



LEVI W. BARRETT



NATHAN A. COHEN



MARK A. SNYDER

#### For More Information Please Contact

Levi W. Barrett  
lbarrett@pecklaw.com  
212.382.0909

Nathan A. Cohen  
ncohen@pecklaw.com  
310.228.1075

Mark A. Snyder  
msnyder@pecklaw.com  
212.382.0909

## How Will Today's Pandemic Impact Tomorrow's Construction Contracts?

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The emergence of COVID-19 has created a new set of challenges in the already complex world of negotiating construction contracts. In the pre-COVID-19 era, general contractors, construction managers and those negotiating on their behalf, needed to balance a variety of fairly well-established legal risks and exposures and commercial realities with the need to maintain a positive relationship with their counterparty. While many are rightfully concerned with addressing the impacts of COVID-19 to their on-going projects, those negotiating new contracts now are undoubtedly cognizant that they are negotiating in the midst of an unpredictable future that is tipping the historical negotiating balance. The following presents some crucial areas to focus on when negotiating and drafting your contracts in this new era.

### Contract Terms Through the COVID-19 Lens

Contractors should examine proposed new contracts carefully to identify rights that afford COVID-19 protections and identify contractual obligations that create COVID-19 commercial risks.

Specific attention should be paid to those sections relating to force majeure/excusable delay, emergencies, changes (including changes in law), contingency, suspension and termination, site investigation as well as all representations and warranties. The paramount concern in examining these provisions is to ensure that they not only entitle the contractor to relief for those unknown events, emergencies and changes, but that they also contain sufficient entitlement for the contractor to obtain both time extensions and financial compensation for *unknown* impacts of a *known* event – the COVID-19 pandemic.

For projects that may have been bid before COVID-19, contractors may be experiencing internal and external commercial pressures to ignore potential COVID-19 impacts and hastily sign the contract. Others may have considered withdrawing their bid or submitting a revised price that considers the increase in costs related to COVID-19 resulting from government mandates, unpredictable labor markets, potential project-shutdowns and other impacts to a project. While the latter choice may appear attractive, it too comes with risk. Estimating a job by assuming that the current conditions will remain in-place for the full duration of a complex, long-term, construction project may not be a commercially viable option given the risk of numerous changes the future may hold.

## Items of Particular Concern

### I. COVID-19 Impacts to Price and Schedule

Construction contracts often entitle the contractor to extensions of time for excusable delays, but not an equitable adjustment of the contract price.<sup>1</sup> Contractors should look to adjust excusable delay provisions or include new specific language to provide for entitlement to additional time and compensation associated with COVID-19 impacts. If compensation terms cannot be negotiated into the contract, this risk will need to be priced, which, as discussed above, may be a difficult task.

Contractors should be especially concerned with risk-shifting provisions which make the contractor responsible for “anticipated” events or impacts that the contractor “should have” known about. Such broadly phrased risk-shifting provisions may saddle the contractor with an unwieldy burden. The question of what a contractor should “foresee” is inherently difficult to answer. When this language cannot be removed, it should be limited to the extent of “reasonable” foreseeability. For contracts that are being negotiated today, contractors should be mindful that the cause of tomorrow’s delays may actually flow from COVID-19 events which commenced prior to the execution of their agreement. When confronting COVID-19 delay and impact claims owners can be expected to contend that these impacts were foreseeable, even if not fully quantifiable. Contractors need to take appropriate steps to ensure that their contracts are clear, and to the largest extent possible, cover impacts flowing-out of the present pandemic and any future resurgences of COVID-19 or similar outbreaks.

Alternatives to this kind of language are manifold and include from building COVID-19 allowances or contingences into the contract to including concise language detailing the specific COVID-19 related risks that the contractor has built into its price (as distinguished from those that will entitle it to an adjustment from the owner). Contractors may consider categorizing COVID-19 related impacts into two buckets – the known and the unknown and factoring those presently known impacts of COVID-19 into their price and schedule. For example, such known items may include social distancing requirements, workforce limitations, temperature screening, personal protection equipment, as well as performance delays and costs that arise out of the cumulative impact of these new measures. Next, the contractor needs a mechanism to obtain price and schedule relief for the presently unknown impacts of COVID-19.

