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# The Big Questions: How to Cope With Project Delays and Unknowns During COVID-19 — Part One

[Luke J. Farley Sr. and Dixie T. Wells](#) April 21, 2020

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It's hard to imagine a construction project of any size that won't eventually be impacted by the COVID-19 pandemic — whether it's a labor shortage due to quarantined workers, a delay in receiving specially-fabricated materials or an inability to get permits because government offices are closed. This article provides answers to the most pressing questions a contractor is likely to face during the outbreak.

### **Can I get extra time to finish the project because of the COVID-19 outbreak?**

Most likely yes. A project delay is likely to be the most immediate effect that you — a contractor — would experience. The ways that COVID-19 could delay the project are too many to list.

When faced with a delay due to the outbreak, the question for the contractor is whether the delay is excusable. Generally, delays to the project are either considered excusable or inexcusable.

If a delay is excusable, then it means you will be given extra time to finish the project. (Whether you're also entitled to extra money for the delay is a separate issue that we discuss below.) If the delay is inexcusable, then you'll be held responsible if the project isn't finished on time. If the contract includes a liquidated damages clause, then those damages would start to accrue after the contractor fails to meet the completion date. It goes without saying that there's a lot riding on whether the contract excuses a delay related to COVID-19.

Luckily, the major industry form contracts (AIA, ConsensusDocs, EJCDC) along with the Federal Acquisition Regulation (FAR) are all relatively forgiving of pandemic-related delays — as long as the contractor is careful to give the owner proper notice of the delay:

- The AIA contracts consider excusable delays to be “labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions ... or other causes beyond the contractor's control.”
- The ConsensusDocs contracts consider an excusable delay as any “cause beyond the control of the constructor.” Notably, “pandemics” are specifically listed.
- The EJCDC contracts also allow for excusable delays due to “pandemics.”

- The FAR is the most explicit about disease as an excusable delay and allows for extra contract time for both “epidemics” and “quarantine restrictions.”

Under any of these four contract clauses, the contractor should be entitled to extra time because of the pandemic. Whether or not the contract language specifically references disease, epidemic, or quarantine, the COVID-19 outbreak was so unexpected that no contractor could have foreseen it, and the outbreak was beyond the control of the contractor.

But you may not have a delay claim merely because your city or state is under a “stay-at-home” order. Many such orders make an exception for residential and commercial construction as an “essential business” that can continue to operate while the order is in place.

The extra time, however, isn’t a given. You must still give the owner written notice of the delay. The notice periods will usually vary from 10 days (FAR) to 21 days (AIA) from either the date of the event giving rise to the delay or the date you learned of the delay, whichever is later.

Considering that the president declared a national emergency due to the outbreak on March 13, 2020, there’s some argument that everyone’s clock has been running since at least that date. If there’s the least chance you think your project will be delayed by pandemic, give the owner written notice right now.

What happens if you don’t give the owner notice in time? Usually that can be a serious problem, because notice is supposed to give the owner an opportunity to take action to mitigate the delay. In this case, though, the whole world knows about the coronavirus and everyone is expecting disruptions to their lives and businesses. There’s a fair argument then that your notice wouldn’t tell the owner something he doesn’t already know, so there’s no harm in being late.

Further, you may have believed on March 13 that you would be able to meet the deadlines, but have since encountered problems obtaining supplies. Try hard to give your notice on time, but don’t let a minor slip-up cause you to think that all hope is lost.

**Can I be compensated for my delay damages due to the COVID-19 outbreak?**

Probably not. If you conclude that your delay is excusable, then you next need to consider whether the delay is compensable or non-compensable. On a construction project, time is money. The longer the project is delayed, the greater the cost to the contractor in the form of extended general conditions and increased home office overhead. If a project is delayed due to the pandemic, then the contractor will want not only extra time to finish but additional compensation, too.

Most commercial construction contracts these days aren't as forgiving when it comes to extra money as they are when it comes to extra time. Today, owners often insert a no-damage-for-delay clause in the contracts. Under this clause, even if the contractor experiences an excusable delay, his or her only remedy under the contract is to get extra time to finish, but not extra compensation for the extended general conditions. Often, the only exception to this limitation is active interference in the work by the owner. During the COVID-19 outbreak, you can expect extra time to finish a project (and consequently relief from liquidated damages), but you shouldn't expect to be paid for your extended general conditions or increased home office overhead.

