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Practice Group:  
*Construction*

## UNITED STATES EPC CONSTRUCTION CONTRACTING IN THE WAKE OF COVID-19

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As the effects of COVID-19 make way into various supply chains throughout the construction industry, contractors may eventually experience difficulties in performing obligations under contract and meeting milestones due to causes largely outside their control. It is important contractors are mindful that the consequences of COVID-19 are ongoing and should be considered and protected against when negotiating construction contracts in the future. This document provides suggested force majeure and time extension provisions that should be considered and negotiated into both prime and subcontracts to protect general contractors from the ongoing risks associated with COVID-19.

### 1. FORCE MAJEURE EVENT

EPC contracts typically allow a contractor to request a change order and, in some occasions, suspend or excuse performance, if certain events beyond the contractor's control occur, commonly known as "force majeure events." Below are two force majeure provisions that can be negotiated into an EPC contract to account for potential ongoing construction and supply chain impacts of the COVID-19 pandemic.

#### A. Broad Force Majeure Clause for COVID-19

The parties can add the following provision to the Force Majeure clause within the contract to read as follows:

**COVID-19.** The Parties agree that any event that is caused, directly or indirectly, by the COVID-19 pandemic and that results in delays in [Contractor's] ability to perform under this Agreement shall be regarded as a Force Majeure event as of the date on which [Contractor] becomes aware of the delays caused by such event. For purposes of clarity, [Contractor] shall not be precluded from claiming relief under this Agreement because of the pre-existing nature of the COVID-19 pandemic.

#### B. Limited Force Majeure Extension for Pandemic

The parties can add the following definition of Force Majeure Event:

A declaration of a pandemic is made by the World Health Organization and any government or other competent authority imposes, after the date of this Agreement, quarantine, expropriation, restraint, prohibition, intervention, requisition, requirement, direction or embargo by legislation, regulation, decree, executive order, or other legally enforceable order for the purposes of responding to the pandemic.

## UNITED STATES EPC CONSTRUCTION CONTRACTING IN THE WAKE OF COVID-19

### 1. TIME EXTENSION EVENT

As a result of supply chain issues stemming from COVID-19, contractors may face delays in meeting various milestones under their respective contracts. In order to limit the liability associated with such delays, including the circumstances under which contractors may be required to pay delay liquidated damages for not delivering the project by the agreed-upon completion date, the following provisions can be incorporated into prime and subcontracts, respectively.

#### A. Prime Contracts — Upstream COVID-19 Event

First, the parties should add new definitions to encompass the COVID-19 pandemic. These new definitions should include the following COVID-19 related definitions:

**COVID-19** means the infectious disease caused by the novel coronavirus first detected in 2019.

COVID-19 Event means:

- a) COVID-19, including any treatment or measures recommended to control, address or otherwise manage COVID-19;
- b) any Law or other rule, regulation, determination or other finding in relation to or in connection with COVID-19 which is binding on the Contractor or any subcontractor, supplier or consultant engaged by the Contractor;
- c) any directive by the Owner or any government or other competent authority with which the Contractor, or any subcontractor, supplier or consultant engaged by the Contractor, must comply in relation to or in connection with COVID-19;
- d) any impact on the supply, location or availability of materials, labor, power, transportation, inspection or other inputs required to undertake, progress and complete the [work under the Contract] which is directly or indirectly caused by COVID-19;
- e) any quarantine, expropriation, restraint, prohibition, intervention, requisition, requirement, direction or embargo by legislation, regulation, decree, executive order, or other order from any government or other competent authority for the purpose of responding to COVID-19; and
- f) any other impact of COVID-19 or the matters set out in paragraphs (a) to (e) above, whether such matters or impacts occurred prior to or after the date of this Contract or are of a continuing nature and to the extent the relevant matter or impact: (1) was not able to be mitigated, avoided or overcome by the Contractor using reasonable endeavors; and (2) prevents, hinders or delays the Contractor in carrying out the [work under the Contract], or renders the [work under the Contract] more costly to undertake and complete.

