

# Practical Tips for Ohio Construction in Response to the Coronavirus Pandemic

By **Thomas L. Rosenberg**

On March 22, 2020, Governor DeWine issued a Stay at Home Order that permits essential infrastructure projects to continue performance. Essential infrastructure includes construction projects and specifically, the Governor's Order makes it clear that public health emergency, hospital construction, construction of long-term care facilities, public works construction, school construction, essential business construction and housing construction constitute essential infrastructure projects. The Governor's Order indicates that essential infrastructure is to be construed broadly in its definition and therefore all construction projects are deemed essential infrastructure projects. Note, other states including border states such as Pennsylvania have taken a contrary position and have ordered all construction contractors to cease work. For the time being, in Ohio, contractors can continue to work however, they have to follow the social distancing requirements, including maintaining six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes, regularly cleaning high touch surfaces and not shaking hands.

Even though work can proceed, it is important for contractors to examine their construction contracts to determine their rights and obligations under the current coronavirus pandemic circumstances.

First, determine whether your contracts have a force majeure clause. Force majeure is a term commonly used for contract clauses that deal with unexpected events beyond the control of the contracting parties. The coronavirus pandemic qualifies as a force majeure event. When a contract includes such a clause, it will control the party's rights, obligations and potential remedies.

If a force majeure clause exists, it is important to provide notice within the contractually prescribed time-frame to the Owner or other entity the construction contractor has a contract with, of any impact upon performance. The notice requirements of the contract must be met and they often specifically require written notice not e-mail notice and may require notice to be sent to a specific individual. While you may not know the full impact or monetary impact of the delays caused by the virus, you are likely obligated to put parties on notice within a limited amount of time after becoming aware of the potential impact. Since the full extent of the impact is not known, the notice should state that supplemental information will be submitted when you are in possession of more detail about the impact and monetary costs incurred.

The impact to construction contractors may include delays in meeting the contract schedule, potential delays in acquiring materials especially if the materials are being delivered from a location out of the country, shortages of labor, potential demobilization and re-mobilization costs, and further additional costs. To the extent applicable, a construction contractor should identify these types of circumstances in its notice letter even though it may not know the full extent of the impact at present.

If a force majeure clause does not exist in your contract, you still may be excused from complete performance as a result of the present circumstances. Give timely notice as set forth above. Most construction contracts have clauses in them that still require timely notice of any impact to a contractor's

ability to perform or circumstances that could give rise to delays, increases of costs, schedule delays and other circumstances impacting performance.

All contractors have an obligation to mitigate the damages resulting from any delay. In this case, certain steps may not be able to be taken, but contractors should consider what they can do to minimize the losses being sustained. Is there work that can be performed partially off-site, or elsewhere? Is there rental equipment that could be returned so that continuing rental costs are not incurred if you are unable to perform?

On federal projects, the coronavirus is clearly established in federal regulation as a limitation on performance. Federal Regulation 52.240-14 provides that a contractor shall not be in default of any failure to perform if the failure to perform arises from causes beyond the contractor's control and without the fault or negligence of the contractor and includes epidemics and quarantine restrictions as examples of such causes. On federal projects, however, construction contractors still must provide notice.

In summary, while construction currently can proceed in Ohio, circumstances exist that may cause delays, increased costs and other losses to construction contractors. Closely follow the contract documents in all respects to provide timely, proper notice, keep track of costs and delays incurred and supplement notice on a regular basis if able to do so. Even though presently the Governor's Order allows construction to proceed, there are going to be many circumstances where it cannot in full, in part or as expeditiously as desired as a result of the virus' impact on labor, material availability and the like.

If you have any questions, or would like more information, please contact Tom Rosenberg by email at [trosenberg@ralaw.com](mailto:trosenberg@ralaw.com) or by phone at 614.723.2006, or any of the listed attorneys.

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