The day-to-day professional and personal impact of the COVID-19 pandemic is substantial. The global event will have dozens of common legal implications that we will address in this blog over the coming days, but for now I wanted to start with the basic starting point for any event of delay and/or additional cost on a construction project — THE NOTICE!

The time is now to send your notice.

This is not an adversarial notice. Your contracting party will understand the impacts experienced and should appreciate the proactive approach in communicating the COVID-19 impacts. If discussions have occurred between with your contracting party, I would still send a formal notice as to avoid further legal defenses down the line. Also, providing the formal notice creates a structure that is helpful in creating a productive communication pathway regarding the delays/costs incurred and ways to mitigate them.

No matter what the legal theory, the COVID-19 pandemic and its impact on the construction industry was not anticipated, outside of contractor/owner’s control, and it is causing delays and impacts to construction operations. Determining permissible events of delay are fact-intensive inquiries — so it will take time to fully realize the impact. But, you likely know there is an impact now. The impacts may increase and become more “black and white.” For example, here in Boston, effective March 17, 2020 (as I am writing this post), the City of Boston
suspended construction activities for two weeks. While essential services will continue and the policy will be revisited in two weeks, it is clear that a governmental order has delayed Boston construction projects. To view the City’s press release and announcement, see our prior post.

Whether it is invoking a force majeure clause or relying upon the common law doctrines of impossibility and frustration of purpose, the first step is to notify your contracting party that you are being delayed. Your contract likely requires immediate/prompt notice and, even if it does not, starting this dialogue is essential to the success of your project. Here are some questions to ask and points to cover in your notice letter:

**Does your contract require notice to be sent by a particular method?** If so, follow that notice requirement. If you are unsure, then send the notice in a variety of methods to ensure it is received by your contracting party. At a minimum, I suggest sending it by email, overnight courier, and certified mail. Many contracts still have the certified mail requirement in them. Another alternative is to contact your contracting parties and confirm that they will accept service by email and waive any contractual requirements. This could be incorporated into your notice, and if used, I would be sure to follow-up to confirm receipt within a day or two.

**Explain the contractual grounds for your request.** It is easy for me to say “read your contract” when I know that you presently are being pulled in a thousand different directions. But, to ensure that your notice will fulfill its purpose, it is worth the investment of time (whether it is your or your counsel’s time) to review the contract and provide a tie-in with the contract.

- **Time Extensions.** At a minimum, you will likely be noticing an event that is causing delay to project performance. As such, an extension of the “Contract Time” is required. The AIA, ConsensusDocs, and governmental contracts all have force majeure and/or time extension provisions that permit extensions of contract time. Section 8.3.1 of the AIA A201 permits time extensions for “causes beyond the contractor’s control.” Section 6.3 of ConsensusDocs 200 similarly provides an extension of time for “any cause beyond the control of the Constructor.” The ConsensusDocs goes further by providing examples of such causes which include “(j) epidemics; (k) adverse governmental actions; and (l) unavoidable accidents or circumstances.” Thus, emphasize in your notice letter that the delays caused by the COVID-19 epidemic were unanticipated and beyond your control.

- **Delay Costs.** The language of your contract may or may not permit you to recover costs. For example, subparagraph (j)-(l) quoted above from Section 6.3 of ConsensusDocs 200 excludes those items from compensable delay events. But, the reality is that contractors, owners, suppliers, and all project participants will incur some additional labor, material, and equipment cost associated with COVID-19. Determining which party will bear (or share in) those costs will depend upon numerous variables, including the contract language, the project participants, and arbitrators/judges (should the matter proceed to dispute resolution). It will be in all parties best interest to find ways to practice techniques of
dispute avoidance during this time period to the extent possible. Nevertheless, I would include in your notice letter that there is a cost impact to your operations. **Be as specific as possible regarding the costs incurred or anticipated additional costs.** For example, the letter could include the daily cost of equipment on site and describe the measures your company is taking to ensure the safety of your workforce. Commit to providing an update regarding the costs and **provide periodic updates.** If you collect and provide that information as it is being developed, you will avoid surprise and also engage your contracting party to participate in cost mitigation efforts.

- **Material Escalations.** Your contract may also have particular provisions regarding increased material costs. If it does not and you are experiencing supply chain slowdowns and/or increased costs, include that in your notice letter.

**Explain impacts on project performance.** Make the cause and effect tie in the letter regarding how the COVID-19 measures are directly impacting the project schedule and/or causing increased costs. This does not have to be a complete list, but put some effort into making the notice unique to the facts of your contract and your contractual performance. State that you will provide periodic updates.

**Project Suspensions.** If your project has been suspended by governmental order, as in Boston, or by the owner or other authorities, provide a notice of project suspension as well. Some of the standard form contracts have particular suspension provisions that allow the contractor remedies if there is an extended suspension of the Work. For example, the AIA A201, **section 14.1 permits a contractor to terminate a contract** if the Work is stopped for 30 consecutive days through no fault of the contractor (or its subs) because:

1. 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;

On March 13, 2020, President Trump [declared a national emergency](#). In Boston, the City suspended work for two weeks. If suspensions become more prevalent, then **contractors may be able to evaluate whether and when to exercise the termination remedies of the contract.** Section 14.1.3 of the A201 provides that “the Contractor may, upon seven days’ notice to Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, as well as reasonable overhead and profit on Work not executed, and costs incurred by reason of such termination.”

**Format.** The notice can be short and concise (1-2 pages is fine). It should be plainly written and provide that updates will be given. Here is a suggested template to get past any writers block:

[VIA EMAIL / FED EX / CERTIFIED MAIL – Contract Requirement]

[Name/address listed in contract]
RE: Notice of Delay and Increased Cost Due to COVID-19 Pandemic on Project __________

Dear __________:

The COVID-19 Pandemic, which has been declared a national emergency by President Trump on March 13, 2020 [and ______________ (local authorities)] has caused unanticipated delays and increased costs to the above-referenced Project that were beyond the Contractor’s control. See Sections ____ of the Contract.

In particular, Contractor has experienced the following delays and impacts to project performance: _______________. [If applicable,] the project has been suspended since ______________(date).

Contractor requests a time extension of ____ days at this time in response to the COVID-19 delays and impacts. Contractor invites the Owner to participate in a conference call to discuss this request for a time extension and to outline a plan to reduce the impact on the Contract Time and Contract Price.

In addition, Contractor is experiencing increased costs resulting from the COVID-19 pandemic including ______________ (explain). Contractor is collecting its costs and will provide updated information to the Owner in the near future. In the meantime, we are available to discuss different options to reduce the amount of costs incurred in connection with the Project.

Contractor reserves all rights and remedies it has pursuant to the Contract and is confident it will be able to get through these events with Owner and all project participants. Please contact me to discuss these issues and, again, we will provide periodic updates as soon as possible.

Patience and Planning. Like so many, my family and I started working from home yesterday (3/16/2020). I watched Frozen 2 last night with my kids (ages 11 and 8). I couldn’t help but take some guidance/inspiration from Anna’s song about confronting challenge by doing the “The Next Right Thing.”

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