



DANNIS WOLIVER KELLEY

Attorneys at Law

Construction in the COVID-19 Era: Construction Contractor Claims

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Presented by:

Deidree Sakai

Stephen Cali

Reid Shannon

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Today's Webinar

- Today's session is best viewed in Full Screen
- Attendees can submit **questions** by:
 - Using the **Chat Box** function during the webinar; or
 - Email to emcpeters@dwkesq.com.
- Interactive polls will be conducted throughout the webinar.
- The PowerPoint presentation and webinar recording link will be sent to all registrants the following day.

Introduction

Welcome to our third installment in the **Construction in the COVID-19 Era Webinar Series** concerning construction claims. COVID-19 produced novel challenges for construction projects including site closures and the introduction of social distancing protocols. The next test will be dealing with the ensuing claims. Are we truly without guidance on how to proceed with the claims resulting from COVID-19? Or, do we already have procedures in place for resolving claims in your contract documents? We will discuss hypotheticals based on notices provided to districts.

Today's Presenters



Deidree Sakai
Shareholder



Stephen Cali
Of Counsel



Reid Shannon
Special Counsel

Who's in our audience?

POLL

Roadmap

- 1) Background
- 2) Force Majeure
- 3) Time Impacts
- 4) Cost Impacts
- 5) Claims Procedures

BACKGROUND – GOVERNMENT REGULATIONS AND COVID-19

Government Regulations and COVID-19

- State Order
 - 3/4/20 - Governor Executive Order - COVID-19 State of Emergency
 - 3/13/20 - Executive Order N-26–20 re Local Educational Agencies – K-12, County educational offices, charter schools
- County Shelter in Place Orders (SIP)
 - 3/16/20 – public works projects could proceed as “Essential Infrastructure”
 - 3/31/20 – Public works projects could proceed if designated “Essential Governmental Functions” by the District’s governing board
 - 4/29/20 – Authorized construction subject to the (1) Small or (2) Large Construction Project Safety Protocol
 - 6/2/20 – Authorization similar to prior Order re public works projects

SIP – Small / Large Construction Project Safety Protocol

- SCPs: (a) residential projects 10 units or less; (b) commercial projects less than 20,000 sqft.; (c) mixed-use projects meeting (a) + (b); and (d) all other projects not falling under LCP requirements.
- LCPs: (a) residential projects 10+ units; (b) commercial projects over 20,000 sqft.; (c) “Essential Infrastructure” as defined in the Order requiring 5 or more workers at any one time
 - Santa Clara County June 5 update, revised to 20 or more workers for Essential Infrastructure

SIP – Small / Large Construction Project Safety Protocol – continued

- Does SCP or LCP apply to school districts?
 - Bay Area Counties
 - School district projects do not expressly fall within SIP Order “Essential Infrastructure” definition, thus covered in SCP catchall provision
 - However, at least one County Counsel Office asserted schools over 20,000 sqft. should be subject to LCP as Essential Infrastructure
 - The Essential Infrastructure definition is illustrative, not meant to be limiting
 - District Office, Corp Yard, Maintenance/Operations/Transportation Building

Other Requirements

- California Department of Industrial Relations, Division of Occupational Safety & Health (Cal OSHA) has published Safety and Health Guidelines, which can be found at:

<https://www.dir.ca.gov/dosh/coronavirus/COVID-19-Infection-Prevention-in-Construction.pdf>

- Train workers on COVID-19
- Increase cleaning and disinfection
- Increase physical distancing
- Ensure good hygiene practices
- Implement safe work practices
- Handling of potentially infected COVID-19 workers

FORCE MAJEURE

What Qualifies?

- Generally, events that are:
 - Beyond the parties' control;
 - Unforeseeable; and
 - Prevent performance
- Contract may specifically define or list qualifying events
 - E.g., epidemics, quarantine restrictions, Act of God

Is COVID-19 a force majeure event?

POLL

What Happens When Triggered?

- Contract may provide:
 - Failure to perform excused
 - Time extension
 - Additional compensation
 - Right to terminate or renegotiate

Does your contract have a force majeure clause?



Other Doctrines Excusing Performance

- Common law doctrine of impossibility or impracticality of performance may apply
 - Performance excused “[w]hen it is prevented or delayed by an *irresistible, superhuman cause*, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary.” (CC 1511(2).)

