

MEMORANDUM

Subject: Response to COVID-19 Orders

Date: April 24, 2020

Our nation's businesses are facing an unprecedented economic disruption due to the Coronavirus (COVID-19) outbreak. Governmental actions to (1) cease/suspend work and (2) expeditiously procure critical facility projects have had a major impact to Design Professionals' business in terms of navigating new regulations of projects and reviewing, drafting and/or negotiating contracts for new work and evaluating the impact to existing contracts. Donovan Hatem has developed contractual language for the Design Professionals to consider in charting a path forward and managing the risk associated with COVID-19 and its related regulations. Note that the examples below are not appropriate for implementation in all situations, and we recommend Design Professionals discuss the terms of any contract, and responses to governmental actions, with counsel.

On March 23, 2020, Massachusetts Governor Charlie Baker issued COVID-19 Order No. 13, an Emergency Order requiring all businesses and organizations that do not provide "COVID-19 Essential Services" to close their physical workplaces and facilities to workers, customers, and the public until May 4, 2020. The restrictions on businesses do not apply to most construction companies, though a blanket statement regarding construction activity has not been provided by the Commonwealth. Rather, the Commonwealth maintains that the restrictions of Order No. 13 do not apply to those providing construction services for the energy, electric, petroleum, natural gas, communications, and information technology industries. Additionally, companies providing construction services related to essential infrastructure, aid in COVID-19 response, housing, and places of education are exempt from the restrictions.

While construction is not explicitly restricted by Order No. 13, COVID-19 has added barriers to construction including social distancing, interrupted supply chains and a potential shortage of healthy workers. These regulations may make timely completion of certain projects impractical, if not impossible.

This memorandum discusses contract provisions and actions that should be considered in navigating the shutdowns and disruptions as well as regulations regarding the health of personnel working on projects.

CONTRACT LANGUAGE RECOMMENDATIONS

COVID-19 disruptions bring increased risk to projects' schedules, certifications and cost increases related thereto. Donovan Hatem is available to assist in reviewing, drafting and/or negotiating agreements and amendments to assist clients in navigating the web of new regulations and managing risk to their projects and enterprises.

A. Force Majeure

The three points considered herein are: (1) how a Force Majeure clause should be drafted, in a new professional services agreement, to protect a Design Professional from liability for delay arising from COVID-19 and/or related governmental act; (2) whether Design Professionals are protected by the Force Majeure clause in the professional services agreement they entered into before the advent of the COVID-19 outbreak; and (3) if such a clause is not present in a Design Professional's executed professional services agreement, what other defenses the Design Professional may have for delay in project completion due to COVID-19 and/or related governmental acts.

1. New Agreements

Design Professionals should ensure that adequate Force Majeure language is included in any professional services agreement, including language detailing delay or stoppages due to "pandemics, epidemics, quarantine, work

slowdowns, or work stoppages (whether resultant from Owner or governmental action)”. Force Majeure clauses do not usually include language entitling Design Professionals to compensation for additional costs due to Force Majeure events, so this is ideal to include: “Design Professional shall be entitled to reasonable compensation for such extension and additional costs arising from the Force Majeure.”

2. Existing Agreements with Force Majeure Clauses

Force Majeure can be used as a defense for delay and suspension if an adequate clause is present in the agreement. Courts in Massachusetts do recognize Force Majeure and uphold clauses. Courts are also willing to interpret ambiguous language, such as poorly written Force Majeure clauses, against the drafting party. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995). Accordingly, Force Majeure clauses may be considered broadly and language such as “acts of God” may encompass pandemics and epidemics such as COVID-19, and “acts of Government” may encompass an order by the President or Governor to quarantine. If evoking Force Majeure, Design Professionals must show that a Force Majeure, as defined in the professional services agreement, was in fact the reason for the delay (opposed to negligent failure to perform or other cause). Bellerman vs. Fitchburg Gas & Elec. Light Co., Mass. Super., No. WOCV0923B (Sept. 9, 2009).

Owners, meanwhile, cannot use mutual Force Majeure clauses to anticipatorily repudiate projects due to market instability. Yangtze Optical Fibre and Cable Company Ltd. vs. Lucent Technologies, 2005 WL 8175831 (Feb. 24, 2005). Design Professionals can thus protest if an Owner cancels a project due to market instability caused by the pandemic, unless termination is broadly permitted in the agreement. Clients must pay for services rendered, despite the economic impact of the COVID-19 pandemic.