Further, since the outbreak of the pandemic, governmental agencies across the country have imposed new rules and restrictions on contractors to protect workers and the public and to prevent the spread of the disease. These rules and requirements have changed repeatedly as this pandemic has unfolded and construction contracts do not always provide clear entitlement to relief for a change in law. For example, AIA A201 – 2017 Section 3.7 requires the contractor to comply with all laws applicable to the work without regard to when such law(s) were enacted. Therefore, the contractor would be well served to revise such language to include an entitlement to time and financial compensation for any changes in law, and expressly those related to COVID-19.

## II. Contractor Representations

In many construction contracts, the contractor provides broad and unqualified representations that it will be able to furnish the materials and labor required to complete the work, often within the defined contract time. This can be a difficult representation to make in the current market and should be appropriately qualified to consider the uncertainty that exists in current labor markets and the potential for supply chain disruptions that are outside the contractor's control. Additionally, ensuring that the contract provides for entitlement to equitable adjustments of time and contract price for COVID-19 related impacts will assist with mitigating this risk.

Contractors should also be mindful of how the various provisions of a contract interact with one another. For example, an excusable delay provision with a catch-all for causes of delay outside of the contractor's reasonable control may be partially undermined by a broad representation that the contractor has investigated the project, carefully reviewed the contract documents, and assumes all risks and hazards associated with labor availability, site safety, material availability, market conditions and site accessibility.

While some owners now include explicit COVID-19 risk transfer provisions requiring the contractor to assume all risks, others have relied on more surgical language changes to subtly shift COVID-19 risks to the contractor. Thus, it is important that all clauses that relate to COVID-19 impacts are harmonized.

## III. Indemnities, Insurance and Waivers of Consequential Damages

No discussion of construction contracts would be complete without a nod to indemnities and waivers of consequential damages. While indemnity language differs widely from project-to-project, and a general discussion about the myriad variations is beyond the scope of this article, indemnity issues affected by risks related to COVID-19 should be treated with special consideration. Contractors are well advised to carefully examine contractual indemnity language for risks arising from or related to COVID-19 related exposures and coordinate the indemnity with their insurance coverage. For example, to what extent might COVID-19 be included as a covered claim for "bodily injury" as some insurers have now begun to exclude coverage for communicable diseases. As coverage and policies varies from company-to-company and at times from project to project for the same company, contractors should consult with legal and insurance professionals to assess these provisions.

Consequential damages waivers are always critical protections for contractors; and should now be tailored to ensure they address COVID-19 related risks. A failure to secure an effective consequential damages waiver creates significant exposure on any construction project, exposure that is made exponentially greater by the long list of potential damages that may arise from COVID-19. For instance, a contract by which a contractor has exposure to delay damages or has a broad obligation to comply with all laws and regulations applicable to the project (including those enacted after execution of the contract),<sup>2</sup> would potentially create a heightened risk of liability in this current COVID-19 environment.



### Conclusion

As this pandemic continues to impact the construction industry, we expect new strategies to be developed as contractors and owners work together to address and apportion the risks of tomorrow’s construction projects. As part of that effort, contractors will be best served to bear in mind potential impacts to cost and schedule, the scope of their representations and obligations, and ensuring that all such clauses throughout the contract are properly harmonized. The results of a sensible and carefully formulated risk allocation effort should be written into prime contracts and contracts with trade contractors.

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<sup>1</sup> See, for example, AIA A201 – 2017 Section 8.3.1 and ConsensusDocs 500 Section 6.3.1

<sup>2</sup> See, again, for example AIA A201 – 2017 Section 3.7

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