COVID-19 TIME IMPACTS

Time Impacts

- Entitlement
 - Who bears the risk?
 - What compliance is required?
- Time
 - What mitigation efforts undertaken?

Time Impacts

- What does the Contract provide?
- What steps are required to comply with contract provisions for a time extension?
 - Notice
 - Claim substantiation

Time Impacts

- Contract Provisions:

- *Time limits stated in the Contract Documents are of the essence to the Contract. By executing the Agreement, the Contractor confirms that the Contract Time is a reasonable period for performing the Work.*
- *Excusable Delay. Contractor shall not be charged for liquidated damages because of any delays in completion of Work which are not the fault of Contractor or its Subcontractors, including acts of God as defined in Public Contract Code section 7105, acts of enemy, epidemics, and quarantine restrictions.*

Time Impacts

- Notice and Justification of Delay.
 - *Within 5 days of beginning of any delay, Contractor shall notify District in writing of causes of delay, including facts explaining the delay and the direct correlation between the cause and effect.*
 - *Justification of Delay must be based on the official Construction Schedule as updated at the time of occurrence of the delay.*
 - *Contractor must show an actual impact to the schedule, after making a good faith effort to mitigate the delay by rescheduling the work, by providing an analysis of the schedule (“Time Impact Analysis”). Such Time Impact Analysis shall describe in detail the cause and effect of the delay and the impact on the critical dates in the Project schedule.*

Time Impacts

- *Following submission of a claim, the District may determine whether the delay is to be considered avoidable or unavoidable, how long it continues, and to what extent the prosecution and completion of the Work might be delayed thereby.*

Time Impacts

- HYPO 1: Contractor requests time extension due to lost productivity to accomplish social distance protocol.
 - If new construction protocol requires an hour of cleaning everyday in response to COVID-19, then does the contractor get a corresponding time extension?

Time Impacts – HYPO 1 continued

– Contract Provisions:

- *Contractor will be solely and completely responsible for conditions of the Site, including safety of all persons and property during performance of the Work.*
- *Implementation and maintenance of safety programs shall be the sole responsibility of the Contractor.*
- *Contractor shall take, and require Subcontractors to take, all necessary precautions for safety of workers on the Project and shall comply with all applicable federal, state, local, and other safety laws, standards, orders, rules, regulations, and building codes to prevent accidents or injury to persons on, about, or adjacent to premises where Work is being performed and to provide a safe and healthful place of employment.*

Time Impacts – HYPO 1 continued

- Is Performance Excused?
- Time Impact Analysis
 - Start with official Construction Schedule
 - Before or after SIPs?
 - Did Contractor make a good faith effort to mitigate the delay?
 - What is the actual impact to critical dates?
 - Float?
 - Concurrent delays?
- Alternative: Time extension based on estimate

Time Impacts

- HYPO 2: Contractor requests time extension for longer lead time of key materials due to COVID-related manufacturing interruptions.
 - Contract Provisions:
 - *Materials shall be furnished in ample quantities and at such times as to insure uninterrupted progress of Work and shall be stored properly and protected from the elements, theft, vandalism, or other loss or damage as required.*
 - *Contractor shall place orders for materials and/or equipment as specified so that delivery of same may be made without delays to the Work.*
 - *Contractor is required to order, obtain, and store materials and equipment sufficiently in advance of its Work at no additional cost or advance payment from District to assure that there will be no delays.*

Time Impacts – HYPO 2 continued

- Is Performance Excused?
- Time Impact Analysis
 - Start with official Construction Schedule
 - Did Contractor make a good faith effort to mitigate the delay?
 - If suppliers to businesses performing Essential Governmental Functions are also Essential Workers, then is COVID-19 the cause of the delay?
 - Look for other sources for materials?
 - Make other transportation arrangements?
 - What is the actual impact to critical dates?
 - Was the order placed timely?