3. Existing Agreements without Force Majeure Clauses

While common law, including that in Massachusetts, generally does not recognize Force Majeure (which may be codified in civil law jurisdictions) as a defense if it is not expressly included in an agreement, the similar defenses of (i) impossibility and (ii) impracticability may be available for delay in project completion. To evoke these defenses, a Design Professional’s workforce and services must be impacted by COVID-19 and subsequent governmental actions, such that a delay, suspension, or termination incurred or was implemented.

a) Impossibility

Impossibility has previously been identified in Massachusetts as a common law equivalent to Force Majeure. This defense appears to be used infrequently, and the burden of proof is upon the defendant to prove such impossibility. Lenn v. Riche, 331 Mass. 104, 111 N.E.2d 129 (1954). For the “impossibility” doctrine to apply, there must be “an unanticipated circumstance [which] has made performance of the promise vitally different from what should reasonably have been” contemplated by the parties. Republic Floors of New England, Inc. v. Weston Racquet Club, Inc., 25 Mass. App. Ct. 479, 520 N.E.2d 160 (1988); Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass. 122 at 129, 310 N.E. 2d 363 (1974). For example, compliance with a government order, such as quarantine, can render a contract impossible to perform, if site services are needed, and the workforce is subject to such quarantine. However, a contract being temporarily impossible to perform “would not discharge a promisor’s duty to perform unless his performance, after the impossibility had ceased, would have subjected him to a substantially greater burden than would have been imposed had there been no impossibility.” Fauci v. Denehy, 332 Mass. 691, 127 N.E.2d 477 (1955). Further, where the conditions that rendered performance impossible are not of such extent as to amount to a substantial abrogation of the entire contract, they excuse performance only to the extent to which performance is impossible and may not excuse the remaining part of the contract, unless the circumstances are such that performance would be unjust to the promisor. Van Dusen Aircraft Supplies of New England, Inc. v. Massachusetts Port Auth., 361 Mass. 131, 279 N.E.2d 717 (1972). Design Professionals can thus likely use impossibility due to quarantine of its workforce as a defense to timely completion of certain services, but likely cannot use it as a defense for services which can be performed remotely. Design Professional also likely cannot use impossibility as a defense for termination of services, even if Design Professional’s rates become dated and uneconomical and/or remobilization is difficult due to decreased work force.

b) Impracticability

Design Professionals are more likely to utilize impracticability to excuse suspension and delay in performance. Performance under a contract is excused on the grounds of impracticability if the hardships or risks “are so unusual and have such severe consequences that they must have been beyond the assignment of risks inherent in the contract,

that is, beyond the agreement made by the parties.” Wagner and Wagner Auto Sales, Inc. v. Land Rover N. Am., Inc., 539 F. Supp.2d 461, D.Mass (Mar. 19, 2008). If a Force Majeure clause is not present in an agreement, the court may thus still consider factors such as health risk, decreased work force, and quarantine as factors which make performance impracticable, if not literally impossible. Factors the courts may consider include “the foreseeability of the supervening event, allocation of the risk of the occurrence of the event, and the degree of hardship to the promisor.” Wagner and Wagner Auto Sales, Inc. v. Land Rover N. Am., Inc., 539 F. Supp.2d 461, D.Mass (Mar. 19, 2008). Being that the situation with the COVID-19 pandemic, and subsequent governmental action, is unprecedented in recent history, Design Professionals can likely identify these events as unforeseeable, and that performing duties such as site visits, if in violation of governmental quarantine order, as impracticable.

It should be noted that services which can be performed remotely, such as certain design services and project management services, may not be considered rendered impossible or impracticable by the COVID-19 pandemic or any governmental quarantine, nor any current or future market instability, if the Design Professional remains in business.

B. Suspension, Termination, and Remobilization

Projects, and Design Professional services, are being suspended and terminated. Design Professionals should ensure there is language in their agreements allowing them to obtain reasonable costs for suspension and termination. Further, Design Professionals should be able to renegotiate rates if they are asked to remobilize. Design Professionals should seek to include language similar to the following in their agreements, to address suspension, termination, and remobilization:

“Design Professional shall be entitled to a minimum of thirty days’ notice prior to suspension or termination of services, as well as reasonable costs for suspension or termination. Owner may require remobilization for one hundred and eighty days after notice of suspension. In the event of suspension and remobilization, Design Professional shall be entitled to a minimum of thirty days to remobilize personnel, a reasonable adjustment to rates, and reasonable costs for remobilization.”

