On March 6, Smith Currie first reported on emerging impacts related to the disease COVID-19 nationally. At that time, the U.S. had approximately 500 reported cases and was just beginning to hear rumblings of construction supply chain disruptions. The legal firm posted on its website that:

While the outbreak in the U.S. has not reached the magnitude seen in China (greater than 80,000 cases), South Korea (6,000 cases) or Italy (3,000 cases), the U.S. has begun to feel the impacts of coronavirus on trade and resultant disruptions to supply chains, as many raw materials used in U.S. manufacturing and manufactured goods consumed in the U.S. originate from China and the other impacted countries. Furthermore, the U.S. is likely to suffer more direct impacts from coronavirus, as the Centers for Disease Control and Prevention (CDC) notes that “[i]t’s likely that at some point, [a] widespread transmission of [coronavirus] in the United States will occur.”

By early April, the number of reported cases in the U.S. had skyrocketed (245,601 as of the submission of this article) and 31 states and the District of Columbia are under statewide business closures and/or stay-at-home orders. While engineering and construction have largely been exempted from these business restrictions, the construction industry has nevertheless been substantially impacted. Furthermore, the forecast is for even greater spread of COVID-19 (caused by a virus called SARS-CoV-2) and for increased economic disruption in the U.S. and its trading partners. That will make it increasingly likely that COVID-19 will cause more substantial impacts to construction material supply chains, labor availability and construction projects in general.

To prepare for, address and mitigate ongoing and near certain future impacts, contractors, subcontractors, material suppliers, owners, sureties and other construction project participants should analyze and consider contractual, insurance, statutory, regulatory and other legal protections and relief that may be available. Among these protections and relief that will be covered here are:

- Paycheck Protection Program 7(a) Loans under the CARES Act
- Contractual force majeure clauses and other provisions providing for excusable delays
- Material escalation provisions
- Suspension and termination for convenience clauses
- Common law relief for impracticability or impossibility of performance
- Commercial general liability and other insurance coverage options
- Contractual indemnification provisions

**COVID-19 Contractual and Legal Considerations**

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**CARES Act – Title I – Keeping American Workers Paid and Employed Act**

Signed into law on March 27, 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act contains a small business loan program, the Paycheck Protection Program (PPP), designed to provide quick financing of payroll and overhead (rent, interest on mortgage payments and utilities) for businesses with less than 500 employees and existing SBA small businesses through June 30, 2020. These loans are eligible for forgiveness upon submission of documentation demonstrating that the loans were used for payroll costs, interest on a covered mortgage, rent and utilities.

**Force Majeure and Excusable Delays**

Modern construction contracts commonly contain provisions addressing risks of delays resulting from force majeure (translated from French as superior force). A force majeure clause excuses a party’s performance obligations when certain events or circum-

**While engineering and construction have largely been exempted from (statewide business closures and/or stay-at-home orders), the construction industry has nevertheless been substantially impacted.**
Was it foreseeable? To invoke the force majeure clause, courts have generally held that the event must be unforeseeable.

Were the impacts caused by the force majeure event or other causes?

Did the contractor or subcontractor cause delays that superseded the force majeure delays?

The issue of foreseeability is one contractors and subcontractors should consider carefully for future contracts. Now that the impacts of COVID-19 are all too apparent to everyone, a contractor would have a difficult time arguing that impacts from this disease are unforeseeable going forward. Thus, contractors and subcontractors should consider including a clause in future contracts specifically addressing time and/or compensation for COVID-19-related impacts.

### Material Escalation Provisions

While not typical in construction contracts or subcontracts, escalation clauses are sometimes used for construction materials subject to significant market volatility (steel, Portland cement, etc.). Where present, these clauses specify the materials subject to escalation and define the events that trigger the clause. Often, the triggering event is a specified percentage increase in a standard price index. Other clauses call for making price adjustments at fixed intervals (quarterly, annually, etc.) or upon certain project milestones. Given the uniqueness of COVID-19, project participants should consider escalation clauses tailored to the circumstances, with provisions flexible enough to account for the fast-changing impacts associated with the spread of the disease. These clauses should establish standards for documenting and proving the cost increases, including the exhaustion of alternative sources of supply.

