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A Look at COVID-19 Impacts on the Construction Industry

Holland & Knight Alert

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Highlights

- Construction industry members — including owners, developers, contractors, subcontractors and supply chain vendors — have experienced varying degrees of impacts as a result of the COVID-19 pandemic based upon the various responses at the state and local levels.
- These impacts have resulted in the need for industry members to address both short-term and long-term business challenges as the construction industry is faced with a new national, and even international, environment.
- This Holland & Knight alert summarizes a number of short-term and long-term considerations that construction industry stakeholders should be aware of and prepared to address in light of the COVID-19 pandemic.

Construction industry members — including owners, developers, contractors, subcontractors and supply chain vendors — have experienced varying degrees of

impacts as a result of the COVID-19 pandemic. The nature of the impacts and extent of the ramifications are in large part dependent upon the location of both the respective businesses and underlying projects. Direct impacts have ranged from a slowdown of available goods and labor through to suspensions and, in some instances, terminations of parties or entire projects. Construction activities remain in flux in some states and cities depending upon whether construction is classified as an essential business.

As a result, the COVID-19 crisis has led to the need for industry members to address both short-term and long-term business challenges, as well as formulating project-by-project solutions in the face of a new global and national environment. The full breadth and scope of the changes needed to address issues arising from the pandemic are still unknown, and this analysis is likely to continue to evolve until a vaccine or other curative measures are in place on a global basis.

These new realities touch almost every aspect of the construction process, and specifically such issues as: contract or project notices for default, scheduling and adjustments; project suspension, termination and reinstatement; Occupational Safety and Health Administration (OSHA) and workplace safety compliance; work force management; material, subcontractor and supply chain delays and impacts; risk management and insurance; claims avoidance or, alternatively, claims management; and the disputes process.

Prudent decision-making in this new and unknown environment suggests the use and consultation with persons and teams with necessary industry and legal experience. A proactive approach that seeks sound and practical legal advice will be essential to making cost-effective decisions as new impacts from the pandemic materialize with industry members.

Holland & Knight's **Construction Industry Practice Group** has summarized below the short-term and long-term impacts that industry members and clients should be aware of when dealing with the COVID-19 pandemic. Our experienced attorneys and professionals are ready to advise on these and other impacts.

Notice to Contractual Partners

It is imperative that parties to a construction agreement review the notice provisions for impacts relating to COVID-19. In particular, parties should familiarize themselves with the requirements and timing for any notice to contractual partners and recipients. The failure to satisfy the contractual notice requirements in conjunction with existing or potential COVID-19 impacts could result in a waiver of rights under the terms of the

parties' agreement. Holland & Knight attorneys are prepared to assist in this effort to ensure that any notice requirements are satisfied.

In particular, suggested steps include:

- issue written notice to all contractual partners as soon as there is any indication that COVID-19 impacts may be realized
- assist with coordinating with contractual partners to ensure all interested parties are aware of project schedules
- once an initial notice is issued, subsequent updates should be issued to ensure ongoing exchange of information and preservation of rights and remedies

The immediate and ongoing exchange of information will allow all interested parties to make informed decisions as the overall situation continues to evolve.

Document All Impacts

While it is always advisable to document events that occur over the course of any construction project, the COVID-19 outbreak has placed an even greater emphasis on the need to maintain contemporaneous and thorough records. Project records comprised of generic descriptions of site activities and impacts will not be sufficient to establish a clear record. Instead, all interested parties should track and document any COVID-19 impacts and related mitigation efforts. Particular attention should be paid to the following as part of any documentation practices:

- identify the impacts/events that have occurred
- track timelines and durations of any impacts/events
- thoroughly detail the course of the impact/event over the entire project, and specifically the causal connection as it relates to the ability to perform
- detail any efforts undertaken to mitigate any impact/event

Force Majeure and/or Frustration of Performance

1. Force Majeure

From the outset of the efforts attempting to respond to the COVID-19 outbreak, a significant amount of the focus has been placed on the applicability of force majeure language in contractual agreements, and particularly as it pertains to construction agreements.