C. Standard of Care

Design Professionals should ensure that adequate Standard of Care language, such as the following, is included in any agreement or certification, including underlined language:

“Standard of Care. Design Professional shall perform its services consistent with the professional skill and care ordinarily provided by design professionals in the same or similar locality under the same or similar circumstances (the “Standard of Care”).”

The circumstances, at this time, are novel, and Design Professionals should have this consideration included in their Standard of Care. Design Professionals are currently utilizing different methods to perform services, such as utilizing third parties or drones to record images at site and provide such data to Design Professional. The Standard of Care will protect a Design Professional should any allegations of negligence be brought when a Design Professional utilized methods contemporaneously employed by other professionals.

As Design Professionals may face claims if a project is delayed, they should also ensure that any clauses regarding timing for performance are subject to a Standard of Care, such as:

“Design Professional shall perform its services as expeditiously as is consistent with its Standard of Care.”

Avoid agreeing to “time is of the essence” language, as this may require a Design Professional to perform services in a manner too expeditious to maintain quality, or to finish within schedule despite delays. Donovan Hatem is available to assist in reviewing, drafting and/or negotiating Standard of Care language and other relevant language in agreements.

D. Disclaimers for Deliverables and Payment Applications

The COVID-19 pandemic has caused Design Professionals to devise alternative arrangements for performing construction administration services, which ordinarily requires physical presence on site. Such alternative arrangements include utilizing a drone, or a third party who is permitted on site, to take video or still footage of site, and provide such digital material to Design Professional, who then composes necessary reports and deliverables based on the data received. If alternative arrangements are utilized, we recommend that Design Professionals include information on their (1) deliverables and (2) payment applications, describing such arrangements, such as:

“Due to government restrictions which hindered Design Professional attendance at site, these reports were composed through the use of third parties on site, who provided digital information to Design Professional. These reports are subject to further review when Design Professional’s attendance at site is reasonably feasible.”

It should be noted that an appropriate Standard of Care definition may protect a Design Professional from any claims of negligence, if a Design Professional utilizes alternative arrangements contemporaneously used by similar professionals.

E. “Whereas” Language for COVID-19 Response Projects

For projects originating from the COVID-19 pandemic and or/governmental response, such as fast-track healthcare facility projects, Design Professionals should ensure that adequate “Whereas” clauses are included in the preamble of their agreements, describing the situation, such as:

“Whereas, the COVID-19 pandemic has broadly threatened the health of Commonwealth residents;

Whereas, Commonwealth seeks to address the public health threat by designing and constructing a new health care facility at the identified location (the “Project”);

Whereas, Commonwealth seeks to have the Project designed and constructed in an expeditious manner;

Whereas, Design Professional is prepared to perform design services in an expeditious manner, subject to the Standard of Care (defined in Section 2);

Whereas, Design Professional undertakes considerable risk in performing design services during the COVID-19 pandemic, and in an expeditious manner;

Therefore, in consideration of the needs and risks set forth above, the Parties do hereby agree as follows:”

These “Whereas” clauses capture the needs of the parties and demands of the situation and may be valuable to have memorialized if examined years after execution, when the current situation may be forgotten. They should be specifically incorporated as terms of the agreement.

F. “Fast Track” Language for COVID-19 Response Projects

For projects originating from the COVID-19 pandemic and or/governmental response, such as fast track healthcare facility projects, Design Professionals should ensure that adequate “fast track” clauses are included in their agreements, describing the situation, such as:

“Fast Track Process. Owner acknowledges that the fast track process has a greater likelihood of errors, omissions, inconsistencies, ambiguities and lack of coordination in design and other work product produced by Design Professional and its consultants which could add to additional design and construction costs, the occurrence of which is inherent in the fast track approach and for which neither Design Professional nor its consultants may be held legally responsible.”