Time Impacts

- HYPO 3: Contractor requests time extension due to lack of available workers
 - Contract Provisions:
 - *Contractor and Subcontractors shall continuously furnish sufficient and competent work forces with the required levels of familiarity with the Project and skill, training and experience to ensure the prosecution of the Work in accordance with the Construction Schedule.*
 - *Contractor shall proceed expeditiously with adequate forces and shall achieve Completion within the Contract Time.*

Time Impacts – HYPO 3 continued

- Is Performance Excused?
 - Illness
 - Child care
 - Preexisting Problem
- Time Impact Analysis
 - Start with official Construction Schedule
 - Did Contractor make a good faith effort to mitigate the delay?
 - Union hall?
 - What is the actual impact to critical dates?

Are all time extensions compensable?



COVID-19 COST IMPACTS

Cost Impacts

- Entitlement
 - Who bears the risk?
 - What compliance is required?
- Costs
 - Has amount of claim been substantiated?
 - What mitigation efforts undertaken?

Cost Impacts

- HYPO 4: Contractor requests additional compensation to supply workers with PPE.
 - What does the Contract provide – any available provision covering a pandemic?
 - What do you do?
 - Require compliance with contract provisions for a change
 - Notice
 - Claim substantiation

Cost Impacts - Requirements

- What conditions for Contract Price adjustment Claim for COVID-19 expenses?
- Prior Written Approval
 - Generally
 - Contract Price adjustment typically requires prior written approval by governing board
 - Risk of noncompliance – waive claim for Contract Price (and Time) adjustment

Cost Impacts - Requirements

- Sample provisions

- District shall not be liable for the cost of any extra work or any substitutions, changes, additions, omissions, or deviations from the Drawings and Specifications unless the District's governing board has authorized the same and the cost thereof has been approved in writing by Change Order or Construction Change Directive in advance of the changed Work being performed.
- Should any Change Order result in an increase in the Contract Price or extend the Contract Time, the cost of or length of extension in that Change Order shall be agreed to, in writing, by the District in advance of the work by Contractor.
- In the event that Contractor proceeds with any change in Work without a Change Order executed by the District or Construction Change Directive, Contractor waives any claim of additional compensation or time for that additional work.

Cost Impacts - Requirements

- Mechanism for Contract Price adjustment
 - Proposed Change Order “PCO” [“CPO”, PCE, etc.]
 - Change Order - bilateral
 - Construction Change Directive - unilateral
- Notice
 - Notice required
 - Important procedural requirements
 - Provide District opportunity to investigate and potentially develop alternatives to proposed change
 - Provide clarity on scope of change

Cost Impacts - Requirements

- Notice Requirement – Sample Provision:
 - Contractor shall submit its PCO within five (5) working days of the date Contractor discovers, or reasonably should have discovered, the circumstances giving rise to the PCO, unless additional time to submit a PCO is granted in writing by the District.
 - Time is of the essence in Contractor's submission of PCOs so that the District can promptly investigate the basis for the PCO.
 - Accordingly, if Contractor fails to submit its PCO within this timeframe, Contractor waives, releases, and discharges any right to assert or claim any entitlement to an adjustment of the Contract Price and/or Contract Time based on circumstances giving rise to the PCO.

Cost Impacts - Requirements

- Substantive Requirements:

- Contractor required to explain the change proposed and why necessary
- Particularly important under COVID-19 circumstances
 - What scope?
 - Required to meet Government requirements, *i.e.*, State requirements, County shelter-in-place orders / Construction Protocol, other local or state agent requirements
 - What duration?
 - Current compliance requirements, ongoing requirements
 - What if COVID-19 compliance changes, *i.e.*, relaxed over time with changed regulations?

Cost Impacts - Requirements

- Substantive Requirements – Sample Provision
 - *A PCO shall include breakdowns and backup documentation pursuant to the provisions herein and sufficient, in the District's judgment, to validate any change in Contract Price.*
 - *In no case shall Contractor or any of its Subcontractors be permitted to reserve rights for additional compensation for Change Order Work.*

Cost Impacts - Considerations

■ Considerations

– Budget

- Is there money in the budget?

– Contingency

- Is there Contingency to be tapped into to cover the additional cost?
- Sample provision:

The Contract Price includes a Contingency for potential additional construction costs for unforeseen conditions that occur over the course of construction and/or scope gaps between the subcontract categories of the Work.

– Allowance

- Is an allowance appropriate?
- Does it allow flexibility in additional costs as requirements change?