Generally, force majeure and other provisions addressing excusable delay seek to address delays and impacts arising from circumstances beyond the immediate control of the contractual parties. These provisions contemplate that in the event of any of the identified conditions, neither party to the contract shall be responsible for any added costs since the conditions are deemed to be beyond the control of both parties. Within existing contractual documents, examples of these excusable delay clauses can be found at AIA A201 Section 8.3.1, ConsensusDocs 200 Section 6.3, and, for federal contracts, at Section 52.249-14 of the Federal Acquisition Regulation (FAR). The remedy under each of these standard provisions is an excusable, but not compensable, extension of time. It's worth noting that the current version of the AIA A201 does not specifically address pandemics, while the form ConsensusDocs 200 identifies "epidemics" and "quarantine" as being considered excusable delays under the form language.

Because the conditions covered through a force majeure or excusable delay provision may vary, it should not be presumed that any contractual language addressing excusable delays automatically applies to the COVID-19 outbreak. A careful review of the language of any force majeure provision should be undertaken to determine whether impacts resulting from the COVID-19 outbreak are covered as an excusable delay.

2. Frustration of Purpose

Even if there is no express language in a contractual agreement addressing the impacts resulting from COVID-19, it still may be possible to excuse impacts to a party's performance. Depending on the existing law in the applicable jurisdiction, the legal concept of contractual impracticability/frustration of performance may provide a party with a basis to avoid liability. By way of example, the U.S. Court of Appeals for the Fourth Circuit has provided guidance on determining if impracticability/frustration of purpose may be applied, by stating "a party relying on the defense of impossibility of performance must establish: 1) the unexpected occurrence of an intervening act; 2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties; and 3) that occurrence made performance impracticable." *Opera Co. of Boston, Inc. v. Wolf Trap Foundation for Performing Arts*, 817 F.2d 1094 (4th Cir. 1987). While this is clearly a fact-based determination, it is

certainly conceivable that the COVID-19 impacts would satisfy the "foreseeability" component identified by the Fourth Circuit.

As it pertains to excusable impacts, members of Holland & Knight's Construction Industry Practice Group have the requisite experience to work with parties:

- to ensure that impacts arising from COVID-19 are scrutinized to determine what legal remedies may be available
- to determine whether the impacts can be considered a force majeure event under the terms of the contract
- to analyze and address the potential applicability of common law remedies (i.e., contractual impracticability/frustration of performance)

OSHA, Workplace Safety and Health Compliance

As construction industry sector members and clients ramp up operations, they continue to evaluate and consider workplace safety and compliance issues. Maintaining an "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm," is required of every private sector employer (with limited exception) under OSHA's General Duty Clause (Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 USC 654(a)(1)).

Satisfying OSHA's General Duty Clause obligations requires adherence not only to OSHA, Centers for Disease Control and Prevention (CDC) and U.S. Department of Health and Human Services (HHS) standards, recommendations and best practices but also that employers adopt and implement workplace safety orders and regulations issued by state, local and municipal governmental agencies, which can be even more burdensome than those issued by federal agencies. Holland and Knight attorneys can assist and advise on OSHA, workplace safety and health compliance, including advising on concerns and issues raised by the COVID-19 pandemic such as:

- developing and updating plans and procedures both for office and jobsite operations compliant with applicable standards, regulations and orders, including advice and counsel regarding OSHA standards governing:
 - respirators, masks and face coverings
 - other personal protective equipment (PPE)

- hazard communication
 - handwashing or hand cleansers
 - cleaning, disinfecting and sanitizing workplaces
 - bloodborne pathogens
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- developing and implementing jobsite best practices and working through risk exposure analyses that are driving workplace logistics, including social distancing
 - assisting clients with developing and implementing processes such as temperature checks and pre-access jobsite questionnaires that are compliant with U.S. Equal Employment Opportunity Commission (EEOC), Americans with Disabilities Act (ADA) and Health Insurance Portability and Accountability Act (HIPAA) guidelines, as applicable
 - responding to/defending OSHA complaints filed by employees, workers and third parties
 - responding to/defending OSHA whistleblower actions stemming from claims of retaliation based on complaints of workplace safety/health violations under OSHA or under the other nearly two dozen whistleblower laws that OSHA oversees and is tasked with processing.