G. Cost Increase

Design Professionals have largely reported that they are able to perform professional services remotely. However, remote work has caused need for new software and hardware, as well as developing means to address construction administration services (such as purchasing drones to record digital data). Design Professionals should ensure that language is included in the cost summary in their agreement which addresses the potential for changes in working arrangements, and additional costs, arising from the COVID-19 pandemic, such as the following:

“It is understood that the shift of Design Professional’s services from on-site or in-house to remote working arrangements shall not negatively affect Design Professional’s fee entitlement. It is also understood that should the COVID-19 pandemic impact Design Professional’s ability to perform its services at the costs and fees stated, Design Professional shall be entitled to an equitable adjustment of costs and fees.”

H. Prompt Payment

It is foreseeable that the COVID-19 pandemic may cause Owners or Clients to delay payments. Design Professionals should require prompt payment in their professional services agreements, such as:

“It is understood and agreed that Design Professional shall be entitled to prompt payment for services rendered, despite any market instability, governmental suspension, or other cause arising from the COVID-19 pandemic.”

I. Hazardous Waste Indemnification and Notification

Design Professionals should ensure that language is included in their hazardous waste articles which address the potential for damages arising from the COVID-19 pandemic as follows, including underlined language:

“Design Professional and its consultants shall have no responsibility for the discovery, presence, handling, removal or disposal of, or exposure of persons to, hazardous waste or viruses, including COVID-19, in any form at the Project site. Accordingly, Owner hereby agrees to bring no claim for negligence, breach of contract, strict liability, indemnity, contribution or otherwise against Design Professional, its principals, employees, agents or consultants if such claim in any way arises from such services. Owner further agrees to defend, indemnify and hold Design Professional and its consultants and their principals, employees and agents harmless from and against any claims, demands, loss or damage (including reasonable attorneys' fees) sustained by any person or entity arising from such services or circumstances. Design Professional shall not be liable for any damages or injuries, of any nature whatsoever, due to any delay or suspension in the performance of its Project caused by or arising out of the discovery of hazardous substances or pollutants at the Project site or exposure of any parties to the COVID-19 virus.”

Further, Design Professional should include language regarding viral exposure in any requirement for Owner to inform Design Professional of hazardous conditions at Project site, such as:

“Owner hereby warrants that, if he or she knows or has any reason to assume or suspect that hazardous materials, including materials or persons with viral contamination, may exist at the Project site, he or she has so informed Design Professional. Owner also warrants that he or she has done his or her best to inform Design Professional of such known or suspected hazardous materials’ type, quantity and location.”

J. Liability Threshold

In Design-Build arrangements, Design Professionals should ensure that adequate Liability Threshold language is included in any professional services subconsultant agreement, such as the following, including underlined language:

“Liability Threshold. Design-Builder recognizes and expects that (a) it may incur or expend direct or indirect costs in excess of the fixed contract amount specified in its Agreement with Owner due to a number of reasons, including (i) the design development process; (ii) Owner review of design development submissions; (iii) quantity or cost estimating issues or variations; (iv) inaccurate or otherwise unattainable concepts, assumptions, details or other information underlying or embodied in deliverables, including schematic design, prepared by Design Professional during the Proposal Phase; (v) costs arising from COVID-19 or related quarantine or governmental acts; or (vi) for other reasons, and for which Design-Builder may be unable to obtain any cost or time adjustment or relief from Owner (the “Additional Costs”). Design-Builder agrees not to assert any claim against Design Professional unless and until

such Additional Costs exceed \$[_____]; and, in such event, Design-Builder's entitlement to any recovery shall be based on a breach of the professional standard of care."

K. Limitation of Liability

Design Professionals should ensure that adequate Limitation of Liability language, such as the following, is included in any agreement or certification, including underlined language:

"Limitation of Liability. To the fullest extent permitted by law, Owner agrees to limit the total liability, in the aggregate, of Design Professional and Design Professional's officers, directors, employees, agents and independent professional associates and consultants, and any of them, to Owner, and anyone claiming by, through, or under Owner, for any and all injuries, claims, losses, expenses or damages whatsoever arising out of or in any way related to Design Professional's services, the Project or this Agreement from any cause or causes whatsoever, including but not limited to the negligence, errors, omissions, strict liability or breach of contract of Design Professional or Design Professional's officers, directors, employees, agents or independent professional associates or consultants, or any of them, and any causes arising from or related to the COVID-19 pandemic. Such liability shall not exceed the total compensation actually received by Design Professional under this agreement, or the total amount of \$[_____], whichever is greater."

