

Force Majeure Recommendations

CONTACTS

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This bulletin provides guidance to contractors, subcontractors, suppliers, and others to ensure compliance with contractual change order requirements in the event work on a construction project is impacted by a force majeure event.

Contract Protection Tips:

A force majeure event is defined as an unforeseeable circumstance that prevents someone from fulfilling a contract. Because many events arising on a construction project could be arguably unforeseen, it is imperative that the contract contain a force majeure provision. Examine all contracts for the applicable force majeure provision. **Look for a clause like this:**

§ 8.3.3 Any failure or omission by Owner or Contractor in performance of its obligation shall not be deemed a breach or create any liability for damages or other relief (other than additional time) if it arises from any cause beyond the reasonable control of such party, including, without limitation, acts of God, floods, fire, explosions, storms, earthquakes, acts of public enemy, war, terrorism, rebellion, insurrection, riot, sabotage, invasion, epidemic, quarantine, strikes, lockouts, labor disputes, or other industrial disturbances, any order or action by any governmental agency, or causes of similar nature.

In the aftermath of the COVID-19 pandemic, a variety of force majeure clauses have been added to construction contracts. The catastrophic impacts caused by Hurricane Helen highlight the need for the inclusion of force majeure clauses. Additionally, the short-lived dock worker strike may become an issue again in January 2025.

Given supply chain issues, it is advisable to include a clause addressing specific supply chain impacts provided by the contractor or supplier, including: “lack of or failure of or other inability to obtain necessary transportation, fuel, power, materials, machinery, equipment or facilities, delays caused by other

contractors, subcontractors or their subcontractors of any tier, or any materialmen or suppliers.” Also, it is recommended that the clause specifically state: “Any such delay shall extend the time for completion of the contract by not less than the duration of the delay.”

Force Majeure Event Action Items:

If you experience a force majeure event, it is imperative that you comply with the notice provisions of your contract and track your actual time and damages.

1. Provide notice and request for a time extension, as well as associated costs. Notice should be provided in accordance with the contract provisions. Remember to check the timing of notice (e.g., within five days of the occurrence of the event) and the method of notice (e.g., in writing delivered by certified mail return receipt requested). If your contract does not contain specific requirements of what must be included in the notice, the following **Example Notice Language** may be used:

At this time, [Contractor/Subcontractor/Supplier] is being delayed by a force majeure event, which is outside of its control.[Describe Event].[Contractor/Subcontractor/Supplier] has been impacted by the force majeure event. Among other impacts, we continue to face impacts to our labor force and disruptions to the delivery of material and detailing services.

It is impossible to notify you of the full impact the force majeure event will have on costs and schedule; however, we hereby request a day-for-day extension. [Contractor/Subcontractor/Supplier] will submit the costs associated with this impact along with documentation of the schedule impacts. [Contractor/Subcontractor/Supplier] reserves all rights that it has under the contract and applicable law to an extension of time for any delay and costs that result from this force majeure event.

2. Check all contracts for clauses relating to compensation in the event of a shutdown or delay. Is there a No Damages for Delay clause? **Look for a clause like this:**

No claim for damages . . . other than for an extension of time shall be made or asserted against the owner for any reason whatsoever. The contractor shall not be entitled to an increase in the contract sum or payment or compensation of any kind from the owner for direct, indirect, consequential, impact, or other costs, expenses, or damages, including but not limited to costs of acceleration or inefficiency arising because of delay, disruption, interference from any cause whatsoever.

If there is an enforceable No Damages for Delay clause, begin considering mitigation options that will reduce your job site overhead and general conditions, such as the ability to return rented equipment during any project suspension.

1. Check the contract for a supply chain delay provision.
2. Check the contract for a price escalation provision.
3. Keep meticulous records of all damages arising from any delay and increased expenses and provide supporting documentation as required to obtain payment.
4. Follow the recommendations set forth in “Protect Your Right to Payment.”

Contact Partner **Denise M. Motta** with any questions.