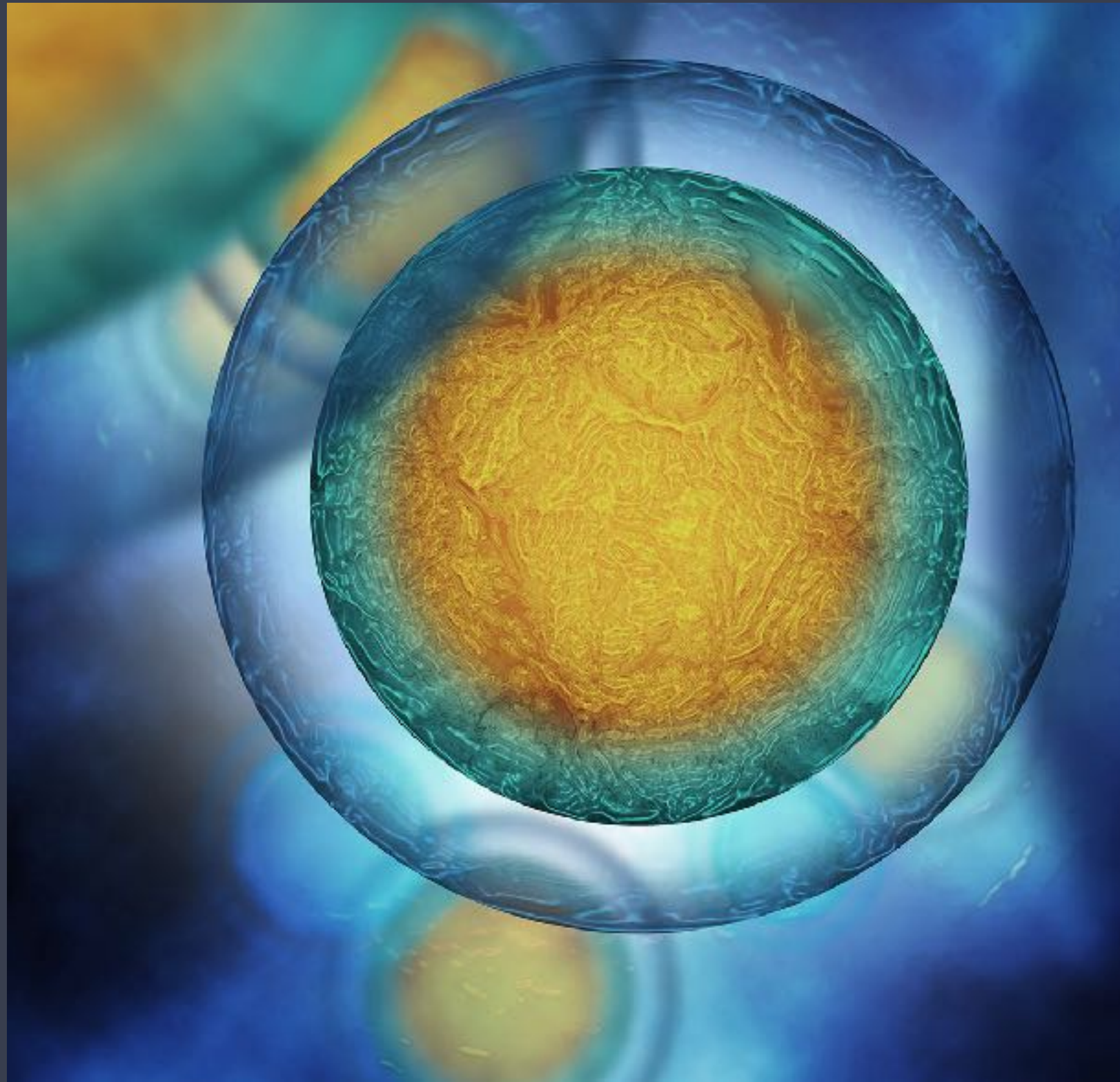


# COVID-19: WHAT YOU NEED TO KNOW

Best Practices for dealing with construction claims, supply chain interruption, schedule and delay impacts, safety concerns, employment challenges, payment disputes and business interruption losses.

Published by [MATTHEW J. DEVRIES](#) of Burr & Forman, LLP

BEST PRACTICES CONSTRUCTION LAW



# Coronavirus and Construction Projects

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On March 11, 2020: the World Health Organization declared that the outbreak of COVID-19, commonly known as the Coronavirus, is a pandemic. (More on that word "pandemic" later.) Over a two-day period, we saw the NCAA cancel March Madness, schools began ramping up for online programs as they cancelled in-person classes, and even a presidential ban on foreign travel. Each day since then has brought a new challenge. So what happens to the construction industry during these uncertain times?