L. Waiver of Consequential Damages

Design Professionals should ensure that adequate Waiver of Consequential Damages language is included in any agreement or certification, such as the following, including underlined language:

"Waiver of Consequential Damages. Design Professional and Owner waive consequential damages, including but not limited to, damages for loss of profits, loss of revenues, loss of business and of business opportunities, reduced rental or market values, increased insurance costs, increased energy, water and other operational costs, unrealized tax incentives, credits, deductions and/or rebates, for claims, disputes or other matters in question arising out of or relating to this Agreement, including costs arising from the COVID-19 pandemic. Design Professional and Owner agree to require a similar provision in all contracts with contractors, subcontractors, subconsultants, vendors, and other entities involved in this Project to carry out the intent of this provision."

M. Remote Mediation

Due to COVID-19's disruption of court systems, parties are being encouraged to use creative means to resolve disputes. Design Professionals should add the following language to mediation and disputes resolution clauses in their agreements, including underlined language:

"The parties may engage in remote mediation if in-person mediation is not possible or practicable due to the COVID-19 pandemic, or if mutually agreed upon between the parties."

COVID-19 OFFICER ACTION RECOMMENDATIONS

On March 23, 2020, Governor Baker issued executive order COVID-19 Order No. 13 to address COVID-19 social distancing issues. On March 31, 2020, the Governor revised COVID-19 Order No. 13 to require the Massachusetts Department of Transportation ("MDOT") and the Division of Capital Asset Management and Maintenance ("DCAMM") to "issue guidance and enforcement procedures for the safe operation of public works construction sites." In response, MDOT/DCAMM issued the COVID-19 Construction Safety Guidance ("Guidelines"), which contain the required enforcement procedures that shall be followed by all state agencies and authorities who undertake, manage or fund construction projects. Where these Guidelines do not meet or exceed the standards put forth by the Project Team, the more stringent procedures shall apply. The Governor's chief legal counsel sent notice to city and town executives that all construction projects should continue operations during the Governor's state of emergency but with the Guidelines incorporated.

According to the Guidelines, a site-specific COVID-19 Officer shall be designated for every site. "The COVID-19 Officer shall certify that the contractor and all subcontractors are in full compliance with the COVID-19 Construction

Safety Guidance.” The question of who should be designated the COVID-19 Officer is left open. Also, the word “certify” is not defined.

Below are considerations if a Design Professional is instructed by the Client that it must assume the role of the COVID-19 Officer and the responsibility to certify that entire Project Team is in full compliance with the Guidelines.

Accepting this role creates new, unanticipated risk for the Design Professional that was not negotiated or bargained for in developing its Scope of Work. Furthermore, the Design Professional is unlikely to be in the best position to undertake this responsibility given inconsistency in site visits and the unknowns of project execution in terms of manpower and construction methods.

In response to a request to take on the COVID-19 Officer role, the Design Professional should consider the following:

- The Design Professional may negotiate with the Client the role of the COVID-19 Officer as an additional service to be memorialized in a change order or contract amendment.
- The Design Professional may recommend that the underlying certifications off the COVID-19 Officer be divided between the Client, the Contractor and the Design Professional, each assigning its own COVID-19 Officer. The Design Professional and Contractor COVID-19 Officers would each ensure that its own employees and subcontractors are following the Guidelines and send separate reports to the Client COVID-19 Officer. The Client COVID-19 Officer would have the authority to represent the Municipality’s best interests and make decisions based on information provided by the Contractor and Design Professional COVID-19 Officers as to whether it is safe to continue with construction.
- The Design Professional may condition taking on the role of the COVID-19 Officer by advising the Client that the Design Professional will only agree to “Observe,” “Report,” or “Record,” but not “Certify” that the Contractor and subcontractors are in compliance with the Guidelines. In the event that a certification is required, the Design Professional should include appropriate language indicating the basis of its certification and the efforts taken in gathering information, but disclaiming a blanket certification or any certification beyond the information provided for consideration. Moreover, the design professional should not certify the health of workers given the virus incubation period and likelihood of being asymptomatic while being a carrier of COVID-19.

ACEC, AIA MA, and others are engaging with government to seek clarification on the COVID-19 Officer regulation. This memorandum will be updated as further information becomes available.