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Force Majeure Events - Will Your Project Contract Require a Response to the Coronavirus Pandemic?

As the number of those impacted by the coronavirus (“COVID-19”) pandemic continues to grow, affected parties across all industries look for guidance on how to deal with this novel situation. Governments and private parties are analyzing project contracts as they take precautionary actions to prevent the spread of COVID-19. In this midst of all of this confusion, two questions arise: What does the COVID-19 pandemic and the steps being taken in response mean for your project contracts? And, will an excusable delay/force majeure clause provide any protection for the impacts of COVID-19?

Force majeure or other excusable delay clauses (“force majeure clauses”) grant parties contractual relief from some or all performance when specified events beyond the control of the parties occur and impair the ability of one or both of the parties to perform (a “Force Majeure Event”). The question of whether a force majeure clause in a project contract will address schedule or cost impacts attributable to the effects of the COVID-19 pandemic involves a three step analysis.

First, determine whether the force majeure clause provides relief to either the owner or the contractor (or both) in the event of a situation like the COVID-19 pandemic. The force majeure clause will typically define in detail what constitutes a Force Majeure Event. Force Majeure Events are often defined to include events like natural disasters, terrorist attacks, labor action, government-declared emergencies, epidemics and pandemics.

Second, determine any limitations that apply to the protections under the force majeure clause. Many such clauses only allow relief if the Force Majeure Event materially impacts the work to be performed and the work schedule under the contract. The clause may similarly dictate that the event affected the project site or geographical area in which the project is located. Most project contracts require the contractor to take commercially reasonable measures to mitigate the impact of a force majeure event. This duty to mitigate is critical to consider as some work, for example design work, can still proceed remotely and is less likely to be materially impacted by a pandemic such as COVID-19. Construction, utility and other field work as well as work related to operation and maintenance of projects in the operating phase, on the other hand, may be more likely to be impacted by precautionary measures put in place to combat the spread of COVID-19.

Lastly, determine what relief can be sought. This step in the analysis allows the parties to the contract to plan and manage the likely project impacts. Project contracts may vary in the nature of relief provided and relief may even vary depending on the type of Force Majeure Event in question. Force majeure clauses in design-bid-build contracts normally allow time extension only, without the right to additional compensation. Clauses in alternative delivery contracts may be similarly limited, or may allow additional compensation for costs incurred as a direct result of the event, or may provide for the parties to share certain costs. Additionally, some contracts may exclude cost relief for matters where the contractor’s insurance provides coverage.

With the uncertainty surrounding the COVID-19 pandemic, more and more infrastructure projects

are likely to be directly impacted. Now is the time to conduct a full analysis of your project contracts and plan for the potential impact of COVID-19.

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