As the author of [www.bestpracticesconstructionlaw.com](http://www.bestpracticesconstructionlaw.com), I follow case law and legislation affecting the construction industry. As a construction litigation attorney, I help parties involved in the construction industry with their daily needs—from job site accidents, payment and scheduling disputes, change orders, and employment claims. I also draft or review a significant number of contracts before the project starts in an effort to evaluate and assess the various risk-shifting contractor provisions.

And so I share with you, **COVID-19: What You Need to Know**. As with any problem on a construction project—whether you are talking about a construction defect, an accident or safety violation, payment claims or untimely completion of the project—the outcome always depends on the facts, the law, and how well you document and tell the story. Ultimately, in response to COVID-10, best practices will help you identify options and take practical steps for addressing the challenges that arise and mitigating any losses.



# EMPLOYMENT AND HUMAN RESOURCES

When talking about employment-related impacts on construction companies, we are generally concerned about two types of employees: (1) the home office, including management, accounting, administrative and support staff; and (2) the on-site employees and laborers. As of March 18, 2020, almost every level of government (federal, state and local) issued recommendations, guidelines, and even emergency orders to businesses and companies limiting access to public spaces, closing down work places, and instituting social distancing limits.

*"Social distancing is deliberately increasing the physical space between people to avoid spreading illness. Staying at least six feet away from other people lessens your chances of catching COVID-19."*

*—Johns Hopkins Medical Center, 3/9/20*

Given the volatility of the environment, companies will have to either voluntarily act or comply with executive orders and government shutdowns. So, what are the immediate responses and recommendations?

- **Identify essential construction tasks, roles and staff.** It is important to immediately determine what business functions must continue during this time, both at the home office and project sites.
- **Consider alternative work solutions.** To the extent practicable, use technology for remote access, video conferencing, and mobile operations.
- **Implement and enforce new safety policies.** Given the fear of lost wages, many employees are reticent to report even a sniffle if they think they will be sent home. The company, workforce and project cannot afford unnecessary exposure due to employee fears. (See p. 8 for "Checklist" of safety policy and training log).
- **Increase cleaning and maintenance.** After you identify skeleton crews, assign additional tasks to them to ensure workplace disinfecting and proper hygiene.

**How can industry respond?** As federal, state and local governments are issuing executive orders that effectively close down businesses and venues, construction industry associations have responded in an effort to protect continuity of projects. For example, the Tennessee Road Builders Association, the Homebuilder's Association of Tennessee and the Associated Builders & Contractors recently sent an email to Governor Bill Lee's staff requesting that if the state needs to act with additional quarantine measures through an executive order, then it should contain the following language in that directive:

*For purposes of this Order, individuals may leave their residence to provide any services or perform any work necessary to the operations and maintenance of "Essential Infrastructure," including, but not limited to, public works construction, the permitting, inspection, construction, transfer and recording of ownership, of housing and anything incidental thereto, airport operations, water, sewer, gas, electrical, oil refining, roads and highways, public transportation, solid waste collection and removal, internet, and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services, business infrastructure, communications, and web-based services), provided that they carry out those services or that work in compliance with Social Distancing Requirements as defined this Section, to the extent possible.*





# PROJECT SITE ACCESS

As of March 18, 2020, the City of Boston appears to be one of the first public entities to have suspended “all regular activity at construction sites.” What can you do if your job site is shut down or you are given limited access?

- **Review the contract documents.** While suspension, work stoppage, or government action can directly affect contract performance, make sure to review the contract to identify relevant provisions addressing site access.
- **Secure the site.** You need to schedule crews to take the necessary measures to keep your site secure, keep materials from risk of loss, and prevent trespassing.
- **Maintain skeleton crews.** After the site has been secured, skeleton crews should be permitted thru the remainder of any suspension to ensure site safety.
- **Identify and schedule “emergency” work.** If there is emergency work that needs to be completed, make sure you notify the owner (public or private) and get advanced approval for completing emergency work.
- **Document and photograph conditions.** Make sure you take photos of the work in place and stored materials, as well as start maintaining a separate “COVID-19” claim file with important notices.

