

Construction Industry Key Considerations

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As the COVID-19 situation continues to develop on an almost hourly basis, and new advisories are provided by governmental authorities, construction industry stakeholders should consider that business operations may require significant change to adhere to public health and safety recommendations.

The Construction Law Group at Cassels offers the following key points for industry leaders to keep top of mind:

1. Stay informed
2. Communicate
3. Review contract provisions
4. Review insurance policies

1. Stay Informed

Federal, provincial, and municipal government websites are regularly updated to provide advisories and should be reviewed several times per day so that appropriate steps can be taken to deal with the dynamically changing situation. Governments may also implement emergency measures, such as restricting access to airports, roads and resources, which could impact the supply and delivery of materials and equipment to project sites. To stay informed, organizations should consider implementing designated leads to evaluate strategies and project impacts.

As COVID-19's effects become more widespread, personnel will be affected and grow more concerned. All organizations need to be proactive and diligent. Companies should consider existing health and safety protocols and any additional procedures that might be implemented or supplemented at their job sites or offices, such as providing hand sanitizer, limiting in-person meetings in favour of video-conferencing, limiting the number of individuals attending meetings, and generally requiring six feet of separation between individuals.

2. Communicate

Organizations should anticipate delays and interruptions on projects and familiarize themselves with all applicable contractual notice requirements. Best practices would include:

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- adhering to the proper timelines and procedures for all required notices;
- assigning designated employees to be familiar with and responsible for all contractual notices and related correspondence;
- assuming that verbal communication is insufficient, and always recording verbal conversations in meeting minutes, emails or other written records;
- keeping good records of work progress (reports, photos, videos, etc.); and
- being aware of contractual *force majeure*, delay and time extension clauses, and their actual or potential applications.

It is important to maintain a well-documented record of events so that decisions and discussions can be revisited, if required, at a later date. Keeping an up-to-date record also provides an opportunity for project participants to regularly reflect on progress and cost issues so that they can consider appropriate steps to mitigate potential delays and interruptions. As much as possible, parties should be proactive, identifying challenges early, communicating those issues with their counterparts, and considering potential solutions.

Understanding the type and stage of each project is critical to developing solutions. The scheduled sequencing of work may need to be reviewed and revised to reduce personnel density. For example, certain outdoor work may not be as heavily impacted as inside work and may therefore present lower health-related risks. Since resequencing could impact the construction schedule and therefore potentially affect the project cost and completion date, such changes need to be carefully documented and considered by all affected parties.

3. Review Contract Provisions

Parties should carefully review the entirety of their existing contracts as well as any proposed or pending contracts, including those that are the subject of current procurements. Among other things, provisions relating to unforeseen conditions, delays and *force majeure* deserve special attention. Depending on the form of the contract, the impact of COVID-19 restrictions might be addressed under one or more of those provisions.

Force majeure provisions are intended to address events that are unanticipated, beyond the parties' control, and/or not caused directly or indirectly by the fault, negligence or default of the party seeking relief. Such provisions may include a list of examples of applicable *force majeure* events such as: fire, unusual delay by common carriers, civil disturbance, changes in legislation, directives by government or other public authorities, acts of war, riot, sabotage, blockade, embargo, lightning, earthquake, inclement weather or acts of God. In some cases, the list may even specifically include "epidemic" or "pandemic."

It cannot be assumed that similar contracts take a similar approach to *force majeure*. CCDC contracts do not define *force majeure* events, and supplementary conditions are often used to amend and modify

standard terms. Where a contract is silent, or unclear on *force majeure* events, parties may look to interpret the broad phrase "*event or cause beyond the parties' control*" in an effort to address delays resulting from the current COVID-19 outbreak and resulting public health restrictions.

The consequences of a *force majeure* event vary from contract to contract, but typically include relief from performance and extensions of time. Where an extended *force majeure* event is contemplated, parties should consider whether the contract termination provisions permit a termination of the contract without cost consequences. Termination of a contract must always be exercised with caution and parties should consider negotiation prior to exercising a termination right.

Organizations should also consider any applicable exception or exclusion provisions in their contracts. A common exception to *force majeure* is the exclusion of events that were reasonably foreseeable at the time the contract was entered into. For contracts that are the subject of pending or recently awarded tenders, COVID-19 restrictions could be found to be a reasonably foreseeable event, potentially barring claims of *force majeure*. Consequently, for current and future projects, parties should carefully consider the precise provisions of the contract and include a mitigation plan in their construction schedules to account for the uncertainty surrounding the short-and long-term impact of COVID-19.

4. Review Insurance Policies

Organizations should review all required and applicable contract and project insurance policies to evaluate whether there is appropriate coverage for potential losses that they may incur. Typical project insurance coverage may include one or more of: Comprehensive General Liability, Builder's Risk and Wrap-Up Liability policies. Business Interruption insurance is another type of coverage that could become important due to existing circumstances.

Review all current and proposed project policies with your insurance advisors in order to fully understand what is and is not covered, and whether existing policies extend coverage for the types of losses that could occur as the result of a pandemic.

Where insurance coverage is available, parties should be mindful that insurance policies usually include mandatory time-sensitive notice requirements. If notice of a claim is not given in a timely manner, it could result in a denial of coverage by the insurer. It is also important to be diligent in collecting and producing documentation required to support insurance claims.

Be diligent, be proactive and above all, be safe.