In addition, the parties should revise the definition of “Law” to ensure the avenue of relief under a “COVID-19 Event” is broad, notably so the definition of “Law” includes extra-territorial

## UNITED STATES EPC CONSTRUCTION CONTRACTING IN THE WAKE OF COVID-19

jurisdictions and is broader by definition than merely legislation. The following definition of Law has been revised in accordance with these considerations:

**Law** means any law or legal requirement, including:

- a) any statute, regulation or by-law enacted or made by any executive or legislative body or other subordinate instrument of any competent authority;
- b) any direction, order or ruling of a sovereign, or duly appointed leader or responsible executive of that sovereign, or other authorized government representative pursuant to statute, in any applicable jurisdiction;
- c) the constitution (or other applicable governing document) of any relevant sovereign nation;
- d) any local law, any directive, any approval, consent or license (including its terms) with which compliance is required;
- e) any decision, directive, guidance, guideline, policy or requirement of any competent authority that is lawful and binding upon the applicable party; and
- f) any applicable common law in force or applicable from time to time in any applicable jurisdiction or any final determination of a court or legal tribunal within that jurisdiction.

With these additional and revised definitions,

With these additional and revised definitions, COVID-19 Event should be encompassed within the “Extension of Time” provision of the EPC contract and should expressly allow contractor an extension of time to the extent a COVID-19 Event occurs. Further, language should be added to remove contractor’s liability for delay liquidated damages resulting from COVID-19 and entitle contractor to delay compensation and an extension of time for practical completion. In addition, a new provision should be added alongside the Extension of Time provision that provides as follows:

Except as otherwise agreed by the parties, the Owner is responsible for any cost, loss, expense, liability or claim suffered, incurred or received in connection with the [work under the Contract] due to any COVID-19 Event, and the Contractor is not responsible any such cost, loss, expense, liability or claim suffered, incurred or received.

### B. Subcontracts — Downstream COVID-19 Event

Similar to the above, the parties should first add new definitions to encompass the COVID-19 pandemic. These new definitions should include the following COVID-19 related definitions:

**Affected Party** has the meaning given in the definition of 'COVID-19 Event'.

**COVID-19** means the infectious disease caused by the novel coronavirus first detected in 2019.

## UNITED STATES EPC CONSTRUCTION CONTRACTING IN THE WAKE OF COVID-19

**COVID-19 Event** means:

- a) the occurrence of any COVID-19 infection, including any treatment or measures recommended to control, address or otherwise manage COVID-19;
- b) any Law or other rule, regulation, determination or other finding in relation to or in connection with COVID-19 which is binding on the Subcontractor or any subcontractor, supplier or consultant engaged by the Contractor;
- c) any direction by the Contractor or any government or other competent authority with which the Subcontractor, or any subcontractor, supplier or consultant engaged by the Contractor, must comply in relation to or in connection with COVID-19;
- d) any impact on the supply, location or availability of materials, labor, power, transportation, inspection or other inputs required to undertake, progress and complete the [work under the Subcontract] which is directly caused by COVID-19;
- e) any quarantine, expropriation, restraint, prohibition, intervention, requisition, requirement, direction or embargo by legislation, regulation, decree, executive order, or other order from any government or other competent authority for the purpose of responding to COVID-19, whether such matters or impacts occurred prior to or after the date of this [Subcontract] or are of a continuing nature and to the extent the relevant matter or impact: (1) was not able to be mitigated, avoided or overcome by the relevant party (**Affected Party**) using reasonable endeavors; and (2) prevents, hinders or delays an Affected Party in carrying out its obligations under this [Subcontract] or renders the [work under the Subcontract] more costly to undertake and complete.

In addition, the parties should revise the definition of “Law” to ensure the avenue of relief under a “COVID-19 Event” is broad, notably so the definition of “Law” includes extra-territorial jurisdictions and is broader by definition than merely legislation. The following definition of Law has been revised in accordance with these considerations:

**Law** means any law or legal requirement, including:

- a) any statute, regulation or by-law enacted or made by any executive or legislative body or other subordinate instrument of any competent authority;
- b) any direction, order or ruling of a sovereign, or duly appointed leader or responsible executive of that sovereign, or other authorized government representative pursuant to statute, in any applicable jurisdiction;
- c) the constitution (or other applicable governing document) of any relevant sovereign nation;

## UNITED STATES EPC CONSTRUCTION CONTRACTING IN THE WAKE OF COVID-19

- d) any local law, any directive, any approval, consent or license (including its terms) with which compliance is required;
- e) any decision, directive, guidance, guideline, policy or requirement of any competent authority that is lawful and binding upon the applicable party; and
- f) any applicable common law in force or applicable from time to time in any applicable jurisdiction or any final determination of a court or legal tribunal within that jurisdiction.

