Contract Issues in the Age of Covid-19

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Today’s Speakers

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FORCE MAJEURE – YOU KNOW WHEN YOU SEE IT

force ma·jeure

/ˈfɔːrs məˈZHər/
noun
1. LAW
unforeseeable circumstances that prevent someone from fulfilling a contract.
2. irresistible compulsion or greater force.

**Force Majeure** clause is a provision in a contract that excuses a party from not performing its contractual obligations that becomes impossible or impracticable, due to an event or effect that the parties could not have anticipated or controlled.

Concept may be captured in other clauses with different names (delay, extension of time, changes)
WHAT DO FORCE MAJEURE TERMS ALLOW

Time. Typically all that’s allowed on face of terms

Do delay terms help? Maybe.

Consider nature of COVID-19
  ◦ Safety Issues and Obligations
  ◦ Owner Suspension Terms
  ◦ Emergency Terms, Obligation and Rights
  ◦ Adherence to and Change in Laws
§8.3 DELAYS AND EXTENSIONS OF TIME

§8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by...unusual delay and deliveries, unavoidable casualties or causes beyond the Contractor’s control...or by other causes that the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.
§6.3  DELAYS AND EXTENSIONS OF TIME

§6.3.1 If Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of Construction include, but are not limited to, the following:

(e) transportation delays not reasonably foreseeable;

(f) labor disputes not involving Constructor;

(g) general labor disputes impacting the Project but not specifically related to the Worksite;

(j) epidemics;

(k) adverse governmental actions;

(l) unavoidable accidents or circumstances;

(m) adverse weather conditions not reasonably anticipated. Constructor shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8.
§12.03 Delays

A. Where Contractor is prevented from completing any part of the Work within the Contract Times due to delay beyond the control of Contractor, the Contract Times will be extended in an amount equal to the time loss due to such delay if a Claim is made therefor as provided in Paragraph 12.02.A. Delays beyond the control of Contractor shall include, but not be limited to epidemics or acts of God.

... 

C. If Contractor is delayed in the performance or progress of the Work by epidemic acts of God, or other causes not the fault of and beyond the control of Owner and Contractor, then Contractor shall be entitled to an equitable adjustment in Contract Times, if such adjustment is essential to Contractor’s ability to complete the Work within the Contract Times. Such an adjustment shall be Contractor’s sole and exclusive remedy for delays described in this Paragraph 12.03.C.
Section 3.04(3) (Time Extension)

Extension of time for unforeseeable supervening conditions entirely beyond Contractor’s control (includes acts of god, national emergency and labor disputes).
General Conditions - Section 9.01(D)(2) (Force Majeure)

Extension of time for unforeseeable causes beyond Contractor’s control and approved by the Owner (includes acts of god and epidemics).
FORCE MAJEURE
Port Authority

General Contract Provisions- Section 33 (Extension of Time)

Extension of time for causes that in the opinion of the Engineer are: (a) beyond the Contractor’s control and fault; and (b) occur after bid opening and could not be anticipated by prior investigation.
General Terms and Conditions - Article 6.07 (Force Majeure)

Excusable Delay if MTA determines cause is entirely due to a cause beyond the Contractor’s control (includes federal, state and municipal acts and epidemics).
FORCE MAJEURE

FORCE MAJEURE LIKE LANGUAGE

ARTICLE 11 NOTICE OF CONDITIONS CAUSING DELAY AND DOCUMENTATION OF DAMAGES CAUSED BY DELAY

11.5 Non-Compensable Delays

11.5.6 “…catastrophes or other acts of God”...including the City’s reasonable responses thereto”

ARTICLE 13 EXTENSION OF TIME FOR PERFORMANCE

13.3.3 Time extension may be available for “…supervening conditions entirely beyond the control of either party...such as...or other national emergency...”
FORCE MAJEURE LIKE LANGUAGE
ARTICLE 9 TIME OF COMPLETION
Section 9.03 C. Delay due to unforeseeable cause beyond control of contractor including but not limited to “...epidemics, quarantine..” is excusable
Construction General Conditions, Article 17A – Delays

Delays are compensable if attributable to

- “act or omission to act by the State ...”
- unavailability of the site for an extended period of time that significantly affects completion
“Force majeure includes ... actions of the elements, floods, or other similar causes beyond the control of the Contractor or the Commissioner in the performance of the Contract where non-performance, by exercise of reasonable diligence, cannot be prevented.”