Dear Trade Partner:

As you are aware, the impact from the COVID-19 pandemic ("Pandemic Event") has affected all aspects of the construction industry. In an effort to identify the impacts, delays and increased costs on the \_\_\_\_\_ Project, ABC Construction, Inc. ("Contractor") provides the following information and guidelines to protect the site and project.

1. Upon receipt of this letter, contact us via email to verify that there is full or limited access to the jobsite, as well as our home office.
2. We follow all guidelines published by the Center for Disease Control ([www.cdc.gov](http://www.cdc.gov)) as it relates to persons who have travelled abroad or exposed to someone who has done so. Any such employees will not be permitted access to any job site or our home office.
3. We are currently coordinating what the owner regarding job site access, security and level of construction activities that will be allowed. If your work is "emergency" in nature or requires completion of a particular task, please coordinate with us to schedule and complete that work.
4. If you are aware of a direct delay to materials, equipment or supplies as a result of COVID-19, please let us know immediately so that we may inform the owner. We may be able to locate and use alternative or substitute materials, but this will require approval by the owner and design team.

We appreciate your prompt attention to the above and thank you for working with us to ensure a safe and healthy transition during this difficult time.

*Consider the above language in a notice letter to all subcontractors and suppliers.*

• **Notify subs and suppliers.** Contractors often have a contractual obligation to inform all subcontractors, laborers, material suppliers and other vendors about potential impacts or interferences with their scope of work, including access to the job site. Some projects can

have 500+ subcontractor and suppliers, and notice should be given to all of them as your trade partners. You will want to keep the lines of communication open and very cooperative as you prepare to mitigate the losses resulting from COVID-19 impacts.



# OSHA COMPLIANCE

On March 9, 2020, the U.S. Department of Labor (OSHA) published its report, "Guidance on Preparing for COVID-19" to help companies respond in the event of coronavirus in the workplace. The 35-page practical guide can download a copy at:

[www.osha.gov/Publications/OSHA3990.pdf](http://www.osha.gov/Publications/OSHA3990.pdf)

Read the Guide to help develop an infectious disease preparedness and emergency response plan. Recognize that COVID-19 is a recordable illness in the employer's 300 logs, and that construction employers may be subject to the General Duty Clause, which provides that:

*Employers must furnish employment and a place of employment free from recognized hazards causing or likely to cause death or serious physical harm.*

OSHA allows employees to refuse to work without retaliation if the assignment carries a risk of death or serious physical harm and other factors are met, including there is not enough time to correct the hazard through regular OSHA enforcement channels.

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**1. Draft an amendment to your safety policy.** Specifically reference COVID-19 and identify best practices for the following:

- 2. Train employees on the safety policy.** If you are still on site, limit the attendance and have multiple meetings. Otherwise, use video. Finally, keep records of the meeting.

Consider using the Job Safety and Record-Keeping Form from the AGC of Tennessee (pictured above).





## H.R. 6201 – Emergency FMLA and Paid Sick Leave

# WAGES AND BENEFITS

In addition to social distancing and job site access, the construction industry will have traditional employment-related questions, including:

- Are employee absences covered by the Family Medical Leave Act (FMLA)?
- Will my company have to pay sick leave to full time employees? What about part-time employees?
- Are there any tax benefits or credits available?
- Are laid off employees entitled to collect total or partial unemployment benefits?
- Can we test employees for fevers or other symptoms?



Matthew T. Scully  
Partner  
[mscully@burr.com](mailto:mscully@burr.com)  
205.458.5321  
<https://www.burr.com/attorney/matthew-t-scully/>



Christine S. Tenley  
Partner  
[ctenley@burr.com](mailto:ctenley@burr.com)  
404.281.3105  
<https://www.burr.com/attorney/christine-s-tenley/>



Caroline H. Page  
Associate  
[cpage@burr.com](mailto:cpage@burr.com)  
205.458.5392  
<https://www.burr.com/attorney/caroline-h-page/>

For answers to these questions, listen to the [webinar recording](#) and view the [presentation slides](#) for “What’s Next for Employers: *“Dealing with COVID-19, Law Changes, Remote Workplace and Social Distancing.”*”

# SUPPLY CHAIN INTERRUPTIONS

Just go to the local grocery store and you will understand the impact of a state of emergency on supply and demand (*...think hand sanitizer and toilet paper...*). But in the construction industry, the interruption to the supply chain will have the most direct impact on delays and losses. "The issue is not the direct supplier," says Andrew Englehart, Sr. Managing Director with JS Held, "but the indirect supplier." For example, a project may involve installation of an electronic element manufactured in the United States, but the element requires certain components from China. Over the past month, manufacturers in China have gone all but silent. Even then, if a Chinese facility were able to get the component released from its facility, it is likely sitting in a port in China ... waiting ... waiting ... and waiting. "These are just the indirect supply chains at risk," Englehart commented to [www.bestpracticesconstructionlaw.com](http://www.bestpracticesconstructionlaw.com). "What happens when circumstances evolve that affect direct material suppliers who fabricate in the United State?"