The subcontract should also outline a procedure for a COVID-19 Event, suggested as follows:

### **Procedure for COVID-19 Event.**

- a) Where a COVID-19 Event occurs:
  - i. the Subcontractor must notify the Contractor in writing as soon as reasonably possible (and in any event within five Business Days) after the occurrence of that COVID-19 Event (**Initial COVID-19 Notice**); and
  - ii. neither party is responsible for any failure to perform its obligations under the Subcontract to the extent that failure is caused by a COVID-19 Event.
- b) Within ten Business Days after the Subcontractor issues the Initial COVID-19 Notice, the Subcontractor must provide a further notice which sets out:
  - i. the full particulars of the COVID-19 Event;
  - ii. details of the obligations prevented or delayed by the COVID-19 Event;
  - iii. the actual and proposed actions for mitigating the consequences of the COVID-19 Event; and
  - iv. the estimated time required to overcome the COVID-19 Event in each case to the extent known or reasonably capable of estimation at that time, and updated each 20 Business Days thereafter (to the extent continuing) (each a **Further COVID-19 Notice**).
- c) Irrespective of whether or not the Subcontractor has issued an Initial COVID-19 Notice or a Further COVID-19 Notice, the Contractor may issue a notice to the Subcontractor at any time where it reasonably considers that a COVID-19 Event has occurred (**Contractor COVID-19 Notice**).
- d) An Affected Party must mitigate the impact or consequences of the COVID-19 Event on its performance of its obligations, provided that (and without limiting any obligation of an Affected Party with respect to health and safety) it is not required to incur any more than incidental and reasonable expenditure of funds in doing so.

UNITED STATES EPC CONSTRUCTION CONTRACTING IN THE WAKE OF COVID-19

- e) Upon cessation of the impact of the COVID-19 Event on the affected obligations of an Affected Party as notified pursuant to a Further COVID-19 Notice or a Contractor COVID-19 Notice, an Affected Party must as soon as reasonably practicable recommence performance of its obligations under this Subcontract.
- f) A COVID-19 Event does not:
  - i. relieve a party from liability or responsibility for any breach, act or omission which occurs before, or to the extent it is not impacted by, the relevant COVID-19 Event; and/or
  - ii. affect any obligation to pay money in a timely manner.

With these additional and revised definitions, COVID-19 Event should be added under the “Extension of Time” provision and remove the contractor’s liability for delay liquidated damages resulting from COVID-19 and entitle contractor to delay compensation and an extension of time for practical completion.

In addition, a termination provision should be added and coordinated with a COVID-19 Event as described below:

**Termination for COVID-19 Event.**

- a) If one or any series of COVID-19 Event(s) occurs or continues, or in the reasonable opinion of the Contractor will occur or continue, for a continuous period of [20] Business Days or more, the Contractor may terminate this Subcontract immediately by providing written notice to the Subcontractor of such termination.
- b) If the [Subcontract] is terminated under this clause [insert], the Subcontractor:
  - i. is entitled to be paid an amount equal to:
    - a. the [value of / proportion of the Subcontract Price attributable to the works under the Subcontract] performed in accordance with the Subcontract but not yet paid for by the Contractor as of the date of termination, less
    - b. any amount due to the Contractor from the Subcontractor as of the date of termination or which is otherwise claimable under the Subcontract.
  - ii. without limiting any outstanding dispute or claim made prior to the date of termination, is not entitled to any other payment for performance of the [works under the Subcontract].

## UNITED STATES EPC CONSTRUCTION CONTRACTING IN THE WAKE OF COVID-19

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