- Entitled to time but no compensation
- Can’t be defaulted for failure to perform due to a force majeure event

A. Delays are compensable if attributable to
1. *Differing Site Conditions* (§104-03)
3. *Suspensions of Work Directed by the Engineer* (§104-05)
4. Situations **not within the contemplation** of the parties at the time of entering into the contract.
B. Delays are non-compensable (time, no money) if attributable to

8. Climatic conditions ... or other catastrophes

10. “Any situation which was within the contemplation of the parties at the time of entering into the contract.”
Delays are compensable if attributable to
- an act or omission to act by the State ...
- unavailability of the site for an extended period of time that significantly affects completion
Notice of claims for additional time and costs are generally required under all public agency contracts in New York. The contract notice provisions typically impose very short and unreasonable deadlines and unfairly condition a Contractor’s right to additional compensation or time on strict compliance.

Unfortunately, many public agencies rely on these clauses to preclude otherwise legitimate claims and Courts often enforce them.

This portion of the webinar provides an overview of typical notice provisions in several New York public agency contracts and what they require.
§15.1.2 NOTICE OF CLAIMS

Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within twenty-one (21) days after occurrence of the event giving rise to such Claim or within twenty-one (21) days after the Claimant recognizes the condition giving rise to the Claim, whichever is later.
NOTICE REQUIREMENTS

ConsensusDocs 200 (Revised 2019)

- §8.4 CHANGE NOTICE
- Except as provided in §6.3.2 and §6.4 for any claim for an increase in the Contract Price or the Contract Time, Constructor shall give Owner written notice of the claim within fourteen (14) Days after the occurrence giving rise to the claim or within fourteen (14) Days after Constructor first recognizes the condition giving rise to the claim, whichever is later. Except in an emergency, notice shall be given before proceeding with the Work. Thereafter, Constructor shall submit written documentation of its claim, including appropriate supporting documentation, within twenty-one (21) Days after giving notice, unless the Parties mutually agree upon a longer period of time. Owner shall respond in writing denying or approving Constructor's claim no later than fourteen (14) Days after receipt of Constructor's claim. Owner's failure to so respond shall be deemed a denial of the claim. Any change in the Contract Price or the Contract Time resulting from such claim shall be authorized by Change Order.
¶10.05 Claims

Engineer’s Decision Required: All Claims, except those waived pursuant to ¶14.09, shall be referred to the Engineer for decision. A Decision by Engineer shall be required as a condition precedent to any exercise by Owner or Contractor of any rights or remedies either may otherwise have under the Contract Documents or by Laws and Regulations in respect of such Claims.

Notice: Written notice stating the general nature of each Claim shall be delivered by the Claimant to Engineer and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. The responsibility to substantiate a claim shall rest with the party making the Claim. Notice of the amount or extent of the Claim with supporting data shall be delivered to the Engineer and the other party to the Contract within 60 days after the start of such event (unless Engineer allows additional time for Claimant to submit additional or more accurate data in support of such Claim)....
NOTICE REQUIREMENTS

SUCF

Section 3.04(1) (Delays)

Within 10 working days of the condition that causes or may cause delay.

Section 2.03(b) & (c) (Costs)

Within 5 working days of commencing extra work and verified statement with documentary evidence within 30 calendar days.
NOTICE REQUIREMENTS

DASNY

General Conditions - Section 9.01(D)(3) (Delays)

Within 15 calendar days from beginning of delay.

Section 10.03(A) and (B) (Costs)

Within 15 calendar days after occurrence of event giving rise to claim and certified statement with supporting documentation within 90 calendar days. Verified statement every 30 calendar days thereafter for as long as damages are incurred.
NOTICE REQUIREMENTS

Port Authority

General Contract Provisions - Section 33 (Delays)

Within 48 hours of when Contractor knew or should have known of the cause, identifying the cause, nature and expected duration.

General Contract Provisions - Section 45 (Costs)

Within 24 hours of requirement to perform extra work with supporting documentation (time slips and memoranda required by Article 25 – Compensation for Extra Work).
NOTICE REQUIREMENTS

MTA

General Terms and Conditions - Article 6.07(c)
(Excusable/Compensable Delays)

Within 48 hours of when Contractor knew or should have known of Excusable or Compensable Delay event, identifying the cause, nature, expected duration and its effect on Work identified in the Notice. Extension to Milestone must be supported by TIA, narrative and fragnet in current schedule update.

General Terms and Conditions - Article 8.02(C)
(Changes and Equitable Adjustments based on MTA Orders)

Within 5 days of receipt of Order stating factual and contractual basis for change and including a cost and time impact estimate with Notice.

