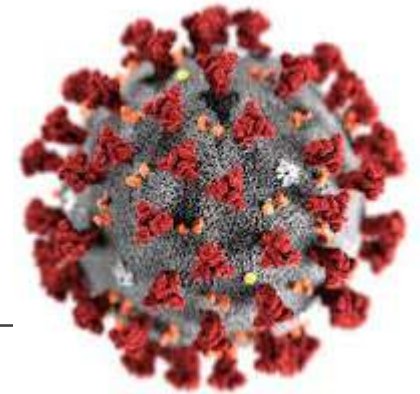


Protecting the Surety During the COVID-19 Pandemic



WHAT CAN WE DO TODAY?

*Presented by Manier & Herod
www.manierherod.com*





Disclaimer:

This presentation is for educational purposes and not intended to be legal advice. In any general presentation on legal topics, the audience should seek separate legal advice on their specific cases and facts. In this unique environment dealing with the impacts of a worldwide pandemic, this advice is even more important. The legal analysis of your claim may be dependent on facts, contractual language, laws of your jurisdiction and other issues beyond the scope of this presentation. We hope you find this brief presentation beneficial.





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*COVID-19 and the Performing Surety:
Contract Provisions & Notice to the
Owner/Obligee*



Read the Contract, Read the Bond

Contract Provisions to Consider:

- Force Majeure Clauses
- Excusable Delay Clauses
- Rights to Additional Time or Compensation
- Termination and Suspension Clauses
- Emergency & Safety Provisions

Force Majeure Clauses

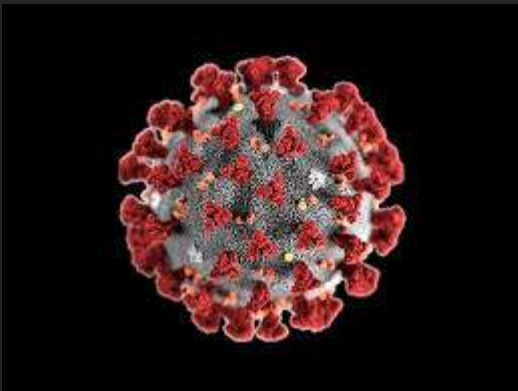
[No party shall be liable or responsible to the other party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement [(except for any obligations to make payments to the other party hereunder)], when and to the extent such failure or delay is caused by or results from acts beyond the impacted party's ("Impacted Party") [reasonable] control, including, without limitation, the following force majeure events ("Force Majeure Event(s)": (a) acts of God; (b) flood, fire, earthquake, [OTHER POTENTIAL DISASTER(S) OR CATASTROPHE(S), SUCH AS EPIDEMICS,] or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (d) government order or law; (e) actions, embargoes or blockades in effect on or after the date of this Agreement; (f) action by any governmental authority; [and] (g) national or regional emergency; [and] [(h) strikes, labor stoppages or slowdowns or other industrial disturbances;] [and] [(i) shortage of adequate power or transportation facilities;] [and] [(j) other [similar] events beyond the [reasonable] control of the Impacted Party.

Force Majeure Clauses

The Impacted Party shall give notice within [NUMBER] days of the Force Majeure Event to the other party, stating the period of time the occurrence is expected to continue. The Impacted Party shall use diligent efforts to end the failure or delay and ensure the effects of such Force Majeure Event are minimized. The Impacted Party shall resume the performance of its obligations as soon as reasonably practicable after the removal of the cause. In the event that the Impacted Party's failure or delay remains uncured for a period of [NUMBER] [consecutive] days following written notice given by it under this Section [X], [either party/the other party] may thereafter terminate this Agreement upon [NUMBER] days' written notice.]

Excusable Delay, Contract Time & Price Adjustments

CONSENSUSDOCS 200



6.3. DELAYS AND EXTENSIONS OF TIME

6.3.1 If Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of Constructor include, but are not limited to, the following: ... (j) epidemics; (k) adverse governmental actions.... Constructor shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8.

