

COVID-19 and Excusable Delay on Public Projects in the District of Columbia, Maryland and Virginia

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While COVID-19 stay-at-home orders have not shut down all construction projects in the District of Columbia, Maryland and Virginia, the impacts of COVID-19 may cause significant delays to construction throughout the region – whether from a shortage of workers, an inability to obtain timely supplies, the implementation of social distancing protocols, or some other pandemic-caused reason. For contractors on public jobs, the applicable contract provisions and incorporated regulations often provide for a time extension for delays outside of the contractor’s control, including for pandemics and other “acts of God.” To obtain this extension, however, it is important that the contractor comply with the contract requirements. While those requirements vary among jurisdictions, as a general rule, contractors facing COVID-19-imposed delays should: (1) promptly notify the appropriate contracting authority of the delay and its causes; (2) document, in as much detail as possible, how COVID-19 has impacted and is impacting the contractor’s performance; and (3) develop and implement a plan, with the contracting authority’s approval, for how the contractor will proceed with the work. Some of the specific provisions found in many government contracts in the District of Columbia, Maryland and Virginia are briefly addressed below.

Excusable Delay Provisions in Public Contracts

Construction contracts for public projects in the District of Columbia, Maryland and Virginia typically include provisions that allow for additional time for excusable delay, which may include delays caused by COVID-19.

Federal Construction Contracts. On federal jobs, many construction contracts will include FAR 52.249-14, for “Excusable Delay” (or a similar provision, such as FAR 52.249-10, “Default (Fixed-Price Construction).” This provision provides that the government will not hold the contractor in default for failure to perform where that failure was not caused by the contractor’s fault or negligence. The provision specifically includes “epidemics” and “quarantine restrictions” as examples. However, the contractor still should establish and document that the epidemic was the actual cause of the delay, how the epidemic impacted

performance, and that the contractor attempted to mitigate the epidemic's adverse effects on the contractor's performance.

District of Columbia Construction Projects. For District of Columbia construction projects, the Department of General Services Standard Contract Provisions and the Department of Transportation Standard Specifications for Highways and Structures provide that the District may not terminate a contractor or impose liquidated damages if the "delay in the completion of the Work arises from unforeseeable causes" beyond the control or fault of the contractor. Such causes include "acts of God," "epidemics," "quarantine restrictions" and "delays of Subcontractors or suppliers arising from unforeseeable causes." However, the contractor must notify the Contracting Officer in writing of the delay and its causes within ten days from the beginning of any such delay (unless additional time is granted by the Contracting Officer).

Maryland Construction Projects. In Maryland, COMAR 21.07.02.07(4) and State Highway Administration Standard Specification GP-8.08(d)(1) also preclude the State from imposing liquidated damages against a contractor for delay arising from "unforeseeable causes beyond the control and without the fault or negligence of the Contractor." Such causes expressly include "epidemics" and "quarantine." Again, prompt notice is essential – as with the District of Columbia requirements, these provisions generally require notice within 10 days unless additional time is granted by the procurement officer. Some counties include language similar to that of the State Highway Administration Standard Specification in their construction contracts. Not all counties and cities use this provision, however, so contractors working on such projects will need to carefully check their contracts if faced with delay caused by the current pandemic.

Virginia Construction Projects. For Virginia Department of Transportation projects, Section 108.04 of the current Road and Bridge Specifications state that, for fixed price contracts, the Department will consider permitting an extension of time "when a delay occurs due to unforeseen causes beyond the control of or without the fault or negligence of the Contractor." In a Memorandum dated March 12, 2020, the Department acknowledged that the Specifications authorize contract modifications and time extensions that may be necessitated by COVID-19, but stated that the Department would address these impacts on a "case-by-case basis." Contractors working on projects for the Department should provide timely notice of delays and all information required by the Department to evaluate the request. For example, Section 108.04 provides that the contractor should provide information regarding certain delays to the

Department “within three days of experiencing such a delay.” Contractors working on County and City construction projects should review their contracts to determine the requirements for pursuing an excusable delay claim for COVID-19 project impacts.

Other Contract Adjustments for COVID-19 Impacts

The foregoing “excusable delay” provisions provide for a contract time adjustment, but typically do not provide any compensation for the additional costs that may be imposed upon contractors by COVID-19. The ability to recover such costs will vary from project to project, and jurisdiction to jurisdiction. As a general matter, however, a contractor may have one or more avenues available to pursue a claim for additional costs:

- **Government-Ordered Suspensions of Work.** Most federal and state construction contracts contain provisions allowing the contractor to recover costs where work is temporarily stopped or suspended. On federal projects, for example, contractors may be able to recover costs pursuant to FAR 52.242-15 (Stop Work Orders) or FAR 52.242-14 (Suspensions of Work). The District of Columbia Department of Transportation Standard Specifications permit a cost adjustment where the contractor’s work is, “for an unreasonable period of time, suspended, delayed or interrupted by an act of the Contracting Officer.” Maryland contractors may recover for additional costs “caused by an unreasonable suspension, delay, or interruption” caused by the state’s procurement officer pursuant to COMAR 21.07.02(4) and State Highway Association Standard Specification 8.07(b). Finally, in Virginia, the Road and Bridge Specifications also allow compensable delay for certain Engineer-ordered suspensions according to Section 108.05. As always, compliance with applicable notice and documentation requirements is essential.
- **Government-Imposed Changes.** COVID-19 may necessitate government-ordered changes to schedules, work site accessibility or other impacts to the contractor’s work. For federal construction projects, the contractor may be able to request a cost adjustment pursuant to the standard FAR Changes clauses: FAR 52.243-1 (“Changes - Fixed Price”), FAR 52.243-2 (“Changes - Cost Reimbursement”), FAR 52.243-3 (“Changes – Time and Materials or Labor-Hours”), or FAR 52.243-4 (“Changes”). For District of Columbia projects, the Department of General Services Standard

Contract Provisions and the Department of Transportation Standard Specifications permit cost adjustments where “alterations or changes in quantities significantly change the character of the Work under the Contract.” For Maryland projects, State Highway Association Standard Specification 4.06 and COMAR 21.07.02.02 provide for an equitable adjustment where a government change “causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this Contract.” Similarly, Virginia’s Road and Bridge Specifications provide for compensable delay in the case of delays due to alteration of quantities or character of work according to Section 104.02. Again, the contractor should pay close attention to notice and documentation requirements.

In addition to the above two examples, contractors may be able to seek recovery of additional costs pursuant to other contract provisions – but it is important that contractors identify such potentially applicable provisions quickly as timely notice and documentation undoubtedly will be key to the contractor’s ability to recover.

Every construction claim, and every project, is different, and the contract clauses applicable to such projects likewise vary. Accordingly, a complete recitation of all of the possible contract clauses and requirements applicable to the COVID-19 pandemic is beyond the scope of this short article. Please consult an attorney to obtain legal advice regarding your particular situation. Also, if you have any questions or comments regarding this article, please contact Gina Schaecher or Eric Lammers at Rees Broome, P.C. Ms. Schaecher may be reached at GSchaechner@ReesBroome.com or (703) 790-1911. Mr. Lammers may be reached at ELammers@ReesBroome.com or (703) 226-1760.