**Think outside the box  
(or technical specifications).**

What are some best practices to deal with material unavailability or delays related to problems direct and indirect supply chains?

- Give full disclosure. Notify the owner and architect/engineer that supplies or equipment delivery has been impacted, including any logistic log jams or deliveries.
- Contact your current supplier and provide written notice of a potential claim for the impacts related to the failure to meet your delivery requirements.
- Confirm that there are no other local manufacturers of the same supply, material, equipment or component. If there is one, document the cost and time impact.
- If there is an entirely different (but available) material or equipment, then check the technical specifications for substitution or waiver of the requirements.
- Prepare a "claim" file where you document the measures you have taken to mitigate losses, track schedule impacts, and identify scope of cost increases.



# TOP 10 CONTRACT ISSUES



The most important step contractors need to take in response to the COVID-19 Pandemic Event is to gather all written contracts and begin identifying key clauses addressing notices, responses and claims. Here is a list of contract provisions that you should be highlighting:

- Notice; Disputes; Claims
- Force Majeure; Delays
- Suspension of Work; Termination
- Material and Labor Escalation
- Coordination and Cooperation

You can go around in circles evaluating the best course of action given the terms and conditions in your construction agreement. Following are a few best practices to address impacts and delays resulting from COVID-19:

- 1. Provide preliminary notice of impact.** Your contract will instruct you on the time frame for providing notice of an impact and the method of delivering that notice. Even if you don't have a contract, draft the notice anyway. (See draft "Notice to Owner" at p. 13).
- 2. Begin organizing your "claim" baskets.** As you identify the various impacts on your project, start to separate them into categories: (a) labor costs; (b) materials, supplies, equipment costs; (c) schedule or time impacts; and (d) consequential damages—even if they are not recoverable under your contract.
- 3. Evaluate alternative material sources and waiver of technical specifications.** Contact your subcontractors and suppliers immediately to start identifying supply chain interruptions. Create material and equipment lists of those products that will be delayed. (See draft "Notice to Subcontractors and Suppliers" at p. 6). If you are in the pre-construction or preliminary estimating stage, include alternative sources in your bids.
- 4. Immediately update schedules.** Even if you have not established any entitlement to a time extension, you must start documenting both the immediate impact of the COVID-19 Pandemic Event, as well as the resulting impacts that continue to compound each day. Start to evaluate factors of inefficiency (such as reduced crew size and limited access to job sites) in any revised schedules.

**5. Understand that *force majeure* is only one tool in the toolbox.** There are countless legal articles analyzing the question of whether the COVID-19 Pandemic Event is an event of *force majeure*. Certainly you are well advised to review your contract and determine whether an infectious virus, a global pandemic, a declaration of national emergency, a constructive quarantine, an executive order shutting down construction sites constitute—each singularly or cumulatively—excusable delay that would grant you additional time or additional compensation or both.

**6. In the absence of a contractual provision, find the statutory or common law equivalent.** If your contract does not contain a favorable *force majeure* clause, or if you don't have a written contract, consider other legal defenses excusing performance, such as impossibility or Georgia's "act of God" defense.

*"If performance of the terms of a contract becomes impossible as a result of an act of God, such impossibility shall excuse nonperformance, except where, by proper prudence, such impossibility might have been avoided by the promisor."*

*Ga. Code §13-4-21*

**7. Evaluate the owner's contractual or legal options.** Once the contractor has given its preliminary notice of impacts and delays, it is advised to evaluate the owner's options, which can include: (a) full or partial work stoppage or suspension; (b) wait and see ... and then assert liquidated damages for delay; and (c)

termination for cause or convenience. The contractor must plan for the best, but be prepared for the worse. In these uncertain times, termination may be the best for all parties involved.

**8. Remember your duty to mitigate.** Most contracts (and even the common law of most states) require a contractor to mitigate its damages. You are advised to document all mitigation efforts, including steps taken to address the epidemic, re-sequencing the schedule of activities, and accelerating performance.

