

In light of the COVID-19 related Shelter-in-Place (SIP) orders, what subcontract clauses should I be reviewing so that I can give timely notice?

by

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The Governor of the State of California has issued a shelter in place order, his order is in addition to those issued by local health officials. The orders that have been currently issued by public health officials generally exempt certain types of construction projects from the shelter in place order.

The current construction related exemptions generally allow workers to leave their residence to provide any services or perform any work necessary to the operations and maintenance of “Essential Infrastructure,” including, but not limited to, public works construction, construction of housing (in particular affordable housing or housing for individuals experiencing homelessness), airport operations, water, sewer, gas, electrical, oil refining, roads and highways, public transportation, solid waste collection and removal, internet, and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services, business infrastructure, communications, and web-based services), provided that they carry out those services or that work in compliance with Social Distancing. The orders also allow plumbers, electricians, exterminators, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, Essential Activities, and Essential Businesses.

Almost every subcontract provides that the subcontractor shall comply fully with all laws, orders, citations, rules, regulations, standards, and statutes affecting or relating to that Agreement or its performance, including but not limited to those with respect to occupational health and safety. While the exemptions to the current shelter in place order appear to allow certain construction activity to continue, the order may change. In addition, there are clearly ongoing occupational health and safety requirements that must be satisfied, such as the social distancing requirements for construction workers.

While certain aspects of the construction industry are exempt from the orders, that doesn't necessarily guarantee that you and your subcontractors will have the necessary manpower and materials to complete your work in a timely manner. It also doesn't mean that building inspectors, employees working for suppliers and material manufacturers will continue to work.

As a result, project owners and prime contractors have started sending out written notices asking their subcontractors for performance assurances and notices of possible impacts. Those notices include a request that the subcontractor provide a written action plan as to how the

subcontractor will safely provide adequate resources to complete their scope of work in accordance with the existing schedule. The notice also states that if the subcontractor is going to be impacted it should review the subcontract and provide a timely and contract compliant written notice.

Since the language in subcontracts vary, it is critical that you review certain key clauses. The goal is to familiarize yourself with the notice requirements in those clauses, as well as learning your rights and obligations when COVID-19 impacts your project. Since the key clauses are not always the same, this article is intended to point out those key clauses. The key clauses are: (1) time or delay extension; (2) contract documents or incorporation by reference provisions; (3) protection of the work; (4) recourse by contractor or termination; and (5) force majeure clauses. The rest of article will provide an overview of each of those clauses and what terms you may want to review in those clauses.

Typical time and delay extension clauses provide that a subcontractor will keep itself fully informed of the progress of the work under the prime contract, and as soon as the project requires work to be performed under this agreement for its continued progress, subcontractor will promptly begin work. In addition, the clauses typically provide that if a subcontractor contends that any act of the owner or of a contractor or any other job condition or event has caused the subcontractor to experience delay, disruption, or inefficiency in performing the work, then the subcontractor shall give written notice of such conditions to the contractor in sufficient time (or a stated number of days) to enable the contractor to comply with the requirements of the prime contract regarding such notice. The clauses may also provide that extensions of time for completion shall be the sole remedy of the subcontractor, provided, however, that in the event the contractor obtains additional compensation from the owner on account of such delays, the subcontractors shall be entitled to such portion of the additional compensation so received by the contractor from the owner as is equitable under all of the circumstance. Irrespective, there are appellate court decisions that may limit the application of such clauses. Some clauses provide that if you fail to give the required notice your claim is deemed waived. It is thus important you review the time and notice requirements and comply with them. The notice should describe the cause for the request for an extension of time and/or assert any other claim for delay or disruption, inefficiency, or lack of productivity. You should also include in the written notice a statement that you are reserving all rights and remedies as to what is in the notice.

