



## Subcontractor Delay and Disruption Claims in the Time of COVID-19

by Jim Sienicki and Ed Hermes, Snell & Wilmer L.L.P.

Delay and disruption claims are always a risk in the best conditions on a construction site. Never more so than during the global pandemic brought about by COVID-19. Since President Trump declared the COVID-19 pandemic a national emergency on March 12, 2020, most contractors, subcontractors, and owners have reviewed the force majeure, change in law, suspension, change order, delay notice, and other applicable clauses in their contracts to understand what the parties' rights, remedies, and obligations are in the event of this novel catastrophe. Force majeure generally refers to a cataclysmic event that adversely affects a project and is outside the control of the parties. Depending on the specific contractual terms and the impact COVID-19 and related governmental orders have had on a specific project, this pandemic may be considered a force majeure, delay, change in law, suspension and/or other applicable event. Subcontractors may be able to use these clauses or the impossibility or impracticability of performance defenses to attempt to excuse their late completion of projects that are delayed or interfered with due to COVID-19's unforeseeable events, and to possibly bring claims against the contractor for delay and/or disruption due to increased costs caused by COVID-19.

### I. Delay

For subcontracts entered into before the COVID-19 pandemic became prevalent in the United States, in determining whether a subcontractor may successfully contend that its inability to complete its work in a timely fashion is a result of an uncontrollable, unforeseeable force, such as the COVID-19 pandemic, one must first look to the relevant contracts to determine

whether force majeure, change in law, delay, suspension, and/or other provisions may be used as a shield against an owner pass-through or contractor delay claim, or as a sword to pursue recovery of additional costs due to the pandemic.

Many subcontracts incorporate the rights, remedies, and obligation provisions of the Prime Contract into the subcontract by reference. Many subcontracts further provide that the subcontractor is limited to the rights and remedies that the prime contractor has against the owner. Since the COVID-19 pandemic was obviously not caused by the owner or prime contractor, the Prime Contract will generally control. Some Prime Contracts direct that a contractor who is excused by a force majeure or other applicable clause from liability to the owner for late performance is entitled to a non-compensable extension of time. In a subcontract that incorporates the Prime Contract with such a provision, the subcontractor may be protected from owner or contractor claims for liquidated or actual damages arising out of the COVID-19 caused late performance, but must bear its own costs to occupy and staff the project for longer than planned and budgeted. Other Prime Contracts provide for a compensable extension of time and require the owner to reimburse the Prime Contractor for its general conditions costs incurred during any delay period. By now, most subcontractors have already reviewed their force majeure, change in law, suspension, delay, and other applicable contractual clauses.

In addition to subcontractors knowing the contracts, both the Prime Contract and the subcontract, it is important for the subcontractors to promptly document, communicate, and provide

notice regarding the delays caused by COVID-19 in the daily reports, meeting minutes, schedule updates, and other applicable documents. It is important for subcontractors to submit daily reports and other updates that address adverse impacts to the critical path caused by COVID-19 as well as other delays that have impacted performance. Prompt, contemporaneous notice to the contractor of the impact caused by COVID-19 or other matters generally may strengthen any delay claims.

### II. Disruption

Unlike a delay claim, which captures the time and cost of not being able to work, a disruption claim "captures the cost of working less efficiently than planned." *Bell BCI Co. v. United States*, 81 Fed. Cl. 617, 636 (2008), *aff'd in part, vacated in part, remanded*, 570 F.3d 1337 (Fed. Cir. 2009) (citations omitted). Moreover, disruption claims exist even if the disrupted work was not on the critical path. Subcontractors may have claims for disruption if an external factor such as COVID-19 requires the subcontractor to perform differently than planned in a way that adversely impacts the subcontractor's productivity—which is typically measured in labor hours or equipment hours.

Oftentimes, a subcontractor's largest risk and variable expense on a project is the cost of labor. If external factors require a subcontractor to perform differently than planned, to install the intended amount of work during a shorter duration, or to install the work under materially different conditions, the subcontractor may have been disrupted.

