

COVID-19:

# The top 5 things to look for in construction contracts



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*Editor's note: This article was written by Rocco Sebastiano, Jagriti Singh and Elliot A. Smith of Osler, Hoskin & Harcourt LLP. It was originally published on the firm's Construction and Infrastructure Law in Canada Blog. We reprint it here with permission.*

As parties to construction contracts continue to navigate the impacts of the COVID-19 pandemic, we highlight below our top five things to look for in construction contract clauses dealing with COVID-19.

## 1. How are COVID-19 pandemic impacts addressed in the contract?

For contracts finalized pre-COVID-19, the impacts of the pandemic are most commonly captured by the existing *force majeure* clause. Post-COVID-19, the trend has been to move COVID-19 out of the *force majeure* clause to its own section. This makes sense. Even though many elements of a typical *force majeure* clause would apply to the pandemic, the reme-

gies applicable to COVID-19 impacts as well as some contractual elements may be different.

For an existing contract, it's necessary to identify all of the possible clauses throughout the contract that may be triggered, not just the *force majeure* clause. For example, governments and public health officials have responded to the pandemic in a number of ways, including by issuing stop-work orders and new health and safety requirements like physical distancing and the use of PPE. This has contractual implications (e.g., GC 6.5.2 of the CCDC 2 and CCDC 5B forms of contract deal with stop-work orders, and some parties have claimed the pandemic has triggered a contractual change in law). For a new contract, if drafting a clause to deal with COVID-19, it is usually a good idea to bring all of the relevant contractual provisions together in a single section so the contract is easier to administer and to help make it clear that there are no other contractual remedies elsewhere for COVID-19 impacts. This prevents parties from trying to pick another clause that is more advantageous to them.

## 2. What's the contractual remedy for COVID-19 pandemic impacts?

Generally, from a contractor's perspective, there are two possible remedies for these types of events: additional time to complete the work and additional compensation for increased costs. Each has its complications.

Regarding additional time, there is a question of whether the contractor would be allowed additional time for all impacts or only those that affected the critical path. Regarding additional compensation, there is the issue of what types of costs are compensable. For example, there may be additional out-of-pocket expenses for PPE or additional rental equipment, additional labour costs for extra cleaning, productivity impacts from performing work in a more physically distant way, and indirect costs from the extension to the construction schedule.

The contract should specify whether some or all of the above are eligible for compensation – and in many cases the parties may agree to share the costs. An alternative approach is to establish a contingency allowance in the contract to deal with costs arising from unknown (or known but not yet quantified) pandemic-related risks.

## 3. How are COVID-19 pandemic effects that are known as of the date of the contract being dealt with?

Events that have impacts that are known by the parties as of the date of execution of the contract are often excluded from relief clauses in construction contracts. The underlying principle behind this is that these should already be factored into the contract price and construction schedule since they are known events. The effects of the COVID-19 pandemic are more complicated, as there are both known elements, such as existing PPE requirements, and unknown elements, such as the possible effects from a "second wave". Unknown elements could also include new laws and regulations and supply chain disruptions resulting from the first (or subsequent) wave in another jurisdiction.

To address this, any clause dealing with COVID-19 should be clear as to what any known impacts are and whether they are addressed in the baseline construction schedule and contract price or if they will be addressed as a change order during performance of the work. Alternatively, as discussed above, they may also be addressed through the implementation of a contingency allowance.

## 4. What type of COVID-19 pandemic impacts are contemplated?

As we have seen over the past several months, there has been a wide range of effects flowing from the pandemic. The most obvious are direct site impacts, like additional site cleaning, reducing staff, and changing shift schedules. We have also seen extensive supply chain impacts, which can have knock-on effects on other aspects of the work. There are also extensive travel restrictions that have impeded the ability of personnel and specialized technical advisors from making site visits. Lastly, even where it is technically possible for the work to continue, the owner for its own reasons may want to suspend construction work, for example due to internal health and safety policies or if COVID-19 is impacting their underlying business and the need for the project.

In reviewing clauses related to COVID-19, all of these potential impacts and any others should be considered, to ensure the clause provides the intended relief for any anticipated implications. In addition, parties should consider the possibility of new and unanticipated impacts based on the evolution of the COVID-19 pandemic and the measures in response to it and ensure their contracts are carefully drafted to achieve the intended effect even for unanticipated impacts.

## 5. What are the notice and supporting documentation requirements?

The final area for consideration is the notice and supporting documentation requirements associated with COVID-19 impact claims. Under a typical *force majeure* clause, there is usually an obligation to provide prompt notice with particulars and documentation at the time of the claim or to follow when available. The particulars of the claim also need to address what obligations under the contract have been impacted. This presumes that a *force majeure* event is acute in nature, such as a winter storm or a fire. With the COVID-19 pandemic, the impacts may be more chronic in nature, possibly extending over the entire life of a project, and potentially with changing implications depending on the project phase. Accordingly, a one-time notice may not be sufficient or appropriate. Instead, regular reporting and updates on an ongoing basis may be more useful, with an established protocol for how relief may be provided.

