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COVID-19 –Project Concerns & Contract Provisions

As contractors monitor developments regarding the coronavirus (“COVID-19”) pandemic, they should be sure to implement measures to promote and protect the health and safety of their employees as recommended by the Centers for Disease Control and Prevention (CDC), OSHA and other public health and government officials.

We recently prepared and distributed a memorandum entitled, *COVID-19 Coronavirus Frequently Asked Employment Law Questions and Answers*, which you may have already received. If you did not already receive a copy, please contact Attorney Ben Lowenthal at bsl@hpsslaw.com.

This memorandum is intended to provide you with information to assist with questions contractors have asked concerning potential job delays, delays in obtaining materials, inability to staff a job as originally contemplated, supply chain disruption, unexpected and substantial price increases and other potential cost impacts resulting from the COVID-19 pandemic with regard to ongoing and upcoming projects. This memorandum also provides you with some pertinent contract provisions.

Potential delays in commencement and completion of the work due to the COVID-19 pandemic may result from, among other things, workers being ill and/or quarantined and disruption in the supply chain causing slow or suspended production or delivery of materials and/or equipment. Delays directly due to the COVID-19 pandemic should be classified legally as “excusable” delays under *force majeure* clauses or other clauses that deal with delays beyond the reasonable control of the contractor. Such clauses usually require you to provide timely written notice of the event causing the delay and information as to how the unexpected event beyond your control is impacting your ability to perform the contracted work. The standard American Institute of Architects (AIA) Document A201TM – 2017 General Conditions of the Contract for Construction contains the following provisions:

§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond Contractor’s control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect

determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

Even if you have an existing contract that does not contain a *force majeure* clause, you should still be certain to give timely notice to your customer if and when your performance of the contract is delayed or adversely affected by the COVID-19 pandemic. We recommend you proceed in the same manner as if you were encountering any unforeseeable condition and requesting a change order for additional time and an adjustment to the contract sum in accordance with the contract provisions dealing with changes and claims.

Force majeure provisions typically allow for additional time, but not necessarily additional compensation. In addition, price increases in materials cannot normally be passed on to the customer in the absence of an explicit contract provision. Therefore, you will want to include provisions in your contracts to address the potential adverse impacts caused by COVID-19.

What should you do with respect to existing contracts?

You should review the contract to determine if it contains a *force majeure* clause and follow whatever notice and other requirements are stated in the contract. You should give written notice as soon as and whenever you experience a delay or condition that is beyond your control and will adversely impact your work. You may be required to provide specific information about the delay, such as information about products you are unable to obtain or the number of workers who are ill and/or quarantined. If you anticipate seeking compensation for additional costs resulting from *force majeure*-type events, you will also need to provide notice and detailed information regarding the additional costs.

You should also review your contracts for other provisions that may allow you to recover additional costs (*e.g.*, if the owner suspends the project, you may have a provision that explicitly allows additional time and compensation for additional costs incurred due to the suspension). Because there are so many unknowns with the COVID-19 pandemic, you should provide updated written notices about the types and length of delays and additional costs incurred as more information becomes available.

Even if you have an existing contract that does not include provisions to deal with such delays or additional costs, contractors should give written notice of the impacts to your scope of

work, schedule and price. Certainly, contractors should give prompt written notice of material price escalation and delay or unavailability of products.

For projects where a contract has not yet been executed, you will want to take a pro-active approach in formulating the contract. You will want to propose and insert contract provisions to address delays and increased costs resulting from the COVID-19 pandemic. We have drafted two contract provisions for your consideration.

This first provision is a *force majeure* clause which allows the contractor additional time and potentially additional compensation if the contractor cannot perform work obligations as prescribed in the contract due to COVID-19:

Force Majeure – Coronavirus Disease 2019 (“COVID-19”)

The parties acknowledge that the potential effects of the coronavirus disease (“COVID-19”) pandemic on the construction industry and the performance of construction projects are not yet fully known and are beyond the control of the parties. The effects of this pandemic may adversely affect the contractor’s workforce, the supply chain for materials, the delivery of materials and/or otherwise adversely impact the contractor’s ability to perform as planned, causing delays in the prosecution and completion of the work and the project. The parties agree that delays resulting from the effects of the COVID-19 pandemic are beyond the control of the parties, and if such delays occur, the contractor will be granted a reasonable extension of time and an equitable adjustment in the contract amount for the additional costs incurred by contractor resulting from the COVID-19 pandemic. Contractor shall give owner/general contractor written notice of delay it experiences due to the COVID-19 pandemic and any additional costs it incurs due to such delay.

The second provision is to provide for an increase in the contract sum if the price of materials increases substantially due to COVID-19:

Price Volatility and Increased Costs Due to COVID-19:

The parties acknowledge that some of the materials and products to be used and installed in the construction of this project may become unavailable, delayed in shipment and/or subject to price increases due to circumstances beyond the control of the contractor, including the COVID-19 pandemic. If a specified product is unavailable or shipment is delayed, contractor shall provide written notice and shall

be afforded additional time and substitute products may be considered. If there is an increase in price of materials, equipment or products between the date of this contract and the time when the job is ready for the installation of the affected material, the amount of this contract shall be increased to reflect the additional cost to obtain the materials, provided that the contractor gives the owner/general contractor written notice and documentation of the increased costs.

With the global impacts of the COVID-19 pandemic, we hope that owners, general contractors, and subcontractors will work together to navigate and fairly deal with all of the impacts of this pandemic.

The above information is not a substitute for having an attorney review and provide advice regarding contracts and does not constitute legal advice. If you have questions about this information, please contact either Leanne Prybylski, Stephen M. Phillips or Philip J. Siegel of Hendrick, Phillips, Salzman & Siegel at (404) 522-1410 or via e-mail at clp@hpsslaw.com, smp@hpsslaw.com or pjs@hpsslaw.com.