

The COVID-19 Change Order

Update

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During the pandemic it has become common for contractors to submit change orders to owners seeking reimbursement for COVID-19 related expenses and costs. This is especially true for large construction projects. These “COVID-19 Change Orders” seek reimbursement for everything from masks, dividers, hand sanitizer and other items required to follow and implement CDC guidelines (or to comply with state and local orders) for maintaining a safe work environment. COVID-19 Change Orders also seek reimbursement for extended general conditions caused by having less workers on site because of social distancing requirements, lost time caused by shorter working hours, and lost time associated with CDC mandated hygiene breaks and temperature checks. On larger projects, COVID-19 Change Orders can escalate into millions of dollars and are often submitted without warning towards the end of a project when final completion and the payment of retainage are approaching.

For owners and contractors that are trying to complete their projects, many of which have been delayed or suffered from cost overruns, these unexpected COVID-19 Change Orders can be very problematic and hard to navigate. Owners will argue that increased costs associated with the pandemic have affected all businesses, not just contractors. Contractors will respond that these are real costs that they must pay to operate. Often, the justification for reimbursement is not black and white because it is hard to find a specific contractual provision that addresses such an unprecedented situation, which causes uncertainty and strained relations between owners and contractors at the end of a project.

The justifications asserted for COVID-19 Change Orders vary from project to project and are sometimes asserted as an event of *force majeure* or more commonly as a general change in site conditions. While many *force majeure* clauses expressly apply to acts of God, pandemics and government shutdowns, that is not the end of analyzing whether the clause applies. While

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the application of a *force majeure* clause to these situations is highly dependent on the wording of such a clause, most require that performance be completely prevented and do not recognize commercial impracticability as a justification for delay. There were a small number of projects that were shut down at the beginning of the pandemic by state and local orders in stricter jurisdictions, but for the most part complete shutdowns were uncommon because of various exceptions to such orders for businesses broadly defined as “essential.” As the pandemic extended through late 2020, and into 2021, shutdowns became non-existent. Finally, many *force majeure* clauses don’t allow for the reimbursement of costs for implementing required protective measures, they simply allow for an extension of the contract time.

As a result, many contractors have turned to other contractual provisions, such as language related to changes in site conditions or clauses related to change orders in general. But prior to the pandemic these provisions were not drafted with this circumstance (a virus) in mind. Instead, they usually apply to changes in “physical” conditions at the site that are specifically described, like subsurface conditions, otherwise concealed physical conditions or hazardous materials found at the site. Making the argument that a virus is an unknown “physical” condition at the site can be a challenge since the virus is airborne, not necessarily part of the site itself and not unique to the site. In addition, because many of these clauses require the approval of the owner or are only triggered by specific conditions, they may not support a unilateral change order.

Because of the ambiguity surrounding COVID-19 Change Orders, many owners will initially be reluctant to cover such reimbursements for their contractors. Aside from the specific language in their construction contracts, Owners should consider other factors when deciding whether to reject, accept or partially accept COVID-19 Change Orders, including the risk of strained relations with its contractor, distractions at the project and the costs of a potential dispute with its contractor. If there are remaining construction contingency funds available, and the project has otherwise run smoothly, the owner should consider offering all or part of it at the end of the project to avoid a dispute. Likewise, contractors should be thoughtful and thorough when deciding whether to seek reimbursement for project costs associated with COVID-19, and make sure the costs at issue were necessary and can be verified. Finally, if the contractor received government loans or payments because of the pandemic, including funds from the Paycheck Protection Program, it should strongly consider not seeking reimbursement from the owner.

Bracewell attorneys are experienced with contractual circumstances across industries, including the construction industry, and are ready and available to provide further information and discuss particular circumstances.