Incorporation by reference clauses provide that a subcontractor, its subcontractors, suppliers and/or materialmen will be and are bound by the terms and conditions of the prime contract. This clause is significant since it requires a subcontractor to not only to meet the obligations of the prime contract but also comply with the prime contract's notification provisions. In furtherance of the incorporation clauses some subcontracts provide that if the subcontractor claims that it is entitled to damages or to additional compensation, or disputes any decision made by the owner or the owner's representative, then it shall, within the time allowed

by the prime contract, prepare its claims in writing, as required by the prime contract, for presentation by the prime contractor to the owner.

Protection of work clauses typically provide that the subcontractor shall protect its work and be responsible in all circumstances for its good condition until final acceptance of the entire project. Subcontractors are also typically required to protect adjacent property from injury arising from their work. If a project is suspended due to COVID-19, subcontractors may be bound to protect their incomplete work during the suspension. If that occurs, you should comply with the claim notice provisions.

Recourse by contractor or termination clauses contain several components. The components can include an assurance provision, a material breach provision and a termination or suspension for convenience clause. An assurance provision typically states when reasonable grounds for insecurity arise with respect to the subcontractor's performance, the contractor may in writing demand adequate assurance of due performance within seven days of the demand. The subcontractor's failure to provide such assurance of due performance as is adequate under the circumstances of the particular case may be a material breach of contract. These types of assurance requirements are the ones referred to in the beginning of this article. A breach of contract provision typically describes what a general contractor may deem a material default and go on to state that if the subcontractor fails, within forty-eight (48) hours after receipt of written notice to commence and continue satisfactory correction of such default with diligence and promptness, and to complete the cure of such default within the time period stated in Contractor's default notice, the Contractor, without prejudice to any other rights or remedies, shall have the right to any or all of the following remedies: (1) supply additional workers; (2) contract with other subcontractors to complete the subcontractors work; (3) withhold payment of any monies due the Subcontractor. In the current environment it would not be surprising that a prime contractor may assert the termination provision if a subcontractor is delayed as a result of COVID-19 impacts. Finally, termination for convenience clauses typically state that the prime contractor may, at any time and for any reason terminate a subcontractor's services and work at the contractor's convenience, including, but not limited to, the Owner's suspension or termination of the prime contract. If you receive a notice pursuant to the recourse by the contractor or termination clauses, it is critical that you immediately respond in writing. If the stay at home orders do not apply and you chose not to perform work, that may be deemed a material breach of contract under these clauses, and the prime contractor's remedies for material breach of contract may apply. If you are considering such action, then you should immediately contact your attorney and discuss your proposed actions in detail.

Another clause you should look for in your subcontract and the prime contract is a **force majeure clause**. The American Institute of Architects *General Conditions of the Contract for Construction* (AIA Form A201-2017), provides that "if the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control... then the Contract Time shall be extended by

Change Order for such reasonable time as the Architect may determine.” These clauses are sometimes referred to as “acts of God” clauses. Depending on the specific language in the clause, the current pandemic and resulting shelter in place order maybe considered a force majeure. If the force majeure clause is applicable, the delay associated with it will be excusable but may or may not be compensable.

Closing Comments

As you review the subcontract you should consider preparing a checklist of what is required under each clause and the time deadlines for satisfying those requirements. After you prepare the checklist in preparation for taking the actions that are on the list you should: (1) if you not already done so, contact your sub-subcontractors and suppliers and ask them to provide you the specifics of what disruptions they anticipate relative to supply chain delays and labor shortages; (2) review possible alternative sources for materials that will be delayed; (3) review all possible sources of insurance coverage under the subcontract with your insurance broker; (4) review your safety policies in context of stay at home policy and what you need to meet the CDC and local health authorities shelter in place orders; (5) put in place a method and means for tracking the covid-19 time impacts, cost impacts, and any other critical documents and occurrences, such as establishing cost codes and separate files related to the impacts; and (6) as the project progresses maintain a contemporaneous narrative of how covid-19 is impacting your ability to complete work in both a timely and on budget manner.

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