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.