



ARIZONA CHAPTER ASSOCIATED GENERAL CONTRACTORS

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COVID-19 BULLETIN - 0001

To: General Contractors, Sub-contractors, Suppliers, Public and Private Owners

From: David M. Martin
President

Re: Potential Recommended Actions

Date: March 13, 2020

The Arizona Chapter of the Associated General Contractors of America, Inc. (AZAGC) is initiating an important discussion about COVID-19 and steps you may already be considering due to the impact of COVID-19 on commercial activity. This is an informational bulletin about the ways in which COVID-19 may impact the construction industry. It is not intended to be legal advice.

On March 11, 2020, Governor Ducey declared a state of emergency in Arizona due to COVID-19. Even before this declaration, COVID-19 and the public reaction to it had begun to affect commercial activity. Financial markets are stressed, use of air transportation is discouraged (and in some cases prohibited), employees are being instructed to work from home, and schools are being closed, to name a few. It is likely that COVID-19 will impact contractors and owners and the construction industry at large. As COVID-19 plays out, the hope and expectation is that those affected will work together to control and minimize personal, health and commercial impacts. As we do that, it is important to ensure contract compliance, proper notice, open communications, and other steps to minimize project and commercial impacts.

Most or all of your contracts likely include force majeure clauses that could entitle you to an extension of contract time if required due to force majeure events. Your contracts very likely include a force majeure clause of some type and perhaps a definition of force majeure event. Below are a couple of examples currently being used in the industry:

In the event of delay in the Work caused by events or acts beyond the control of the Contractor or any of its Subcontractors, including but not limited to acts of force majeure, as defined herein, or by any acts or omissions or failure to act or respond in a timely manner by the Owner or the Owner's Representative, Contractor and its Subcontractors shall notify Owner of the impact of such delay and request a time extension and the date for Substantial Completion shall be extended accordingly. Contractor shall submit a Change Order request for delay damages and time extensions which will be incorporated through a Change Order pursuant to this Agreement.

Force majeure shall refer to events or acts beyond the control of the Owner or the Contractor which makes it impossible, commercially impracticable, or illegal for work to be performed, including but not limited to, acts of god, war, hostilities, terrorism, acts of foreign enemies, immobilization or requisition of the military, embargo, rebellion, revolution, insurrection or civil war, contamination by radioactivity, nuclear waste, toxic or hazardous materials, riot, disorder or commotion, unavailability of reliable electric power, labor disputes or labor strikes, unless restricted to employees of the Contractor

MAG Specifications (MAG Spec section 108.7) address this issue with the following:

If the Contractor finds it impossible for reasons beyond his control to complete the work within contract time as specified or as extended, he shall immediately submit a written request to the Engineer for an extension of time setting forth therein the reasons, which he believes, will justify the granting of his request. The Contractor's plea that insufficient time was specified is not a valid reason for extension of time. If the Engineer finds that the work was delayed because of conditions beyond the control and through no fault of the Contractor, he may extend the time for completion in such amount as the conditions justify. The extended time for completion shall then be in full force and effect the same as though it were the original time for completion.

Each set of circumstances is different, and these are not one-size-fits-all matters. And, while the particular force majeure or delay provision itself may be significant on a particular project if the owner and contractor cannot resolve how to address any impacts, the important point now, and the purpose of this bulletin, is for you to be aware of this issue and to consider whether and when to put owners on notice of potential impacts. The Governor's declaration of emergency may be a particular starting point, in addition to any impacts already being felt through society very broadly and generally. If you have or are experiencing any specific impacts now (such as labor shortages due to employee absences or supply chain problems), it is a good idea to consider whether you should provide notice that addresses these specific impacts in the notice. I'm assuming (but do not know) that you are not experiencing any significant problems yet, but they may be coming.

Other Action Items and Issues

In addition to considering contractual notice or other requirements, it may make sense to consult with insurance agents or risk managers, as appropriate, to determine whether any of your insurance coverages may apply under these circumstances.

As contractors begin placing owners on notice of possible delays and impacts, it makes sense that Owners will begin to search for options that *protect their interests* such as work suspensions or terminations for convenience. Given the broad use of clauses permitting convenience suspensions and terminations, Owners may use these options to limit their risk and downside exposure. Accordingly, there are many issues to consider and it may make sense to keep this possibility in mind when giving any notice and to communicate very clearly a desire to be cooperative and to work through our collective health crisis in a fair and sensible manner.

Please note that this bulletin is intended to educate you, in general, about some potential effects of COVID-19 that may impact our industry. As noted above, this bulletin should not be construed as legal advice. This bulletin also is not intended to be comprehensive with respect to the potential impacts of COVID-19 on your business or the industry in general. The AZAGC

encourages you to consider consulting with your legal counsel in the context of your situation, the specific project at issue and the applicable contract language.

Over the course of the next week, I will be working with public owners to discuss methods to manage this potentially serious development.