*In the next installment, Farley and Wells will discuss issues such as whether a contractor can recover increased costs from owners, as well as if projects can be terminated because of the outbreak. Make sure you visit our site next week for the second half of this article about construction in the era of COVID-19.*

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# The Big Questions: How to Cope With Project Delays and Unknowns During COVID-19 — Part Two

Alan Dorich April 27, 2020

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*Last week, we presented the first half of Luke J. Farley Sr. and Dixie T. Wells' article on construction in the age of COVID-19. Here is the second half, where the authors answer questions about recovering costs, if projects can be cancelled due to the outbreak, and how builders should deal with the virus on future projects.*

**If the COVID-19 outbreak causes an increase in the cost of labor and materials, can the contractor recover that increased cost from the owner?**

It depends. With workers likely to be quarantined and supply chains disrupted, you can expect price increases for both labor and materials. Does the contractor have to bear the burden of those price escalations? It depends on the basis of payment on which the parties agreed in the contract.

If the contract price is a lump sum, then the contractor bears the risk of all price increases. If the contract price is cost of the work plus a fee, the owner will bear the risk. But true cost-plus contracts are exceedingly rare in the commercial context.

Lastly, if the contract price is the cost of the work plus a fee with a guaranteed maximum price (GMP), then the owner bears the risk of price increases but only to the GMP. After reaching the GMP, the contractor bears the risk of price increases. But what if the GMP contract allows for a contingency? Generally speaking, a contingency is a line item included in the GMP at the time of contracting to account for “unknown unknowns.”

It's difficult to imagine something that better fits the definition of “unknown unknowns” than the current pandemic. Contingency clauses in GMP contracts vary widely — some are written to mitigate the owner's risk while others favor the contractor; some treat the contingency as part of the GMP, while others don't.

Regardless, if you have a GMP contract with a contingency, you should argue to the owner that all cost increases resulting from the pandemic must be paid from the contingency first before being counted as part of the other costs of the work. Paying from the contingency first can help prevent you from exceeding the GMP, which effectively means you won't end up bearing all of the risk of COVID cost increases.

## **Can the project be terminated because of the outbreak?**

Yes. Owners will naturally be skittish about moving ahead on big capital projects given the economic uncertainty that comes from the pandemic. Some will even want to pull the plug, especially if there's a lag between the time of signing the contract and starting the work, and there's still an opportunity to make a clean break, so to speak.

These days most commercial construction contracts include a so-called "termination for convenience" clause which allows owners to terminate contracts for their own "convenience." In other words, under this type of clause, the owner can terminate the contract even if there hasn't been a default by the contractor. If an owner determines that the pandemic will make it difficult to get financing or find a tenant for the finished project, then the owner is free to terminate for its own convenience.

A termination for convenience doesn't mean the owner can leave the contractor empty-handed. These clauses give the owner the flexibility to terminate, not to avoid bills. Under most termination for convenience clauses, the contractor is paid for all work done until the date of termination, including overhead and profit. The contractor is also paid its reasonable expenses resulting from the termination, such as added costs for an early demobilization. The contractor won't, however, get paid for any unperformed work or the profit on that work.

Your contract could be at special risk for termination if you've entered into a construction manager at-risk (CMAR) agreement. Under the AIA series of documents, for instance, the owner and the contractor first sign the CMAR agreement and then later execute an amendment to the agreement setting the guaranteed maximum price (GMP) for the project. The owner, however, is free to terminate for convenience before signing the GMP amendment.

If costs for labor and materials increase because of COVID and then you propose a high GMP or the likelihood of finding a tenant for the project goes down, the owner may decide to terminate even before the GMP amendment is signed. In that case, you would only receive compensation for the preconstruction services and the owner would be free to price the work on the street.

## **How should I deal with COVID-19 on future projects?**

Plan ahead and revise your contracts. Understandably, most contractors are concerned with how COVID-19 will affect their ongoing projects. But, unfortunately, COVID-19 may be here to stay for the next several months. Some scientists even think we could be hit by several waves of COVID over the next few years. It's critical that contractors plan as if COVID will be around for a while and that includes incorporating COVID into your contracts.

Obviously, the COVID risk should now be priced into the work to the extent you can, because, as mentioned above, the contractor is most likely to bear the cost of any COVID-related price escalations. All good estimators are probably already doing this. COVID should also be directly addressed in the terms of the contract itself.

The provisions that will require the most attention when negotiating construction contracts in the COVID era are the clauses pertaining to delays, extensions of time and liquidated damages. All these points should all be negotiated with effects of COVID-19 outbreak in the forefront of your mind. COVID-19 should be explicitly listed as an excusable delay.

The risk is too great not to directly address the issue and relying on old form language may now be inadequate. The essence of excusable delays is that the delay event was unexpected. At this point, no one can say they were caught off guard by future COVID outbreaks.

The best way to protect yourself is make clear that COVID remains a ground for extending the contract time. This is especially important if you're using an AIA form contract, since it's the only major industry form that doesn't explicitly reference disease when addressing delays.

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