

COVID-19 Pandemic and the Construction Industry

The current COVID-19 pandemic could effect a major blow on the Construction Industry. In response, we have been working closely with a range of insurance, surety, and risk management professionals to address the most common questions and concerns raised by Contractors with respect to the potential business impact of COVID-19.

Please note, we are in a time of rapid change and adaptation—new questions are being raised daily. Our response below is based on known information and advice at the time of publication only.

CONTRACTS:

Our suggestion is that you review your construction contracts (Prime, Sub-Contracts, and Subs of Subs Contracts) to determine what a pandemic may mean to your work. There are ranges of contracts in the construction industry, so a detailed review is needed. Seek legal assistance as required and pay special attention to the force majeure clause, suspension rights, and delay clauses or similar language that may address situations outside of a party's control.

Below are links to articles provided by legal firms Osler and Torys which address:

- Force Majeure definition and consequences
- CCDC contracts
- COVID-19 impact on project financing

[Osler: Is coronavirus a force majeure event under your project contract?](#)

[Torys: COVID-19 and force majeure clauses: key considerations, implications, and practice tips](#)

Force Majeure—according to [constructiondive.com](#):

“A force majeure clause is a contractual provision that allocates the risk of performance if that performance is delayed indefinitely or stopped completely due to circumstances outside of a party's control which make performance impossible, inadvisable, commercially impractical or illegal, and provides notice to the parties of the types of events that would cause a project to be suspended or that would excuse performance.

The purpose of the provision is to relieve a party impacted by the force majeure by extending, temporarily suspending or terminating the contract due to unexpected

and unavoidable events such as “acts of God,” including hurricanes, tornadoes, floods, earthquakes, landslides, and wildfires, and certain man-made events like riots, wars, terrorism, explosions, labor strikes, and scarcity of energy supplies. To be classified as a force majeure event, the event must be beyond the control of the contracting parties, it cannot be anticipated, foreseeable, or expected, and the event must be unavoidable.”

Our analysis to date appears to indicate that the current COVID-19 pandemic would qualify, but specific contractual language will be key.



Supply Chain:

Be sure to include a review of contractual terms with Suppliers to address construction materials. Given the global nature of supply chain challenges, potential delays, pricing, and shortages should be considered and quantified. The Canadian Construction Association has warned that the virus could cause shortages, disruption of supply partners, and impact contracts.

There are many issues that will be relevant to these discussions, including the various contractual language relating to the contractor schedules, substantial completion, delays, liquidated damages, and other contractual provisions.

EMPLOYEE HEALTH AND SAFETY:

First and foremost, construction firms are concerned with employee well-being. In addition to physical wellness, contractors should be concerned about mental health as anxiety among workers has been reported as a key issue.

Resource: [Guidance on Preparing Workplaces for COVID-19](#)

Featuring risk management steps employers can take to reduce worker/employee exposure to COVID-19.



Safety is always a priority on job sites and managing the risk of COVID-19 should be no exception. From a human resources perspective, trades people cannot work from home, so we strongly encourage contractors to provide advice around the actions your employees are expected to take to reduce the risk. Contractors should have a clear policy regarding when workers should stay home, enforce sanitary standards in portable washrooms, and keep hand sanitizer stocked when running water is not available.

Resource: [COVID-19 and the Workplace: Employers Obligations](#)

OWNERS AND LENDERS:

A significant impact of COVID-19 is the instability that could manifest in the construction and financial markets, causing concern for owners and lenders. Project delays, cancellations, reconsideration or re-design would all lead to changes in bidding and procurement schedules. As this pandemic extends, there will be concerns about new construction in any industry that is negatively impacted by this situation.

Financing may also become a concern, even with the environment of low interest rates, we expect to see this area tighten up.

Owners and Lenders affected by delays should be reasonable in terms of modifying schedules and expectations, but that is yet to be determined.

PROJECT SHUTDOWN:

At this stage we are not seeing government, municipal, or civic stoppages or work halting on projects, however that may change. Many provinces recently declared

States of Emergency which give them broad powers. While construction sites were not specifically mentioned, gatherings of more than 50 people were included in recommended shut downs, so how this will play out for construction projects remains to be seen.

Another risk to project sites is a worker having symptoms or testing positive for COVID-19, requiring all other workers onsite into quarantine or self-isolation and causing significant impact to schedules. Will General Contractors and Subs be able to mobilize other workers to the site? Labour shortages could become an issue that prevents work from continuing.

In the event that a project is suspended, ordered closed or work is stopped, please advise us immediately.

There are provisions in the Builders Risk policy for these situations. We strongly recommend that adequate and appropriate security is maintained to protect the affected site. We can walk you through this situation in more detail if it were to arise.



DELAYS AND COSTS:

Undoubtedly the COVID-19 situation will have an impact on projects. We hope these are within a manageable range for all contractors, but most will be stressed. Your contracts may offer some relief for such an event but there will be costs that are outside of your contract and insurance coverages.

Contractors will want to send notice promptly after becoming aware that COVID-19 has affected material deliveries, labor availability, or other aspects of a project in strict accordance with the contractual notice requirements, advising of the delay or potential delay. Likely, the extent of the delay will be unknown, as it may not be clear when restrictions will be lifted, when travel and deliveries will be reinstated, or when crews will be healthy and available.

WARNING: Do not do nothing, or presume that your customer will be reasonable.

It is far more prudent to send a simple notice explaining the delay, stating that the duration will be unknown, and

noting that the contractor is requesting an extension of the contract performance time as facts become known. If possible, try and see if an understanding is achievable with respect to the steps to taken and document that discussion in writing.

Document everything including:

- Any changes to a project
- Increased costs
- Potential delays
- Impacted crew labour force
- Material availability
- Any other way this event may impact, or is impacting, performance

Complete this documentation as it happens—this will be very valuable when time allows for a deeper review of what took place.

Each organization's situation will be different and we always recommend communicating to the degree you feel is appropriate and document to the highest level.

SICK-LEAVE POLICY:

Contractors will have varying degrees of sick leave, and it may be limited. This can put pressure on workers to continue coming to work when they should be at home or in isolation. Contractors should consider how they plan to handle sick employees who are unwilling to stay home, or employees who are not ill but need to stay home to care for sick family members.

Contractors would be well served to put a working group together involving HR and Legal to develop a practical plan, and one that is adaptable to the moving situation.

REMOTE WORK FOR EMPLOYEES:

Contractors may have technology that allows certain employees to work remotely. During this heavy utilization

of remote access, there will be additional strains and challenges. In addition, during COVID-19, there has been a significant rise in cybercrime, putting more businesses at risk.

Resource: <https://hbr.org/2020/03/will-coronavirus-lead-to-more-cyber-attacks>



ONGOING INSURANCE:

Regarding tenders and any project pricing or issues, we are here to help. The majority of our team is performing their work from home and are in frequent contact with each other and the business. We are conducting team conference calls every second day to stay abreast of any changes. We will react to your needs, questions, and requirements and are ready and able to assist you. For any projects that require our work, please continue to send them to us as you have in the past.

Tender dates and closings are being reviewed and we expect that they may be delayed or extended.

When requesting work, please ensure that timelines are included so that we can be efficient in this changing work environment to meet your deadlines.

We have had many calls and emails regarding COVID-19, and though there is no direct insurance coverage for this pandemic, we are here to assist you with respect to the impact on projects and what Contractors can and should do.

Contact your Mitchell and Abbott Advisor with questions or concerns.

We are here to help.

LET US HELP YOU MANAGE YOUR RISK

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