The COVID-19 pandemic and resulting governmental restrictions are disrupting supply chains, and causing owners and contractors to make

difficult decisions as to how to proceed on a project. For example, instead of accepting that an unforeseen disruptive event has necessitated a complete work stoppage or suspension, which would have caused the owner to bear the financial exposure of lost rents or a timely revenue stream because of the suspension, many owners will instruct their contractors to proceed with the project, be as efficient as possible, and work around the impediments. That instruction will be passed down to subcontractors, vendors, and others who will try to build the project despite various on and off-site hurdles including a broken supply chain and new work rules. These decisions may cause an increase in disruption claims by subcontractors who must conduct their work under changed circumstances, which decreases their productivity.

### III. Keys To A Subcontractor Delay Or Disruption Claim

When a subcontractor is required to perform differently than planned, such as, for example, under a different sequence than scheduled, the work will almost certainly either take longer to perform (delay) or will take more labor hours to finish on time (disruption) or both. If a prime contractor directs a subcontractor to proceed under changed circumstances caused by COVID-19 or for any other reason, the subcontractor may want to make the contractor fully aware of potential impacts, and the subcontractor's intention to seek additional payment if the contract permits it. Detailed notice that estimates the increased costs caused by the changed circumstances may be appropriate, along with noting that the costs are just an estimate and may be further refined in the future.

After this initial notice, subcontractors may want to add a section to their daily logs and meeting minutes called "COVID-19 Impacts" and further detail specific unplanned costs—ingress costs, egress, overtime, and missing materials. Documenting all of

the specific impacts to the work with as much detail as possible may be prudent. Furthermore, it is important that subcontractors validate planned costs, i.e. the baseline as to what the costs and expenses were expected to be so that the contractor and owner understand how the changed circumstances and decisions from the owner and contractor have led to increased costs.

If the parties agree on the scope, time and/or cost impacts of COVID-19 or a change directed by the contractor or owner, those should be documented in a change order. In the absence of such agreement, the subcontractor may want to ask the prime contractor to issue a construction change directive or similar written order documenting the instruction regarding the change. If the prime contractor orders work orally and fails or refuses to document the instruction, the subcontractor may want to submit prompt written notification of the change to preserve its claim.

Similarly, subcontractors want to be careful not to inadvertently waive delay or disruption claims by signing a document that includes boilerplate language waiving your delay or disruption claims. Change orders, payment applications and related lien waivers and releases often contain broad boilerplate language which may waive or release all claims up through the date of the change order or payment, whether or not the claim has been previously presented.

Finally, a subcontractor may want to consult with knowledgeable legal counsel early in the process to maximize the likelihood of success regarding its claims. The attorney may engage claims consultants and together may analyze the specific contract, work plans, impacts, increased costs, and factual and legal defenses, and help the subcontractor preserve and present its claims in a favorable manner. Early consultation with an attorney may help subcontractors identify and follow a path to a successful recovery in COVID-19 or other delay or disruption disputes.

---

#### About the Authors



*Jim Sienicki's practice involves construction contract preparation, construction law representation and litigation, procurement law and bid*

*protests, general commercial litigation, creditors' rights and other litigation, alternative dispute resolution and appellate matters. Jim was the head of the firm's construction practice group for over 15 years, and the firm's construction litigation practice has been recognized as a National Tier 1 practice for the past seven years by U.S. News and World Report/Best Lawyers. Jim has been named to Best Lawyers in America® 2003-2018 in the area of Construction Law and Litigation. The Best Lawyers in America® also named Jim Phoenix Lawyer of the Year, Construction Law, in 2013 and Phoenix Lawyer of the Year, Construction Litigation in 2018. For more information, Jim Sienicki can be reached at 602.382.6351*



*Ed Hermes represents corporate, government and tribal entities in complex commercial and construction disputes in state, tribal and federal*

*courts. Ed is a member of **Snell & Wilmer's** construction litigation practice group and has extensive experience representing subcontractors, contractors, and owners in a wide variety of construction matters. Ed is also licensed to practice in the courts of many Arizona Tribes and often represents parties in complex construction matters in Indian Country. For more information, Ed Hermes may be reached at 602.382.6529.*