General Terms and Conditions - Article 12.01
(Notice of Claims)

MTA Orders – Follow Article 8.02(C)

Other Changes (Non-MTA Orders) - Within 7 days of the first occurrence of such loss or damage.
ARTICLE 11 NOTICE OF CONDITIONS CAUSING DELAY AND DOCUMENTATION OF DAMAGES CAUSED BY DELAY
   11.1.1 Notice of condition due within 15 days
   11.1.2 Notice of damages due within 45 days of when incurred; must include projected monthly costs

ARTICLE 27 RESOLUTION OF DISPUTES
   27.4 Notice of Dispute due within 30 days of determination or action by City

ARTICLE 28 RECORD KEEPING FOR EXTRA OR DISPUTED WORK ON A TIME & MATERIAL BASIS
   28.1 T&M reports due daily

ARTICLE 30 NOTICE AND DOCUMENTATION OF COSTS AND DAMAGES
   30.1 Due within 45 days of incurring damages and every 30 days thereafter (does not apply to delay damages)
NOTICE REQUIREMENTS

NYC School Construction Authority General Conditions (October 2016)

NOTICE

ARTICLE 8 DISPUTES

Section 8.01 Claims for Extra Work. No express requirement for written notice. But do need “Notice of Direction” from SCA

Should keep T&M tickets

Section 8.02 Claims for Delay. A No Damage for delay clause. Notice required no more than 2 business days after commencement of delay to obtain time extension

Section 13.06 Construction Site/Emergency/SCA Notification. Requires immediate telephone notice in case of emergency which affects life or safety
Construction General Conditions – Article 17A.3

• “Notice of claim” of anticipated delay within 15 days of when Contractor knew or should have known, including info required by 17A.6.1 (anticipated costs and schedule impact).

• Maintain cost records for audit.
Supply Contracts – Appx. B – Force Majeure Event

“written notice of any force majeure occurrence as soon as the delay is known and provide the other party with a written contingency plan to address the force majeure occurrence …”
• Notice within 15 calendar days except suspension notice within 7 calendar days (§104-06)
• Time-related claims – must meet TIA requirements and maintain a contemporaneous tally of all delay days attributable to the State and submit to the Engineer on a monthly basis (§108-01)
• Must keep MURKs for direct and time-related costs (§109-05)
ARTICLE 27. NOTICES REGARDING CLAIMS, LITIGATION AND RULINGS
The Contractor shall promptly provide written notice to the Authority of all claims, litigation and governmental rulings pertaining to the work where such claims, litigation or rulings could subject the Authority to liability or substantially impair the completion of the Contract work. With such notice, the Contractor shall include a brief summary of the issue involved and the Contractor's position on such issue. Such written notice is additional to and not in place of any other notices required by the Contract Documents. The Contractor shall cooperate and provide, and shall require all subcontractors to cooperate and provide, such information or
Suspension:

A201-§14.3.1 Owner may, without cause, order suspension, delay or interruption for such period of time as the Owner may determine; 14.3.2 allows costs and time

ConsensusDocs 200-§11.1.1 Owner may order suspension, delay, or interruption for convenience

EJCDC-§15.01-Owner may suspend the Work for a period of not more than 90 consecutive days, Contractor entitled to adjustment in the Contract Price or an extension of Contract Times, or both, but must make a Claim
Emergency:

A201-§10.4 In an emergency affecting safety of persons the Contractor shall act, at the Contractor’s discretion, to prevent threat, injury or loss. Additional compensation or extension of time may be claimed.

ConsensusDocs §3.12.1 In an emergency affecting the safety of persons Constructor shall act in a reasonable manner to prevent threatened injury. Any change in the Contract Price or Contract Time shall be determined.

EJCDC §6.6 In emergencies affecting the safety or protection of persons...Contractor is obligated to act to prevent threatened injury or loss. Notice required, and Engineer to determine any change in the Contract Documents, and if Work Change Directive or Change Order will be issued.
Change in Law:

**A201 §3.7.2** Contractor shall comply with and give notices required by applicable laws, statutes, rules and regulations, and lawful orders of public authorities; no express right to costs or time.

**ConsensusDocs §3.21.1** Contract Price or Contract Time shall be equitably adjusted by Change Order for additional costs or time resulting from change in Law. “Law” means federal, state, or local law, ordinance, code, rule, and regulations.