**9. Don't delay on lien notices and other filings.** Each state has different laws on enforcement of mechanic's liens and prompt payment statutes. Various state and federal courts have issued administrative orders cancelling in-person hearings and trials, as well tolling certain deadlines and statutes of limitations for claims, while court operations are suspended. *However, do not assume that any deadline set by statute or law for filing a lien, notice of completion, preliminary non-payment notice or other prompt payment notice is tolled.*

**10. Start to adjust your contracts for COVID-19.** Now that Coronavirus impacts are foreseeable and a known risk, new construction contracts should include specific reference to COVID-19, virus, bacterial and other global health related epidemics. Also include new escalation clauses addressing increased costs of labor or materials due to supply chain interruptions. and other pandemic impacts. Now is the time to rewrite your contracts.



# EXCUSABLE DELAYS BY CONTRACT:

## AIA A201-2017

### §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 delivery, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control;
- (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or
- (5) or 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.

## ConsensusDOC 200

### §6.3 Delays and Extensions of Time

6.3.1 If Constructor is delayed at any time in the commencement of progress of the Work by any cause beyond the control of the Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond control of the Constructor include, but are not limited to, the following:

\* \* \*

(d) delay authorized by Owner pending dispute resolution or suspension by Owner under §11.1;

(e) transportation delays not reasonably foreseeable;

\* \* \*

(j) epidemics;

(k) adverse governmental actions;

(l) unavoidable accidents or circumstances;

\* \* \*

# SAMPLE COVID-19 NOTICE LETTER

## Notice. Notice. Notice.

Courts regularly enforce notice provisions in a construction contract. For example, in [Schindler v. Tully Construction Co.](#), 139 A.D. 3d 930 (2016), the New York Supreme Court reversed a trial court's award of delay damages in favor of a subcontractor on a public contract because the subcontractor did not strictly comply with the parties' contractual notice requirements.

## What should you do?

- Read your contract for notice issues
- Send notice in the manner required (i.e., certified mail, fax, email)
- Use the words "Pandemic" "Unforeseen" and "Unanticipated"
- Explain the grounds, summarize and document the time and cost impacts

ABC Construction Co.

Owner of Mega Project  
123 Any Street  
Any Town, USA 12345

RE: Notice of Delays, Impacts and Additional Costs from COVID-19 Pandemic

Dear Owner:

On March 11, 2020, the World Health Organization declared that the outbreak of COVID-19 is a pandemic and on March 13, 2020, President Trump issued a proclamation declaring the outbreak a national emergency. In addition, state and local authorities in [\_\_\_\_\_] have also issued similar declarations (collectively "COVID Pandemic Event"). The impacts of the COVID Pandemic Event have caused increased costs and delays that are beyond the reasonable control of ABC Construction Co. ("Contractor") for which we will seek relief, additional time and additional compensation. Specifically, the Contractor has experienced the following impacts:

- [Outline impacts]
- [Describe delays in materials, supplies or equipment]
- [Identify labor shortages]
- [Detail work stoppages or limited access to site]

At this time, the full impact of the above delays to the Contract Time and Contract Price is not fully known and Contractor will submit this information requesting a time extension, additional compensation and other relief. We request a video conference call with the Owner and all project participants to discuss the status of the project and address a work plan for going forward

The COVID Pandemic Event was unanticipated, unforeseeable and beyond the Contractor's reasonable control. We will work diligently with the Owner and its team to minimize the impacts of the COVID Pandemic Event. Contractor reserve all rights and remedies afforded by contract, statute, emergency order, regulation or otherwise.

Sincerely,

Contractor





## PROJECTS IN THE PIPELINE

The COVID-19 Pandemic Event has disrupted not only current projects, but also those scheduled to start in the next few months, those awarded but with no immediate start date, and those currently under solicitation. Some tips for dealing with those projects in the pipeline include:

- **Get everyone talking.** This is not a single isolated event like a hurricane or discovery of subsurface conditions where there is a quantifiable start and finish date of the event. Project financing, permitting, total cost and time of performance all must be re-evaluated. Talk. Talk Talk.
- **Consider alternative options.** No one can predict how long projects will be impacted, so all options are on the table, including delayed start or even termination for the owner's convenience. Consider cost-sharing options.
- **For unsigned contracts, include escalation clauses.** Given the risk, it is reasonable and prudent to address cost escalation in labor and materials before you agree to a contract price and time. Consider different contract approaches like a cost-plus contract with a guaranteed maximum price or contingency for certain cost variances.

