



TIME, MONEY, AND SICK WORKERS

The Three Things Every Contractor Must Consider In A Post Covid-19 World

by Shawn R. Farrell, Esq.

If your contract requires you to place the other party on notice within a given period of time—do what the contract asks!



There has already been much said about the Covid-19 pandemic. The articles that we read, the e-mail blasts we received, and nightly news shows all seem to agree that this pandemic is different from all others that have come before it. Covid-19 and other pandemics are like apples and oranges.

But how different really are apples from oranges? They are both fruit, they both grow on a trees, and they are both delicious. Despite the common usage of this phrase suggesting things are different, apples and oranges have a lot in common. When it comes to your construction business, Covid-19 is just the newest obstacle that you must overcome to complete your job. But this impediment is like its predecessors, when we consider the legal obligations of time, money, and safety.

If we want to understand our rights, we must first examine the contract.

We start with the contract because that is where the parties get to mutually allocate risk on a project. Many contracts will contain a clause known as the Force Majeure clause. A Force Majeure clause defines the limits to complete the project as ending where performance becomes impossible. That means you have no obligation to perform the impossible.

With that said, the impossibility must arise from: an event beyond the control of the contracting parties; an event that could not have been anticipated; an event that could not have been avoided; and the party seeking to avoid performance cannot be, in whole or in part, the cause of the event.

Under such circumstances, the party is relieved of its liability for non-performance. Commonly recognized events that constitute Force Majeure are: war, riots, earthquakes, floods, and pandemics (possibly like the Coronavirus).

The language used within the Force Majeure clause determines the rights and obligations of the parties. For example, events that are outside the control of either party, like poor weather, often only provide a contractor with a right for time and not money. If a contractor seeks both time and money, before putting the owner on notice of a Force Majeure event, you should carefully read and understand the “totality” of your contract. Related to a Force Majeure clauses, contracts often contain provisions concerning “Suspension of Work.”

When the work of a contractor has been suspended by events outside of its control, this clause can provide a mechanism for both time and money. This means that you can seek additional material costs that have increased in the suspended period, such as wage increases, home office overhead, and demobilization/remobilization costs. But don't worry, if your contract lacks a Force Majeure or Suspension of Work clause you may still be protected.

Consider whether the circumstances of the project, e.g. the Coronavirus itself or governmental responses in the form of executive orders that stopped work, have caused disruption to your work. If so, and lacking contractual terms on point, you should evaluate if these occurrences fall within the doctrine of Impossibility of Performance.

This legal principle holds that a party may be released from a contract or obligation on the grounds that uncontrollable circumstances have rendered performance impossible. While very similar to the Force Majeure clause, there is a significant distinction between the doctrine of Impossibility of Performance and a contract term. Namely, reliance on a legal doctrine leaves you at the mercy of a court and subject to its discretion as to whether or not the relief of time or money shall be granted. And factors that a court will consider include the foreseeability that such a pandemic could occur and the severity of the delay.

It is not hard to imagine that a court may conclude that workers getting sick and labor resources are two risks that exist on every job. Thus, the Coronavirus does not present an unforeseeable occurrence and a contractor may not rely on the Impossibility of Performance doctrine. Similarly, the court may believe that a one- or two-month delay to a project, because of the Coronavirus, is not severe enough to relieve a contractor of the obligation for timely completion of a multi-year job. The court might not appreciate that on a construction project delays often have a pernicious “domino effect” exponentially increasing the impact upon



later events. You can avoid this uncertainty by including explicit language within the contract on how to deal with these issues.

Remember, any cause for delay or inefficiency to your work that requires adjustment to time or the contract price must comply with all other contract terms (including change orders requests). As such, timely notice of these events is critical to getting the relief you desire. If your contract requires you to place the other party on notice within a given period of time – do what the contract asks!

Complying with your contract is not you being litigious or a bad partner on the job. To the contrary, you know the historical efficiency of your crew. If your workforce can't perform at the same production level (say installing a 100 linear feet of pipe in eight hours because of social distancing issues), and you want to be paid extra money for the work, you must tell the other party. If you wait until the end of the project, you can guarantee yourself a dispute and possible litigation.

Finally, when you return to work, there will be many legitimate questions about safety. OSHA has not yet published standards for how contractors should keep workers safe

from the Coronavirus. To fill in the gap created by the lack of authoritative guidance, the industry itself has started to prepare and disseminate literature on how to keep the site safe.

These suggestions are very informative and include: the distribution of masks, hand sanitizer, and providing areas to wash hands. The proper amount of protection to provide requires a detailed analysis of the work, logistical and cost constraints, and environmental conditions. That type of analysis is beyond the scope of this article, but let me recommend two things to consider when you work through these issues.

First, the decision making team should include all stakeholders, trusted counsel, and consideration of information obtained from industry organizations (like NUCA). Second, whatever protections you adopt as a company policy, make sure you provide them. Your workers will rely upon what the company states it will provide. If the company promises a mask to every worker, a worker may not bring his/her own mask. In turn, this could expose the company to delays to the start work (as you find a mask), lack of manpower due

to illness, or potential liability of the company for the failure to provide what it promised.

There is a saying, "what is old is new again" and this should provide us comfort. Comfort in this case is knowing the construction industry has always risen to the unforeseen challenges and overcome them with engineering/technological innovation; grit, and collaboration.

The Coronavirus itself is unique, but no different from any other obstacle of years past. Together, NUCA members will adapt, protect, and overcome. ■




Shawn R. Farrell is a partner at Cohen Seglias in Philadelphia, Penn. For more than 20 years, he has represented general contractors, construction managers, owners/developers, subcontractors, design-builders, engineers, developers, and sureties in construction-related litigation. Shawn can be reached


by email at sfarrell@cohenseglias.com or by phone 267-238-4719.

IRON CLAD HISTORY


- ▶ American cast and built
- ▶ Over 300 years in manufacturing
- ▶ Multiple hydrant and valve lines
- ▶ Ductile and cast iron availability



Valve & Hydrant Group







clowvalve.com



mh-valve.com

Look for us on social media

EFFICIENCY PRODUCTION

America's Trench Box Builder™

The NUCA Member's Choice for Trench Shoring

- Largest selection of shielding and shoring equipment available.
- Custom shields built to your specs.
- Site-Specific Engineering
- OSHA Trench Safety Training.
- Our National Dealer Network combine to supply the United States with fast delivery and excellent service.



Slide Rail System



Trench Shield



Hydraulic Shores



Build-A-Box™



Stone Mizer™

Toll Free for your local dealer or Factory Direct Sales & Rentals

800-552-8800

www.efficiencyproduction.com
685 Hull Rd., Mason, MI 48854





America's Trench Box Builder™