6.3.2 In addition, if Constructor incurs additional costs as a result of a delay that is caused by items (a) through (d) immediately above, Constructor shall be entitled to an equitable adjustment in the Contract Price subject to §6.6.

Termination or Suspension of the Contract

AIA Document A201-2007 General Conditions of the Contract for Construction

§ 14.1 TERMINATION BY THE CONTRACTOR

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:

- .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2 An act of government, such as a declaration of national emergency that requires all Work to be stopped;
- .3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
- .4 The Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Section 2.2.1.

Termination or Suspension of the Contract

AIA Document A201-2007 General Conditions of the Contract for Construction

§ 14.1 TERMINATION BY THE CONTRACTOR

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of termination, and damages.

Health, Safety, & Emergencies

AIA Document A201-2007 General Conditions of the Contract for Construction

§ 10.4 EMERGENCIES

In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7.

§ 10.2 SAFETY OF PERSONS AND PROPERTY

§ 10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to...employees on the Work and other persons who may be affected thereby[.].

Notice to the Owner/Obligee

CONTRACT NOTICE REQUIREMENTS

- Proper Recipient
- Written, Verbal – Form
- Timeliness
- Confirm Conditions
- Clarify Relief
- Safety Considerations

tone & LANGUAGE

- Establish facts to support conditions.
- Summary of relief requested.
- Clearly delineate what the surety HAS DONE and what the surety WILL DO.
- Remain collegial and cooperative.
- Reserve all rights.

Notice to the Owner/Obligee

Specifically, this letter is intended to notify [REDACTED] and [REDACTED] (the “Architect”) of (1) the temporary suspension of work under the Contract based upon the emergent and exigent effect the COVID-19 pandemic is having on the safety of persons working on and/or residing in the Project and (2) [REDACTED] claim for adjustments to the “Contract Sum” and the “Contract Time” resulting from the delays and increased “Cost of the Work” caused by the pandemic. A brief summary of the reasons for the temporary suspension of work and resulting claim is set forth below, and [REDACTED] welcomes the opportunity to confer with [REDACTED] and the Architect (and others) regarding the safe and efficient completion of the Contract.

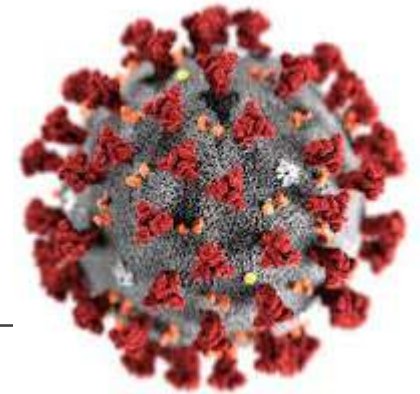
Notice to the Owner/Obligee

At this juncture, [REDACTED] seriously questions whether additional work under the Contract would be permitted under the various restrictions and/or directions issued by the State of Ohio and/or the Federal Government. For example, Ohio Governor Mike DeWine formally declared a State of Emergency for the entire State of Ohio through Executive Order 2020-01D, which went into effect on March 9, 2020. By Proclamation dated March 13, 2020, President Trump declared that “that the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020.” On that same day, the Ohio Department of Health issued a Director’s Order prohibiting visitors to long-term care facilities, such as nursing homes, based upon the heightened vulnerability to infection and death faced by the aged population. All schools K-12 have been closed in Ohio, and various businesses have been forced to close or significantly limit their activities. [REDACTED]

Notice to the Owner/Obligee

Time” and the “Contract Sum.” This letter is not intended to be an exhaustive discussion of the bases upon which a temporary suspension would be justified in light of the COVID-19 pandemic. Like [REDACTED] and the Architect, [REDACTED] find themselves in unprecedented circumstances. Nonetheless, all parties involved are legally and morally required to prioritize the health and safety of the workers on and the residents of the Project. [REDACTED] has confirmed that they have taken reasonable precautions secure the Project during the temporary suspension of work.

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