Cost Impacts

- HYPO 5: Contractor requests additional compensation to sanitize the site to comply government mandated construction protocol?
 - Many of the same issues discussed for Hypo 4 – supplying additional PPE

Cost Impacts

- Other Considerations – Site Safety
 - Contractor is responsible for site safety
 - District position – Contractor obligated to address all safety issues including taking reasonable measures to address COVID-19 protocol
 - Contractor position – safety relates to physical safety concerns, such as traffic control, excavation protection, general on-site safety training and precautions, but not additional costs for unanticipated and new requirements imposed to prevent spread of COVID-19

Cost Impacts

- Other potential contractual bases for Price Adjustment
 - Escalation clause
 - Unanticipated or unforeseeable event
 - Hazardous substance / condition
 - COVID-19 not the type of hazardous substance intended
 - Contractor responsible for allowing or bringing hazardous condition to the site – must take steps to protect workers
 - Emergency circumstance – sudden and limited event to prevent injury to persons and property
 - Is COVID-19 covered?
- What does your contract provide?

General Considerations

- Equitable Considerations
 - Contract silent – Is it fair for either the District or the Contractor to bear the full risk?
 - Note potential shared risk under Contract Time Adjustment
 - Contractor receives noncompensable time extension
 - District loses liquidated damages claim, but avoids paying extended general conditions
 - Should there be shared allocation for increased COVID-19 related costs?
 - Be careful on the requirements the District imposes on Contractor to fulfill COVID-19 compliance obligations
 - District may ultimately be required to pay the additional costs

General Considerations

■ Recommendations

- Enforce notice requirements and substantiation required for all Contract Price or Time Adjustments
- Contractor still bears burden to establish that COVID-19 caused the request for change
 - Segregate COVID-19 claims from other claims impacting Contract Time or Contract Price
 - Are there other concurrent delays or costs not related to a COVID-19 event?

STATUTORY CLAIMS PROCEDURES

PCC 20104 et seq. v. PCC 9204 (1/2)

20104 et seq.

- “Claim” ≤ \$375,000
- Unless extended, district must respond:
 - w/in 45 days < \$50,000
 - w/in 60 days > \$50,000
- If still disputed, claimant must demand meet & confer w/in 15 days of district response
- District must schedule meet & confer w/in 30 days of demand

9204

Any “Claim”

- Unless extended, district must respond w/in 45 days
 - Pay undisputed portion w/in 60 days
- If still disputed, claimant may demand meet & confer (no deadline)
- District must schedule meet & confer w/in 30 days of demand

PCC 20104 et seq. v. PCC 9204 (2/2)

20104 et seq.

- After meet & confer, claimant may file Gov. Code claim
- If claimant sues, court shall refer case to nonbinding mediation w/in 30-60 days of responsive pleading, unless parties waive this process
 - Mediation under 9204 satisfies

9204

- After meet & confer, district must provide updated response w/in 10 business days
 - Pay undisputed portion w/in 60 days
- Parties shall submit dispute to nonbinding mediation
- If mediation is unsuccessful, dispute continues under other procedures

GC 910 et seq.

- Mandatory precondition to and statute of limitations for filing suit
 - Unless displaced by contract claims procedure (see *Arntz*)
- Claimant must present contract claims w/in 1 year of accrual
 - But tolling is granted under PCC 20104.2(e)
- Board shall act on the claim w/in 45 days, and provide written notice in form required by GC 913
 - Claimant has 6 months from notice to sue
 - If no written notice, claimant has 2 years from accrual to sue
- CRC, Emergency Rule 9: all civil statutes of limitation/repose over 180 days are tolled from 4/6/20 to 10/1/20; 180 days or less tolled to 8/3/20



DANNIS WOLIVER KELLEY

Attorneys at Law

Thank You!

SAN FRANCISCO

LONG BEACH

SAN DIEGO

SAN RAFAEL

CHICO

SACRAMENTO

SAN LUIS OBISPO

www.DWKesq.com



Deidree Saka
Shareholder

San Francisco
(415) 543-4111

Dsakai@dwkesq.com



Stephen Cali
Of Counsel

San Francisco
(415) 543-4111

scali@dwkesq.com



Reid Shannon
Special Counsel

San Francisco
(415) 543-4111

rshannon@dwkesq.com