

## Construction Contracts and COVID-19

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COVID-19 is now impacting basically every segment of the construction industry in British Columbia. While a pandemic was probably not contemplated by the parties when entering into their construction contract, it is the contract that will govern the rights and remedies of the parties relating to COVID-19 and its impacts.

Each contract, and the particular circumstances of that contract, must be reviewed individually to determine whether it contains provisions that may apply. There is no boilerplate answer or one-size-fits-all analysis. Much of the focus has and will be on whether a contract contains a force majeure clause, but the review should not stop there. Rather, the entire contract should be reviewed to determine what the party's options are and the required process(es) to be followed (e.g. the provision of notice) in order to ensure that rights and remedies are maintained.

This Update is not meant as a legal memorandum on force majeure clauses or frustration of a contract at common law. Rather, it is prepared to offer an illustration of how a contract the industry is familiar with may apply when dealing with COVID-19 and its impacts. Using the CCDC 2 – stipulated price contract as an example, and depending on how the response to COVID-19 develops over the coming days and weeks and the particular circumstances of the parties, the following provisions and processes may apply:

1. Paragraphs 6.5.3 and 6.5.4:
  - (a) COVID-19 will likely qualify under paragraph 6.5.3.4 as a “cause beyond the *Contractor's* control other than one resulting from a default or breach of *Contract* by the *Contractor*” permitting an extension of the *Contract Time*. That being said, the *Contractor* will need to demonstrate that an event causing delay to the *Work* has actually occurred in order to render this paragraph applicable and obtain an extension.
  - (b) Note that under paragraph 6.5.3 the *Contract Time* will be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*, but the extension of time will not be less than the time lost as the result of the event causing the delay, unless the *Contractor* agrees to a shorter extension.
  - (c) Importantly, the *Contractor* will not be entitled to payment for costs incurred by the delay unless such costs result from actions by the *Owner*, *Consultant* or anyone employed or engaged by them directly or indirectly.
  - (d) Further, under paragraph 6.5.4, no extension will be made for the delay unless *Notice in Writing* of the cause of the delay is given by the *Contractor* to the *Consultant* no later than 10 *Working Days* after the start of the delay.
2. Paragraphs 10.2.4 and 10.2.7:
  - (a) Under paragraph 10.2.4 the *Contractor* must comply with the laws, ordinances, rules, regulations or codes which are or become in force during the performance of the *Work* and which relate to the *Work*, to the preservation of the public health and to construction safety.
  - (b) Further, under paragraph 10.2.7 if subsequent to the time of bid closing, changes are made to the applicable laws, ordinances, rules, regulations or codes of authorities having jurisdiction

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- due to COVID-19 which increase the cost of the *Work*, the *Contractor* may submit a claim in accordance with GC 6.6.
- (c) Note that under paragraph 6.6.1 if the *Contractor* intends to make a claim for an increase in the *Contract Price* it must give “timely” *Notice in Writing* of the intent to claim to the *Owner* and the *Consultant*.
  - (d) In addition, under paragraph 6.6.2 upon commencement of the event giving rise to the claim, the *Contractor* must take all reasonable steps to mitigate the loss or expense and keep such records as may be necessary to support the claim.
  - (e) Finally:
    - (i) under paragraph 6.6.3 the *Contractor* must submit within a “reasonable time” to the *Consultant* a detailed account of the amount claimed and the grounds upon which the claim is based; and
    - (ii) under paragraph 6.6.4 where the event giving rise to the claim has a continuing effect, that detailed account is considered an interim account and the *Contractor* must update the account and related grounds for making the claim as reasonably required by the *Consultant*, and submit a final account after the end of the effects of the event giving rise to the claim.
3. Paragraph 7.2.2:
- (a) If the *Work* is suspended or otherwise delayed for a period of 20 *Working Days* or more under an order of a public authority as a result of COVID-19, and providing that such order was not issued as the result of an act or fault of the *Contractor* or of anyone directly or indirectly employed or engaged by the *Contractor*, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, terminate the *Contract* by giving the *Owner Notice in Writing* to that effect.

The above review and analysis of the CCDC 2 – 2008 stipulated price contract is not exhaustive and other provisions may apply depending on what has and / or may transpire. In addition, there are other potential avenues available (e.g. frustration of the contract, subcontractor’s reliance on a flow through provision potentially incorporating a force majeure clause from the prime contract, etc.) meaning the circumstances of each contract must be reviewed in its specific context in order to determine the best path(s) forward.

All that being said, COVID-19 presents an unprecedented challenge for the construction industry, and society in general. We are all partners in this industry and, where possible, we should seek to work together in order to find reasonable solutions to project related issues caused by COVID-19.