

***While the surety world remains supportive of their clients and is encouraged that work is essential and forthcoming, surety markets have been reaching out with proactive steps. Normal periodic financial and backlog reporting should continue. But here are other things to consider gathered from various markets, Chubb, CNA and Hartford most notably:***

The surety industry understands that contractors are facing a myriad of issues and challenges as a result of the coronavirus (COVID-19) pandemic and will be working through them for some time. It is impossible to know now the extent of any damages and disruptions that will be suffered as a consequence of these events.

To this end find a SURETY basic checklist of issues contractors may want to think about from project-to-project to hopefully protect their ability to evaluate, prosecute or defend any delay and disruption claims that they are involved in.

Again, the items in this checklist are a collection of information provided for consideration that we have been collecting and adding to as received from various surety markets. It is not legal or professional advice. We always suggest clients consult with an experienced construction attorney, licensed in the particular jurisdiction, for any legal advice that might be required.

1. Provide written notice of the impact/delay as soon as possible. Even if you are uncertain how long the delay will last, provide notice now that you believe this situation will affect the project critical path. Regardless of whether your contracts are public or private, give notice as soon as possible. Check the notice provisions of your contracts for details of how notice should be provided. If you have questions, work with your legal counsel.
2. On federal cost reimbursable contracts, review FAR 52.249-14 "Excusable Delay." That clause authorizes non-compensable delay on cost-reimbursable projects for "(5) epidemics, [and] (6) quarantine restrictions." If you conclude this clause may apply, include it in your notice.
3. On federal firm-fixed price contracts, review FAR 52.249-10 "Default." That clause also authorizes non-compensable delay on firm-fixed price projects for "(vi) epidemics [and] (vii) quarantine restrictions." If you conclude this clause may apply, include it in your notice.
4. Diligently monitor government actions, as new decisions may be made that change whether shelter-in-place orders apply to your business. If you have questions, work with your legal counsel.
5. Work with your counsel to ensure future contracts have force majeure clauses specifically including communicable disease outbreaks, epidemics and pandemics, and clear terms addressing the parties' rights and obligations, and applicable procedures after a triggering event. In the context of construction project contracts, for example, the force majeure clause should specifically address and allocate the burdens resulting from the unexpected delays and costs, state limits on the remedies available to each party, and dictate the steps the parties must take to get performance back on track as soon as the threat has passed.

6. Analyze contracts (prime contracts, subcontracts and purchase orders) to determine whether a force majeure event has occurred in relation to a particular contract. Many contracts have “force majeure” clauses. Some contracts will refer instead to “Acts of God,” “acts of government,” or “states of emergency.” Even if a contract does not have a specific clause, common-law doctrines such as commercial impracticability or impossibility may apply, and you should discuss these with your legal counsel.
7. Diligently monitor government actions, as new decisions may be made that change the analysis as to whether a force majeure event has occurred in relation to a particular contract.
8. Assess the potential consequences of claiming a right not to perform.
9. Consider making a good faith attempt to either perform or to take other steps to achieve the contract’s goal.
10. If excused performance will be claimed under a force majeure clause, take all actions the contract requires as conditions of excusing performance, such as giving timely notice, mitigating damages and following any dispute resolution procedures.
11. Create and keep detailed evidence proving the pandemic caused any damages, lost productivity, or made performance impossible, commercially impracticable, or commercially unreasonable (depending on the standard required under the force majeure clause or potentially applicable law).
12. Create and keep detailed evidence regarding your efforts to find alternative means of performing, communications with other contracting parties, and financial impacts, costs, and other losses incurred.
13. When other businesses contact you to claim their performance is excused, consider renegotiation on terms that are reasonable given the situation. If warranted, point out ways the other business could still perform or reasonable alternatives it could take in mitigation.
14. In consultation with their counsel, may wish to consider modifying contracts currently being negotiated to address possible impacts of pandemics, supply chain disruptions and government action. Again, provisions such as Delays, Force Majeure, Changes (including changes to Contract time and the Contract price), Changes in Law, Claims, Owner Funding, Securing and Protecting Work, and Work Stoppages, Suspension and Termination may provide opportunities for appropriately protecting our customers in their future contracts.
15. Be mindful of supply chain disruptions for GC’s and especially for lower tier subcontractors. The ability to procure goods and services may be disrupted effecting product delivery and schedules.

Surety companies caution and advise the efforts contractors make now to give notice, protect rights, and identify evidence could be valuable in the coming weeks, months or longer as they work their way out of this crisis. While at times it may seem that it might be business as usual these are unprecedented times. Read contracts, document, document, document and put owners on notice. Again, when in doubt a contractor should reach out to counsel. Legal advice is ALWAYS better before something happens than after.