# GOVERNMENT CONTRACTORS

In addition to traditional contract principles, government contractors should be mindful of various excusable delay provisions contained in the Federal Acquisition Regulations (FAR) that may provide relief. These include:

FAR 52.249-14, applicable to cost reimbursement contracts, provides that a contractor shall not be default as a result of "causes beyond the control and without the fault or negligence of the Contractor."

The FAR lists examples of causes such as "epidemics" and "quarantine restrictions." FAR 52.249-14(a)(5)-(6).

FAR 52.249-8, applicable to lump sum contracts, contains the same limits on the government's ability to terminate for default based upon "epidemics" or "quarantine restrictions" that are excusable delays.

FAR 52.242-15 allows a contractor to seek an equitable adjustment based upon a stop work order from the government. In addition, if a delay becomes unreasonable in length, a contractor may seek additional compensation under the Government's Delay of Work clause. See FAR 52.242-17. These methods are in addition to any constructive acceleration claim the contractor may have.





# BUSINESS INTERRUPTION

Just because you have a commercial insurance policy does not guarantee that you will have coverage for business interruption losses. Most all-risk property insurance programs are intended to cover risk of loss or damages to insured “property” as well as associated “business losses.” Think about the numerous businesses that were impacted by the recent tornadoes in Nashville, Tennessee.

- **Has your business location ceased operations or has your work trailer at the job site closed?** Ultimately, you will need to demonstrate that there is physical damage to the business premises or work office trailer at the job site.
- **Is the COVID-19 pandemic a covered cause of loss?** Check your policy to see if there is an exclusion for losses caused by communicable diseases, bacteria or viruses.
- **If there is the potential for coverage, what is the history of the profitability of the business location?** There may not be compensation if there is not an actual loss of net business income.
- **My business location is not closed, but one of my supplier’s business location is ... what next?** Check to see if you have Contingent Business Interruption coverage that names specific suppliers or subcontractors.
- **Are there any other applicable policies?** Even if there may not be coverage under one policy form, certain companies have master policies with additional coverage.



**Is there coverage for COVID-19 business interruption losses?** The answer depends entirely upon the policy coverages and exclusions. Do not automatically assume that your property insurance policy provides coverage for business interruption losses. Generally, they do not. (In fact, most policies have exclusions for “contamination” or “pollution.”) The key inquiry will be whether the spread of an infectious disease caused “direct physical loss or damage.” While that question has been litigated in the past in the context of buildings rendered uninhabitable due to dangerous gases or bacteria, and will be the subject of many lawsuits related to COVID-19, there are a number of immediate questions that your construction company should be asking. Call your insurance broker with this list.



# MATTHEW J. DEVRIES



**BURR · FORMAN** LLP  
*results matter*

**222 Second Avenue South, Suite 2000**

**Nashville, Tennessee 37201**

**Direct: (615) 724-3235**

**Mobile: (615) 354-3681**

**LinkedIn: [/matthewdevries](#)**

**Twitter: [@matthewdevries](#)**

Matt DeVries is a shareholder at Burr & Forman, LLP, where his practices focuses on construction/transportation law, contractor professional licensing and complex commercial litigation. He is the founder of [www.bestpracticesconstructionlaw.com](http://www.bestpracticesconstructionlaw.com), a nationally recognized construction blog focusing on project management, claims, technology and legal trends. Matt has received the JD Supra Reader's Choice award four years in a row (2016-2019) for his blogging in the construction arena.

Matt is listed in *The Best Lawyers in America*® for 2013-2020 and has received *ENR South Central* magazine's "Top 40 Under 40" award for leadership in the construction industry. Matt has written hundreds of articles and has been featured in *ENR*, *Capital Thinking*, *The Practical Lawyer*, *Medical News*, *BNA*, *The Tennessean*, and *Chicago-Sun Times*. He speaks all over the country on construction issues. Matt is admitted to practice in TN, VA, and DC. As a single father of seven children, he blogs about leadership and work-life balance at [www.TheSameAsYou.com](http://www.TheSameAsYou.com)

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**Burr & Forman's** COVID-19 Response Team is prepared to help answer your questions. Let us know if we can help you in any way through these challenging times: [www.burr.com/coronavirus-resource-center/](http://www.burr.com/coronavirus-resource-center/)

Construction–Project Development

Corporate Law

Commercial Contracts

Corporate–Finance

Creditor's Rights & Bankruptcy

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