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Construction Law Alert

COVID-19, Current Contracts, Risk, and Contracting with Coronavirus in Mind

CURRENT CONTRACTS – SECURING ADJUSTMENTS TO SCHEDULING AND (POTENTIALLY) PRICE

Force majeure clauses are contractual mechanisms designed to govern contracting parties' rights and obligations (or lack thereof) when certain events, outside of the control of the parties, impact one party's performance.

Importantly, depending on how this type of provision is drafted, it may or may not encompass the coronavirus pandemic. A contractual definition of a force majeure event that specifically includes "epidemics", "pandemics", "widespread viral disease" or something of this sort will almost certainly apply to the coronavirus crisis. If your contract does not have one of these specifically enumerated force majeure events, there are still other commonly used force majeure phrases that are (at least arguably) triggered by this pandemic, including phrases like "acts of God", "government restrictions", and catchall language like "other similar matters outside of [the party's] control".

If you have any of the foregoing force majeure language in your contract and have experienced, or suspect that you will experience, a coronavirus-related delay, it is imperative that you take steps to put the owner (or the upstream contractor, as the case may be) on notice, in accordance with the claim procedures in your contract documents, of the coronavirus-caused delay. Specifically, in addition to identifying the cause of any delay, the notice should (1) identify the contract provision(s) entitling you to suspension of performance and any other relief that may be available under the contract, like an equitable adjustment in price, and (2) include a description of impacts to cost and scheduling. This notice is an essential first step to obtaining any scheduling and/or price adjustments that may be available to you, and to avoiding the imposition of liquidated damages based on delays.

A NOTE ON ULTIMATE RISK—FORCE MAJEURE AND OTHER COMMONLY REFERENCED COVID DEFENSES

In assessing your ultimate contractual risk arising from a coronavirus interruption, it cannot be taken for granted that force majeure events described as "acts of God" or "other similar matters outside [the party's] control", apply to this crisis. And reliance on provisions like "government restrictions" provides an equally uncertain fate, where state, local, and/or federal government guidelines call for - - but do not explicitly require - - "social distancing" and work stoppage for a particular industry. This is because courts narrowly - - even if harshly - - interpret and apply force majeure clauses, notwithstanding seemingly unfair economic consequences.

In addition, much of the law firm literature the impact of coronavirus on contract performance has focused on the application of common law contractual defenses, like impossibility, impracticability, and frustration of purpose, often suggesting that these defenses shield a party from liability for interruptions and delays caused by the coronavirus crisis. Yet these doctrines should not be taken for granted, and, in assessing risk, should be looked at strictly as measure of last resort, for a few reasons.

First, much like the "acts of God" language in a force majeure clause, courts apply these doctrines in very narrow circumstances. Tellingly, in the coronavirus context, we have already seen one instance in which a court rejected a party's reliance on an impossibility defense. The alleged "impossibility" was caused by a company-mandated office closure - - not a government mandated one - - and, notwithstanding local, state, and federal guidelines strongly calling for this social distancing measure, the court determined that the absence of a government required shutdown was a death knell to the impossibility defense. This was not a great decision, especially under such compelling circumstances as the present state of affairs; however, it goes to show how reluctant courts are to apply these types of defenses.

Second, the defenses of impossibility and impracticability are generally treated by courts as default, common law defenses. This means that, where a contract has provisions that govern risk of loss in a contract, like a force majeure provision or certain insurance requirements, a court will not let a party rely on these defenses to excuse performance of a contract.

CONTRACTING AND BIDDING MOVING FORWARD

Reports have indicated that the coronavirus pandemic could come in waves, and, as has unfortunately proven true during this first wave, the market for building materials may become volatile during these times. Consequently, as the first swell of cases passes and the economy, along with contracting and new projects, picks back up, owners and contractors alike need to think about how to take steps to protect themselves in the event of another rise in the pandemic.

Owners are advised to make clear in their bidding instructions that any price adjustments resulting from increases in the cost of building materials associated with the coronavirus pandemic will be capped at a set percentage above the bid price for the materials, such as 110% of the bid price, and they should also require that proof of the increase in cost is a precondition to entitlement for those amounts.

Conversely, contractors, subcontractors, and suppliers are advised to state, in their bids, that increases in the prices of building materials after the submission of the bid (and/or execution of the project contract, as the case may be) resulting from the coronavirus outbreak shall be subject to equitable adjustment.

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This Client Alert is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact Sean Donoghue at 412.566.6057 or sdonoghue@eckertseamans.com, any member of **Eckert Seamans' Construction Law** team, or any other attorney at Eckert Seamans with whom you have been working.