**EJCDC §6.09(C)** Changes in Laws or Regulations (incl. governmental orders) not known of the time of Bids or date of Agreement that effect Cost or Time shall be the subject of an Adjustment in Contract Price or Contract Times.
No suspension of work provision. No change in law provision.
General Conditions - Section 11.04 (Suspension)

Owner may order suspension for a reasonable period of time due to acts of god. Contractor agrees suspension will not increase costs of performance. Time extension only. No change in law provision.
General Contract Provisions - Section 27 (Emergency Delays)

Contractor may be directed to suspend operations for emergency delays and compensation is available for idle labor and equipment time. Prompt notice is required. No change in law provision.
GENERAL TERMS AND CONDITIONS - Article 6.09 (SWO/Suspension of Work)

MTA may suspend for up to 180 days and compensation is available for impact costs. No change in law provision.
33.1.3 Commissioner has power to suspend Work when required in Commissioner’s judgment

Emergency - Used only to describe when Labor Law requirements may be relaxed

Change in Law - term not used

5.2 PPB Rules in effect at bid opening apply; silent as to other laws
SUSPENSION- EMERGENCY- CHANGE IN LAW

ARTICLE 10 TERMINATION

Section 10.02 Termination for Necessity or Convenience. Suspension of Work not addressed. SCA can terminate without cause for any reason.

See Section 13.06 above regarding notice of emergency.

Change in Law- term not used.
• Director may order a suspension

• A suspension for less than 30 days shall not be compensable except for costs related to demob and mob and protection of the work
Supply Contracts, Appx B, Art. 42

The Commissioner … reserves the right to suspend any or all activities under the Contract, at any time, in the best interests of the Authorized User.

In the event of such suspension, the Contractor will be given a formal written notice outlining the particulars of such suspension.

Examples of the reason for such suspension include, but are not limited to, a budget freeze or reduction in State spending, declaration of emergency, contract compliance issues or other circumstances.
“If the performance of all or any portion of the work is suspended or delayed by the Engineer in writing for an unreasonable period of time (not originally anticipated, not customary, or not inherent to the construction industry ... the Contractor shall submit it to the Engineer in writing a request for adjustment within 7 calendar days of receipt of the notice to resume work.”

Must keep and submit MURKs upon receipt of notice of Suspension of Work from the Department.
Article 11.1 General Right to Suspend and Cancel Contract
It is further mutually agreed that if at any time during the prosecution of the work the Authority shall determine that the work is not being performed in accordance with the Contract or for the best interest of the Authority, the Chief Engineer, Department of Engineering, may proceed in any of the following ways:

1) Temporarily suspend the execution of the work by the Contractor, and the Chief Engineer of the Authority may then proceed with the work under his/her own direction in such manner as will accord with the Contract Documents and be for the best interests of the Authority; or
SUBCONTRACTOR/ SUPPLIER /VENDOR ISSUES

Essential Construction Projects (roads, bridges, transit facilities, utilities, hospitals, health care facilities, affordable housing, homeless shelters, local government construction, including municipal and school districts)

Subcontractors should be sent written reminders to follow the terms of their subcontracts with regard to any requests for more time or increased costs and that compliance is essential so that such requests may be timely submitted to project owners for consideration.

Subcontractors who fail to appear or otherwise default on essential construction projects should be sent timely notices of default. Specific remedies for subcontractor defaults (supplementation and/or termination) will vary depending on subcontract terms.

Contractors should track any and all costs related to the COVID-19 pandemic under a separate cost code, such as a Potential Change Order (PCO) number. Contractors also should keep daily logs noting manpower, subcontractor default and/or reduced attendance, specific areas of work impacted, RFI and/or shop drawing approval delays and material and supply chain disruptions. Notice letters should be sent to project owners as required by the contract but no less than weekly with an update on increased costs and schedule impacts with a reservation of rights.
SUBCONTRACTOR/ SUPPLIER /VENDOR ISSUES

Non-Essential Construction Projects

Subcontractors should be sent written reminders to follow the terms of their subcontracts with regard to requests for more time or increased costs and that compliance is essential so that such requests may be timely submitted to project owners for consideration.

Contractors should track any and all costs related to the COVID-19 pandemic and shutdown under a separate cost code, such as a Potential Change Order (PCO) number. Notice letters should be sent to project owners as required by the contract identifying any known increased costs with a reservation of rights for more time and increased costs as allowed under the contract when the shutdown duration is known.

Special attention should be given to long lead material items and project owners should be consulted on whether such items should be ordered for fabrication (if permitted in an out of state jurisdiction) and are payable during the shutdown (if an advance payment is required) to avoid further delays when the shutdown is lifted.
SUBCONTRACTOR/ SUPPLIER /VENDOR ISSUES

Forget flow up and flow down.
Keep the flow of information going
Keep the flow of communication open
Keep track of the flow
Money will only flow from the Owner

GO WITH THE FLOW AND ROW TOGETHER
Questions?

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