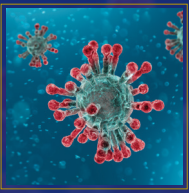
- The party seeking to avoid performance of the contract must mitigate any “foreseeable” risks of nonperformance.
- In order to assist with efforts to demonstrate mitigation, be sure to keep detailed evidence of efforts to continue work, re-locate work efforts and otherwise limit how and when your work is impacted due to the outbreak, quarantine and/or government shut-down.
- Also, be sure to consider concurrent delays that may have occurred during the same time but with no causal relation to the force majeure event. Your contract might expressly limit your rights in the event of a concurrent delay.

Step 4: What if there is no applicable force majeure clause?

If your contract/subcontract does not have a force majeure (or other excusable delay) clause, there are narrow circumstances in which performance may be excused due to an unforeseeable event that makes performance impossible, impracticable, or frustrates the primary purpose of the contract. These legal concepts vary from state to state, so you must consult with your company's legal counsel to confirm how these doctrines might apply to your specific circumstances.

■ Impossibility

- Legal impossibility excuses performance only when performance is rendered **objectively impossible**, typically when the subject matter has been destroyed or by operation of law.
- Increased costs for performance or financial hardship are typically not sufficient to excuse a party's performance under the doctrine of impossibility. However, courts may



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excuse performance where events have occurred that are inconsistent with the conditions the parties assumed existed and would continue to exist at the time the contract was formed. Therefore, the doctrine of impossibility could apply to excuse the performance of contracts made impossible by COVID-19.

■ **Impracticability in construction work contracts**

- In some states, even where performance is not impossible, performance might be excused on grounds of impracticability. Impracticability is similar to impossibility in that it requires an unforeseen event that has made the performance of the contract impracticable.
- Typically, an increase in cost of performance is not grounds for excuse under this doctrine as it is presumed that contracting parties take the risk of such cost fluctuations.

■ **Impracticability in contracts for the purchase of goods**

- Courts generally provide more leniency in analyzing whether performance of an agreement to purchase goods is impracticable. However, if the event that caused performance to be impracticable is determined to be foreseeable then the party obligated to perform must bear the costs of nonperformance because it could have negotiated for greater contractual protections.

■ **Frustration of purpose**

- Frustration of purpose or commercial frustration (as the doctrine has been called in some states) may be applied when the party has satisfied two grounds:
 - (i) the frustrating event was not reasonably foreseeable; and
 - (ii) the value of counter-performance has been totally or nearly totally destroyed by the frustrating event.

■ **Federal Contracts**

- The Federal Acquisition Regulation (“FAR”) §52.249-14 provides a “**Contractor shall not be in default** because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are ... (5) **epidemics**, (6) **quarantine restrictions** In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor.”
- Thus, if your company is involved in federal contracting to which the FAR applies, your contract will likely allow for excused performance due to COVID-19.

■ **Contractual right to stop work and/or terminate**

- Your contract may contain provisions allowing the contractor/ subcontractor to submit a claim, stop work or to terminate the contract for nonpayment, delayed suspensions and other material breaches.
- If COVID-19 causes the project owner or prime contractor to suspend the project, stop payment or otherwise breach the contract, your contract may allow you to claim damages, suspend performance or terminate the contract.
- The business relationships and impacts should be carefully analyzed before terminating, since damages for wrongful termination can be quite significant.

■ **Negotiation and Dispute Resolution**

- Informal negotiation and pre-dispute resolution mechanisms should be considered with the goal of reaching an amicable amendment to your contract to account for the impacts from COVID-19.
- While informal negotiations are pending, continue to satisfy all contractual requirements relating to the preservation of a force majeure or other claim, as set forth above.

¹ This material is for informational purposes only. The material is general and is not intended to be legal advice. It should not be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, applicable CBAs, prime contracts, subcontracts, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.