Subcontractors, Material Suppliers and Project Supply Chains

It is indisputable that COVID-19 has touched many aspects of most people's daily personal and professional activities, and there's simply no avoidance of these impacts in the construction industry.

One of the areas that has experienced a significant level of disruption has been the material/supply chains. The ripple effect of material delays or shortages are likely to be felt for a significant period of time on any project, and perhaps even for the length of the project. When faced with impacts concerning the availability of supplies and materials, contractors and subcontractors should request that suppliers provide delivery updates on a weekly basis and, when possible, even more frequently. Likewise, timely identification of alternatives for materials and/or suppliers will ensure that disruptions will be lessened. Any efforts to mitigate these potential impacts by

maintaining constant communication with suppliers and manufacturers will pay significant dividends.

Regardless of the types of impacts to a project, it is incumbent on all interested parties to mitigate those impacts as much as possible. These mitigation efforts can take many forms, as the challenges being posed by COVID-19 are requiring new and creative solutions in order to mitigate impacts that can ripple throughout a project. It is critical that the interested parties work collaboratively in order to lessen the impacts that have occurred to date as well as those that could occur in the future.

The spread of COVID-19 has disrupted and will likely continue to disrupt the scheduling of subcontractors and supply of goods and materials. Manufacturing and production facilities are likely to be impacted based upon their own internal workforce and facility management challenges caused by the pandemic. Holland and Knight's Construction Industry Practice Group has the experience to assist with these possibilities, to include:

- reviewing and understanding contract documents, scheduling terms and conditions
- working and negotiating potential changes for time, schedule, project completion and management
- understanding supply agreement and purchase orders to determine impacts of delays, delivery obligations, payment and financing issues, and other liability risks
- assessment and analysis of governing bodies' shelter-in-place or stay-at-home orders to determine compliance or appeals for excluded businesses, activities and programs to help facilitate continuation of business and project activities

Insurance, Indemnification and Mitigation

COVID-19 has and will continue to impact project risk assessment and corporate liability. The knowledge of insurance policies, endorsements, insurance industry changes in response to the pandemic, and the application of various insurance coverages available, in place and required under project procurement and contract documents will allow industry members to understand what policies may or may not provide coverage for various claims arising as a result of COVID-19 on a project and corporate level. Holland and Knight's construction attorneys can assist with actions regarding construction claims, insurance and indemnification related to COVID-19, including:

- claim risk assessment and insurance coverage

- insurance coverage reviews and corporate audits for claim coverage
- addressing insurance policies for application and coverage for potential industry and project claims
- understanding triggering events for insurance coverage as it applies claims and coverage through general liability, property, business interruption, contingent business interruption, political risk insurance, professional liability, workers' compensation and builder's risk insurance
- addressing applicable endorsements and changes to policies for inclusion or exclusion of pandemic-related events
- monitoring state and federal proposed and implemented legislation that would require carriers to temporarily or permanently pay out on coronavirus-related loss claims
- maximizing mitigation of potential losses through federal, state and local emergency relief funding
- addressing feasibility and application of post-pandemic contractual and procurement insurance requirements, endorsements and their impact on corporate and project liability and work
- implementing claim and loss-based tools to create accounting of loss-related items
- accounting and understanding timely or delayed notice requirements and impacts to late notice to carriers for coverage
- establishing claim handling teams, communications with carriers, and the creation of repositories for sharing of information and claim resolution
- assessment and documentation of decisions and actions to correspond to insurance policy requirements and obligations
- planning for amendments to project contract documents to prevent the implementation of pandemic-related exclusion endorsements to project and policies
- managing project financial risk issues under self-insured, retention-based policy provisions
- meeting carrier-imposed protective safeguard endorsements to ensure coverage under applicable project policies

Suspension and Termination

1. Suspension

Beyond the human toll that the COVID-19 outbreak has exacted, it has forced all segments of the construction industry to examine the economic feasibility of moving forward with current projects. The reality is that significant decisions have been made, and will continue to be made, concerning the feasibility of moving forward on a project-by-project basis. Regardless whether work on a project is suspended or a project has been terminated, such decisions have significant repercussions.

