

CONSTRUCTION

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Construction Industry Professionals: Check Your AIA Contract Documents for Your Rights and Obligations in Response to COVID-19 Related Construction Delays

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In the wake of the COVID-19 outbreak and subsequent state and local government shutdown orders, some construction projects have come to an abrupt halt while others face significant delays. Across the industry, project owners, general contractors, subcontractors, sub-subcontractors, and architects are reviewing their AIA Contract Documents looking for a standard force majeure clause to decide whether they will be entitled to an increase in Contract Time or Contract Sum, how to best respond to this kind of request, or whether they will have an option to terminate the contract altogether.

This article will address where to look for the key provisions in the AIA Contract Documents that could assist in assessing an owner's, contractor's, subcontractor's, or architect's response to project complications related to COVID-19. As parties confer in dealing with the impact of COVID-19, these various provisions may be important to clarify basic rights and obligations.

OVERALL CONSIDERATIONS

The AIA Contract Documents do not have a clearly labeled force majeure clause, but they do have several provisions drafted to address the same risk-shifting concepts as a standard force majeure clause. When a contract does contain a traditional force majeure clause, it typically provides that if an unforeseeable event occurs without the fault of either party, performance under the contract will either be excused or delayed. Although standard AIA Contract Documents do not include this specific clause, the related provisions

in the standard AIA forms generally create an option for both parties (i) to request a change in schedule, Contract Time or Contract Sum, and (ii) to exercise suspension or termination rights.

In addressing issues related to COVID-19, construction professionals should consider: (1) reviewing their existing contracts; (2) discussing their possible needs for modifications to the Contract Time or Contract Sum internally; and (3) documenting the ongoing COVID-19 response and local governmental orders in the vicinity of the project which caused a delay or increased costs. It may also be important to initially review and understand the notice provision in the Contract and confirm compliance with the notice provision even as verbal or electronic negotiations proceed about these issues.

LIST OF RELEVANT AIA CONTRACT PROVISIONS

The following sections in AIA Contract Documents may be helpful to construction professionals facing challenges related to COVID-19:

Owner / Contractor Contract (A201-2017)

- Section 8.3 governs delays and extensions of time. The standard AIA documents permit the Contract Time to be extended if the Contractor incurs delays beyond their reasonable control.
- Section 15.1.6.1 addresses the method for applying for claims for additional time.
- Section 15.1.3 advises of method of notice. It is crucial for all parties to closely read the notice

provision. For example, if the method provision requires notice by certified or registered mail, the sender (Owner or Contractor) will want to confirm they are abiding by this provision in giving COVID-related notices (even if it would be more convenient to send an e-mail).

- Owner's suspension for convenience and termination for convenience are governed by Sections 14.3 and 14.4, respectively. Please note, under owner's termination rights, depending on the terms of the contract, the Contractor could be entitled to a termination fee, among other expenses, which should be specified in Section 7.1.
- Should a contractor or owner need to make a claim, it is also important to review the claim process in Section 15, including the role of the Initial Decision Maker and alternative dispute resolution.
- Lastly, it is worth noting that the standard contract includes a waiver of consequential damages by both owner and contractor in Section 15.1.7.

Subcontractor / Contractor Contract (A401-2017)

- Subcontractors should pay particular attention to the language in Article 2 of their contract with the contractor. The standard A401 incorporates the applicable provisions of the A201 and gives the contractor the rights and remedies of the owner and the subcontractor the rights and remedies of the contractor.

Architect / Owner Contract (B101-2017)

- The schedule for performance of Architect's services is governed by Section 3.1.3 and per the terms of the standard contract, the Architect's time frame can be extended for "reasonable cause."
- Section 3.6.2.1 sets forth the expectations for the Architect's evaluation of the work at different stages of construction.
- If the Architect anticipates needing to perform additional services, outside the original performance obligation, Section 4.2.1 sets forth the

method by which the Architect must notify the Owner.

- Similar to the A201, the Owner also can suspend or terminate the agreement under the standard B101. The sections which govern the Owner's suspension and termination rights are set forth in Sections 9.2 through 9.6.

CONCLUSION

At this point in their COVID-19 response, many parties are simply trying to work things out, and to take whatever next steps are most sensible and efficient. This is appropriate; however, it is critical to be aware of a specific contract's provisions for delay and additional expense, and confirm that all parties comply with all required notice provisions in order to preserve their rights under the contract. Finally, do not assume all contracts have standard provisions. As always, construction industry professionals should consult their specific project contracts because provisions are often negotiated outside of the standard AIA Contract Documents.

Disclaimer: While AIA Contract Documents are intended by the American Institute of Architects to serve as an industry standard, construction industry professionals may need to complete and modify the standard forms based on state law and the particular circumstances of each project. ♦

For more detailed analysis on a wide range of legal issues, please see Schnader's COVID-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center.

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