

Calgary Construction Association: COVID 19 and your Construction Contracts

Bill Woodhead, Borden Ladner Gervais LLP
Robert Schuett, Goodfellow & Schuett Law
Jeremy Ellergodt, Whitelaw Twining



COVID 19: What is happening?

- COVID 19 Global Pandemic – First reported December 31, 2019
- Alberta declared a public health emergency and banned gatherings of more than 50 people.
- Recommended that any one with symptoms/travel internationally is self quarantined
- COVID 19 is having (will continue to) have major impacts Construction Projects ranging from:
 - Supply Chain
 - Site Safety
 - Contractual Claims for “Force Majeure” relief

What is a Force Majeure Clause?

“A contractual term by which one (or both) of the parties is entitled to cancel the contract or is excused from performance [...] or is entitled to suspend performance [...] upon the happening of a specified event or events beyond [his or her] control.”

- **Not a right at law – needs to be expressly provided for in the Contract**
- **Has to be something more than simple difficulty or just added expense**
- **Standard is impossibility**

Standard Form Force Majeure Provisions

Paragraphs 6.5.3 and 6.5.4 of GC 6.5 of CCDC 2 (Stipulated Price) state (Similar language in CCDC 4, CCDC 5B w/appendix, CCDC 14, CCDC 17)

6.5.3 If the Contractor is delayed in the performance of the Work by:

.1 labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the Contractor is a member or to which the Contractor is otherwise bound),

.2 fire, unusual delay by common carriers or unavoidable casualties,

.3 abnormally adverse weather conditions, or

.4 any cause beyond the Contractor's control other than one resulting from a default or breach of Contract by the Contractor,

then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the Contractor agrees to a shorter extension. The Contractor shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the Owner, Consultant or anyone employed or engaged by them directly or indirectly.

6.5.4 No extension shall be made for delay unless Notice in Writing of the cause of delay is given to the Consultant not later than 10 Working Days after the commencement of the delay. In the case of a continuing cause of delay only one Notice in Writing shall be necessary.



Standard Form Force Majeure Provisions

Paragraphs 6.5.3 and 6.5.4 of GC 6.5 of CCDC 3 (Cost Plus) state: (Similar language in CCDC 5B (before appendix))

6.5.3 If the Contractor is delayed in the performance of the Work by:

.1 labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the Contractor is a member or to which the Contractor is otherwise bound),

.2 fire, unusual delay by common carriers or unavoidable casualties,

.3 abnormally adverse weather conditions,

.4 any Subcontractor's default, insolvency, abandonment, or termination, or

.5 any cause beyond the Contractor's control other than one resulting from a default or breach of Contract by the Contractor,

then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the Contractor agrees to a shorter extension. Any of the Contractor's Fee, the GMP and the Target Contract Price shall be adjusted as the result of such delay.

6.5.4 No extension shall be made for delay unless Notice in Writing of the cause of delay is given to the Consultant not later than 10 Working Days after the commencement of the delay. In the case of a continuing cause of delay only one Notice in Writing shall be necessary.

Standard Form Force Majeure Provisions Subcontract

Paragraphs 6.5.3 and 6.5.4 of GC 6.5 of CCA 1 (Stipulated Price))

6.5.3 If the Subcontractor is delayed in the performance of the Subcontract Work by:

.1 labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the Subcontractor is a member or to which the Subcontractor is otherwise bound),

.2 fire, unusual delay by common carriers or unavoidable casualties,

.3 abnormally adverse weather conditions, or

.4 any cause beyond the Subcontractor's control other than one resulting from a default or breach of Subcontract by the Subcontractor.

then the Subcontract Time shall be extended for such reasonable time as the Contractor and Subcontractor shall agree that the Subcontract Work was delayed. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the Subcontractor agrees to a shorter extension. The Subcontractor shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the Owner, Consultant, Contractor, or anyone employed or engaged by them directly or indirectly.

6.5.4 No extension shall be made for delay unless Notice in Writing of the cause of delay is given to the Contractor not later than 7 Working Days after commencement of delay. In the case of a continuing cause of delay only one Notice in Writing shall be necessary.

BUT WAIT:

ARTICLE 2A – CONFLICT BETWEEN THE PRIME CONTRACT AND SUBCONTRACT

2.1 The requirements, terms and conditions of the Prime Contract as far as they are applicable to this Subcontract, shall be binding upon the Contractor and the Subcontractor as if the word “owner” appearing therein had been changed to “Contractor” and the word “contractor” appearing therein has been changed to “Subcontractor”. In the event of any conflict between the terms of this Subcontract and the Prime Contract, the Prime Contract shall govern.

What should I do?

- If the event occurs and falls within the clause, the party seeking to rely on the clause must notify the other party.
- Review all Contracts and take Note:
 1. The time within which notice must be given;
 2. The facts the notice must contain; and
 3. Where notice should be served.
- Don't forget your duty to mitigate



What are the effects of the operation of the clause?

- Suspension of performance until the event ceases without liability, and re-activation thereafter
- Right to seek an extension of time for performance without liability
- Duty on the part of the party invoking the clause to overcome the event to the extent possible.
- Likely entitlement to costs has been waived in a fixed price agreement (except CCDC 3 and CCDC 5B) – but don't be afraid to ask!



Any other provision which might apply:

Paragraphs 7.2.2 and 7.2.5 of GC 7.2 of CCDC 2: (Similar language in CCDC 3, CCDC 5B, CCDC 14, CCDC 17 and CCA1)

7.2.2 If the Work is suspended or otherwise delayed for a period of 20 Working Days or more under an order of a court or other public authority 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.

7.2.5 If the Contractor terminates the Contract under the conditions set out above, the Contractor shall be entitled to be paid for all work performed including reasonable profit, for loss sustained upon Products and Construction Equipment, and such other damages as the Contractor may have sustained as a result of the termination of the Contract.

What if there is no “Force Majeure”? Frustration?

- The doctrine of frustration applies where an intervening event permits the parties to bring the contract to an end, and relieves them of any future performance
- Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract"

Other things to consider:

Site Safety:

- “Gatherings” of more than 50 people
- Prime Contractor under OH&S
- Quarantining/Site Shut Downs
- California/New York like government ordered shut downs

Insurance:

- What policies are available? Do they cover these types of events?

Bonding:

- Performance/Labour & Material Bonds

Other things to consider: (cont.)

Insolvency in your supply chain:

- Are their risks of insolvency in your supply chain?
- CCDC 9A/9B forms

Concerns about payments at Owner Level:

- Providing reasonable evidence that financial arrangements have been made? Requirement to notify if there is any material change in Owner's financial arrangements (5.1 of CCDCs)

Courts:

- Court filings? Applications?

What should I be doing now:

- **Reviewing all agreements to determine what entitlements exist;**
- **Ensuring that a risk management plan is in place;**
- **Addressing workplace health and safety issues;**
- **Assessing alternative production or work locations;**
- **Reviewing the depth of inventory of parts and material;**
- **Reviewing and assessing insurance coverage; and**
- **Staying in close contact with local and federal health authorities for guidance and directives**

Commonly Asked Questions

Commonly Asked Questions



Contact Information

Bill Woodhead, Borden Ladner Gervais LLP

- Email: bwoodhead@blg.com
- Phone: 403-232-9765

Robert Schuett, Goodfellow & Schuett Law

- Email: rmschuett@gfslaw.ca
- Phone: 403-930-1318

Jeremy Ellergodt, Whitelaw Twining

- Email: jellergodt@wt.ca
- Phone: 403-456-6268