Any potential suspension of a project must first begin with a thorough review of the terms and conditions of the underlying contract. Although many construction contracts contemplate a suspension, not every construction contract will directly address the issue. It is important that parties understand their respective rights and obligations before initiating the suspension of a project or a party. At the same time, if a party is the recipient of a suspension notice, it is imperative that the receiving party take immediate steps to protect its rights.

Next, parties should determine the current status of construction activities on-site as part of any suspension (or termination) analysis. In particular, identifying the activities that must be completed prior to any suspension (i.e., safety issues, exposed equipment, etc.) will assist in determining whether suspension is feasible. As part of this analysis, formulating a clear projection of the project's likely completion will provide additional information as part of a possible decision to initiate a suspension.

Beyond determining the status of on-site activities, it is strongly suggested that any suspension take into consideration the impacts to material and equipment orders and deliveries. Often, long lead items and special orders cannot be canceled. Suspending the underlying project will likely result in increased costs associated with material and supply deliveries.

Finally, it's important to assess whether there is a willingness or ability to incur construction costs beyond current contract values. A suspension implies there is a likelihood that construction activities will resume at some point. It's important to understand that construction costs will likely increase — not decrease — as a result of a suspension. Examples of potential cost impacts can include:

- costs due to damage to completed work in place during suspension period

- costs for damage to stored/uninstalled equipment and materials during suspension period
- costs due to uncertainty regarding availability of original/completion contractor for any future remobilization
- costs due to uncertainty regarding availability of subcontractors/suppliers for any future remobilization
- costs paid to contractor and possibly subcontractors during suspension period (contractor is likely due general conditions costs, at a minimum, over the course of the suspension period)
- costs arising in any future remobilization
- increased construction costs are likely for duration of any remaining construction (labor/material escalation) following remobilization

Thus, while suspending a project or a party may seem like a reasonable method to cut costs for the foreseeable future, the long-term result will likely be more costs than what were contemplated for the suspension. It is suggested that parties considering the suspension of a project or a party, or a party that has received a notice of suspension, seek and obtain legal guidance on how best to proceed.

2. Termination

Similar to the decision-making process for suspension of a party or project, any potential decision concerning a potential termination due to the COVID-19 pandemic must take into account a number of factors. At the outset, the decision to potentially terminate a party or a project in the entirety must begin with a firm understanding of the terms of the underlying construction agreement. The termination provisions of the underlying construction agreement will likely discuss the issues of notice, timing and cost allocation associated with any termination.

Beyond reviewing the terms of the underlying agreement, the party contemplating the termination of a party or a project must consider the impact of the termination relative to the status of the overall construction. Stated differently, a comprehensive cost benefit analysis should be undertaken before initiating any termination. While it is arguable that significant costs will be incurred as a result of a suspension, there is no doubt significant costs will result from a termination. It is strongly encouraged that a

party contemplating the initiation of any termination strive to identify many of the likely cost implications before going down this path.

Holland & Knight Can Help

Holland & Knight's Construction Industry Practice Group is comprised of nearly 50 lawyers and paralegals who practice in all aspects of construction law. Our team routinely and frequently addresses industry members' issues and concerns related to the COVID-19 pandemic.

Our attorneys and professionals understand both private and public (government) sector construction projects, and focus on sensible and cost-effective solutions to meet client and project needs.

Routinely, our construction lawyers work closely with attorneys in Holland & Knight's real estate, corporate, project finance, labor and employment, government, intellectual property, tax and environmental practices to ensure that the diverse needs of construction industry members and clients are met when legal issues involve those areas.

DISCLAIMER: Please note that the situation surrounding COVID-19 is evolving and that the subject matter discussed in these publications may change on a daily basis. Please contact your responsible Holland & Knight lawyer or the authors of this alert for timely advice.

Information contained in this alert is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel.

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