

Calgary Construction Association: COVID 19 and your Construction Contracts March 27, 2020

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COVID 19: What is happening?

- COVID 19 Global Pandemic – First reported December 31, 2019
- Alberta declared a public health emergency and banned gatherings of more than 50 people.
- COVID 19 is having (will continue to) have major impacts Construction Projects ranging from:
 - Supply Chain (availability/delay/insolvency)
 - Site Safety (COVID measures, quarantines)
 - Contractual Claims for “Force Majeure” relief/Change in Law/Frustration
 - Employment (availability/layoffs/termination)

What is a Force Majeure Clause?

- **Not a right at law – needs to be expressly provided for in the Contract**
- **In construction contracts, provides for excused performance, ability to terminate for duration, potential for claim for additional time and/or money**
- **Case law in Canada (but focus on your contract):**
 - suggests that that it has to be something more than simple difficulty or just added expense
 - Standard is near to impossibility
 - Duty to Mitigate

Standard Form Force Majeure Provisions

Paragraphs 6.5.3 and 6.5.4 of GC 6.5 of CCDC 2 (Stipulated Price) state (Similar language in CCDC 4, CCDC 5B w/appendix, CCDC 14, CCDC 17 and CCA 1)

6.5.3 If the Contractor is delayed in the performance of the Work by:

.1 labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the Contractor is a member or to which the Contractor is otherwise bound),

.2 fire, unusual delay by common carriers or unavoidable casualties,

.3 abnormally adverse weather conditions, or

.4 any cause beyond the Contractor's control other than one resulting from a default or breach of Contract by the Contractor,

then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the Contractor agrees to a shorter extension. The Contractor shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the Owner, Consultant or anyone employed or engaged by them directly or indirectly. [NTD: TAKE NOTE OF DIFFERENCE IN CCDC 3 and CCDC 5B]

6.5.4 No extension shall be made for delay unless Notice in Writing of the cause of delay is given to the Consultant not later than 10 Working Days after the commencement of the delay. In the case of a continuing cause of delay only one Notice in Writing shall be necessary.

SUBCONTRACT LOOK FOR FLOW DOWN

ARTICLE 2A – CONFLICT BETWEEN THE PRIME CONTRACT AND SUBCONTRACT

2.1 The requirements, terms and conditions of the Prime Contract as far as they are applicable to this Subcontract, shall be binding upon the Contractor and the Subcontractor as if the word “owner” appearing therein had been changed to “Contractor” and the word “contractor” appearing therein has been changed to “Subcontractor”. In the event of any conflict between the terms of this Subcontract and the Prime Contract, the Prime Contract shall govern.

What should I do?

- If the event occurs and falls within the clause, the party seeking to rely on the clause must notify the other party.
- Review all Contracts and take Note:
 1. Triggering Event for Force Majeure
 2. The time within which notice must be given;
 3. The facts the notice must contain; and
 4. Where notice should be served.
- Don't forget your duty to mitigate (whether contractual or at law)



What are the effects of the operation of the clause?

- Right to seek an extension of time for performance without liability
- Duty on the part of the party invoking the clause to overcome the event to the extent possible.
- Potentially Suspension of performance until the event ceases without liability, and re-activation thereafter
- Likely entitlement to costs has been waived in a fixed price agreement (except CCDC 3 and CCDC 5B) – but don't be afraid to ask!



Any other provision which might apply: (Change in Law)

Paragraphs 10.2.7 and GC 10.2 of CCDC 2: (Similar language in CCDC 3, CCDC 5B, CCDC 14, CCDC 17 and CCA1)

10.2.7 If, subsequent to the time of bid closing, changes are made to applicable laws, ordinances, rules, regulations, or codes of authorities having jurisdiction which affect the cost of the Work, either party may submit a claim in accordance with the requirements of GC 6.6 – CLAIMS FOR A CHANGE IN CONTRACT PRICE.

Any other provision which might apply: (Termination Right)

Paragraphs 7.2.2 and 7.2.5 of GC 7.2 of CCDC 2: (Similar language in CCDC 3, CCDC 5B, CCDC 14, CCDC 17 and CCA1)

7.2.2 If the Work is suspended or otherwise delayed for a period of 20 Working Days or more under an order of a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor or of anyone directly or indirectly employed or engaged by the Contractor, the Contractor may, without prejudice to any other right or remedy the Contractor may have, terminate the Contract by giving the Owner Notice in Writing to that effect.

7.2.5 If the Contractor terminates the Contract under the conditions set out above, the Contractor shall be entitled to be paid for all work performed including reasonable profit, for loss sustained upon Products and Construction Equipment, and such other damages as the Contractor may have sustained as a result of the termination of the Contract.

What if there is no “Force Majeure”? Frustration?

- The doctrine of frustration applies where an intervening event permits the parties to bring the contract to an end, and relieves them of any future performance
- Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract"
- *Frustrated Contracts Act (Alberta)*

Other things to consider:

Site Safety:

- “Gatherings” of more than 50 people – does not apply to construction sites
- Quarantining/Site Shut Downs due to infection? Hand sanitizers? Etc.

Change in Law

- Social distancing still applies
- Essential Business orders in Ontario and Quebec

Insurance:

- What policies are available? Do they cover these types of events?

Other things to consider: (cont.)

Bonding/Security:

- Performance Bonds
- Labour and Material Bonds (obligation to inform beneficiaries)
- Parent Company Guarantees

Insolvency in your supply chain:

- Are their risks of insolvency in your supply chain?
- How can these be mitigated
- CCDC 9A/9B forms

Concerns about payments at Owner Level:

- Providing reasonable evidence that financial arrangements have been made? Requirement to notify if there is any material change in Owner's financial arrangements (5.1 of CCDCs)

Other things to consider: (cont.)

Courts/Land Titles:

- Court filings/Applications
- Lien Considerations
- Timing of disputes when the world order restores

Employment:

- Quarantined employees (due to travel or sickness);
- Termination/Layoff

What should I be doing now:

- **Reviewing all agreements to determine what entitlements exist;**
- **Reviewing and assessing insurance/bonding/other security coverage;**
- **Sending all appropriate communications (including: insurance, bonding);**
- **Risk Management Plan** – ensure a flexible plan is in place, communicate this to your clients, meet regularly to update.
- **Health and Safety Plan** – ensure a flexible plan is in place and followed addressing increased safety obligations and is communicated to everyone on site and enforced

What should I be doing now: (cont)

- **Mitigate, Mitigate, Mitigate** - alternative production or work locations; inventory and availability of parts and material; insolvency risks
- **Monitor, Monitor, Monitor** – monitor government websites, industry organizations for laws, new and information affecting your projects;
- **Communicate, Communicate, Communicate** – communicate early and often with all stakeholders.
- **Careful, Careful, Careful** – are you negotiating a contract now? How will this impact pricing/timing? Is this now foreseeable?

Resources

- **Calgary Construction Association:**
<https://cgyca.com/industry-updates/category/covid-19/>
- **Government of Alberta -**
https://www.alberta.ca/coronavirus-info-for-albertans.aspx?utm_source=google&utm_medium=sem&utm_campaign=Covid19&utm_term=prevention&utm_content=v1&gclid=CjwKCAjwguzzBRBiEiwAgU0FT_g7V33RYAiMiSkMIZOP8aH70gOv8gX9LnSSY8opnkxUs00e2k1FyhoCXVwQAvD_BwE
- **Canadian Construction Association -** <https://www.cca-acc.com/covid-19-resources/>

Any Questions

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