### Suspension and Termination for Convenience Clauses

Clauses addressing suspension of work and termination of work for the convenience of owners and/or contractors are common to modern construction contracts and subcontracts. The concerns related to suspension clauses for COVID-19 impacts are: that some suspension clauses provide excusable time extensions, but no compensation for the suspension; that some suspension clauses preclude or limit recovery of overhead and profit; and that many suspension clauses do not address price increases resulting from the suspension (upon resuming work). For termination clauses, a major concern is recovery of additional costs incurred as a result of the early termination (e.g., termination fees and costs associated with settlement of purchase orders and subcontracts, and costs associated with protections and disposition of unused materials).

### Common Law Relief

Depending on the jurisdiction, common law doctrines of Impossibility of Performance and Commercial Impracticability offer protection where performance becomes more difficult or impossible to accomplish because of an unanticipated occurrence. Impossibility of Performance excuses performance when it becomes actually impossible (e.g., a law or order prohibits construction). Commercial Impracticability applies when performance is physically possible, but unfeasibly difficult or costly to accomplish and will result in a substantial hardship to the performing party. To establish commercial impracticability, the following conditions must be met:

- Nonoccurrence of the event was a basic assumption of the contract
- The occurrence was not the fault of the party claiming impracticability
- The party claiming impracticability did not assume the risk of the event

Note that not all jurisdictions recognize commercial impracticability as a basis for excused performance or relief.

### Possible Insurance Coverages

Contractors and subcontractors may have insurance coverage for COVID-related damages from the following policies, though policy exclusions may limit or preclude such coverage. The following policies may apply:

- **Commercial General Liability**: CGL policies provide liability coverage from third parties for bodily injuries and property damage caused by an occurrence.
- **Threshold Issue**: Whether any alleged bodily injury or property damage arising out of an insured’s failure to prevent or limit exposure to the COVID-19 virus is accidental. CGL policies commonly include “loss of use” of tangible property that is not physically damaged as property damage. This definition raises the possibility of claims alleging the loss of use of premises and other tangible property due to the alleged negligent failure to prevent or limit the transmission of the COVID-19 virus.
- **Builder’s Risk**: Whether a preferred all risk policy, or a much less desirable named peril, or a designated peril policy, the common coverage trigger is that there must be a “direct physical loss” to covered property. Most builder’s risk policies contain a delay in completion endorsement (sometimes referred to as a delay in startup or DSU endorsement). The delay in completion endorsement has a sublimit for the loss and a deductible usually defined as a number of days. The delay in completion coverage must be triggered by a covered cause of loss — meaning there must be direct physical loss or damage to the property that is insured. The question for these times is whether contamination of the covered property by the COVID-19 virus constitutes direct physical loss or damage.
- **Subcontractor Default Insurance**: SDI may be described as an alternative to bonding subcontractors. SDI is first-party insurance that compensates the general contractor insured in the event a covered subcontractor fails to fulfill its contractual obligations. Under SDI policies, general contractor insureds are obligated to develop and implement rigorous subcontractor prequalification procedures.
- **Business Interruption Insurance**: This insurance covers the loss of income that a business suffers after a disaster and may contain civil authority coverage that covers loss of business income resulting from government-mandated closures of business premises that directly causes loss of
Indemnification Provisions

Indemnification provisions may offer protection to contractors and subcontractors should third parties make claims against them for damages or impacts caused by subcontractors or vendors working for them.

Recommendations

Given the issues identified thus far, project participants should take the following actions for current and future contracts:

Current Contracts

- Closely monitor federal, state and local government actions that might affect construction in general, and your project(s) in particular
- Verify sources of supply for all open subcontracts and purchase orders (ask vendors and subcontractors to confirm in writing)
- Review subcontract force majeure, delay, changes, claims, suspension, termination, indemnification and notice provisions (and prime contract provisions incorporated by a flow-down clause)
- Immediately notify owner (if prime contractor) or contractor (if you are a subcontractor) of any current or potential delays resulting directly or indirectly from COVID-19, including any cost/price impacts

Future Contracts

Include provisions in future contracts specifically addressing delays and cost impacts that result directly or indirectly from epidemics and pandemics (expressly including COVID-19). Provisions should address:

- Disruptions to material and/or equipment supply
- Illness of contractors, subcontractors or any of their subcontractors’ workforces and/or unavailability of labor
- Government quarantines, shelter-in-place orders, closures, or other mandates, restrictions, and/or directives
- Owner or contractor restrictions and/or directives
- Fulfillment of subcontractor’s contractual or legal health and safety obligations associated with COVID-19
- Express rights to suspend or terminate work in the event work becomes impossible, impracticable or inadvisable (due to health and safety concerns) to perform