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WHAT'S WORSE, COVID-19 OR ITS AFTERMATH?

Force Majeure and Disputes Pre- and Post-COVID

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I. Introduction

The following supplements a panel discussion presented at ALFA International's 2022 Construction Law Seminar, at The Ritz-Carlton, Bacara, Santa Barbara, California, July 27-29, 2022. The seminar panel examines the effect of COVID-19 on the construction industry, both in terms of what has happened in the last two years, the lasting effects, and where the industry is headed next. This paper supplements the panel by providing various practical and legal arguments, as well as practice tips, which may prove useful to construction professionals who continue to deal with the fall-out or even future disputes.[1]

Since the COVID-19 pandemic swept the country starting in March 2020, construction professionals have no doubt become familiar with force majeure. One cannot discuss COVID-19's impact on the construction industry without a discussion of the term. Some might argue that there has been too much focus on force majeure. This may be valid, given that, more often than not, the relief available under force majeure may be limited to additional time for the contractor (although such relief may be substantial if that means relief to the contractor from large liquidated damages claims for failing to meet the project delivery timeline). However, there are other avenues to additional compensation, and clearly every case is fact-dependent such that the terms of the contract and circumstances must be carefully examined. Indeed, it is likely that most of the battles on compensation and termination have yet to be won or lost and are still making their way through the claims process and courts. Regardless, for the foreseeable future, COVID-19 has changed the way that all parties in the industry view and negotiate force majeure clauses whereas

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there was less attention paid to such clauses in the past, with such clauses often considered boilerplate.

This paper covers more than just time extensions for force majeure and suggests legal and practical routes that might shed light on disputes for additional compensation and/or contract termination. Additionally, various other issues are examined, such as whether bids need to be held open for projects that have been shelved, labor and employment issues, and the continuing impact of material cost escalation.

II. Recap of Problems For the Construction Industry Created By COVID-19

COVID-19 caused numerous problems for construction projects, ranging from shut-downs, labor shortages, quarantines, social distancing and other COVID-19 protocols causing lost productivity claims, employment issues caused by vaccination mandates, and many more issues causing associated delays and costs.

As discussed further below, construction activities in the United States were not uniformly shut down. While many regions and counties were fully shut down, particularly in the North Eastern United States, construction continued in many other regions, particularly on the West Coast and South East. However, even in those regions where construction continued, some counties still shut down all construction for a period of time. Others allowed construction activity but restricted it. Therefore, while the entire country (and world) was no doubt affected by COVID-19, the degree to which each construction project was directly affected will vary region by region and project by project.

Whether a project was shut down entirely or simply impeded or slowed down by COVID-19, the goal of the contractor will most often be to recover both time and compensation for lost

productivity claims, with termination due to COVID-19 likely reserved for a small minority of projects.

III. Force Majeure

A. What is "Force Majeure"?

"Force majeure" means "superior force" in French. "A force majeure clause is defined as 'a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled.'" *The Lampo Group, LLC v. Marriott Hotel Services, Inc.*, 2021 WL 34900063 at *7 (U.S.D.C., M.D. Tenn. 2021), citing *ARHC NV WELFL01, LLC v. Chatsworth at Wellington Green, LLC*, No. 18-80712, 2019 WL 4694146, at *3 (U.S.D.C., S.D. Fla. Feb. 5, 2019) (quoting Black's Law Dictionary, 718 (9th ed. 2009)). "Force majeure is a phrase coined primarily for the convenience of contracting parties wishing to describe the facts that create a contractual impossibility due to an 'Act of God.' " *Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1248 n.5 (5th Cir. 1990) (citing 6 A. Corbin, Corbin on Contracts, § 1324 (1962)).

Generally, pandemics are the kind of events that are commonly captured by force majeure or excuse clauses, particularly where entire jobs were shut down entirely by State and County orders halting all construction. Moreover, these clauses often capture actions by governmental authorities not caused by the contractor's activities that disrupt or delay construction operations.

As discussed below, in addition to contractual force majeure clauses, there also exists statutory force majeure clauses in many jurisdictions which are read into contracts, as well as common law theories which may be applicable to COVID-19, including rescission, frustration of purpose, impossibility, and illegality.

B. What do Recent Court Decisions Tell Us About Where COVID-19 Fits Into Force Majeure?

Interestingly, the answer to the above question is—very little. Courts have given us very little information at present about how COVID-19 fits into force majeure on construction projects. Except for leasing and business interruption insurance cases, there are very few reported decisions on COVID-19 and force majeure, and virtually none involving the impact to construction disputes. It seems likely that many cases have not fully made it yet through the claims processes nor to trial, particularly given the slow-down of trials through COVID-19 and the tolling of statutes of limitations in many jurisdictions due to emergency COVID-19 orders by courts. As those cases result in verdicts and subsequent appeals, it is likely that more case opinions will surface to provide guidance on this topic in the future. Nevertheless, in the meantime, there are a few recent trends among force majeure decisions as applied to COVID-19:

1. Force Majeure Clauses Are Construed Narrowly

Force majeure clauses are narrowly construed such that a qualifying event must be within the clear terms of the contract. "Force majeure clauses are typically narrowly construed, and will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified." *The Lampo Group, LLC*, *supra*, 2021 WL 34900063 at *7; see also *Gibson v. Lynn Univ., Inc.*, 504 F. Supp. 3d 1335, 1341 (S.D. Fla. 2020) (quoting ARHC, 2019 WL 4694146, at *3); *Kyocera Corp. v. Hemlock Semiconductor, LLC*, 313 Mich. App. 437, 886 N.W.2d 445 (2015) (force majeure clauses typically are construed narrowly so that performance will only be excused if the event that caused the party's nonconformance is specifically identified).

Therefore, parties should be cautioned that unless the contract clearly spells out pandemic

relief or something that can reasonably be understood to encompass pandemic relief (such as any "event beyond the control of the contractor" as further discussed below), a court may find against a party seeking relief under force majeure for COVID-19. "[A] claim of *force majeure* is equivalent to an affirmative defense and the party relying on a *force majeure* clause bears the burden of proof." *In re Flying Cow Ranch HC, LLC*, 2018 WL 7500475, at *2 (Bankr. S.D. Fla. June 22, 2018). The ability to try to expand the force majeure terms to other events which seem "similar" will be limited.

Owners are now routinely demanding provisions which state that in the event of COVID-19 delays, the contractor will be entitled to only time and no additional compensation (or termination). By contrast, contractors are negotiating for additional compensation as well as time in the event of COVID-19 delays. Clearly, all parties must pay special attention to force majeure provisions in construction contracts now, as the terms of the contract will control (and no parties can claim complete unforeseeability now that the risk of COVID-19 delays is known). The doctrine of force majeure may not be invoked, and thus offers no defense to the enforcement of a contract, when "the terms of the contract impose the relevant risks on one of the parties." *In re Condado Plaza Acquisition LLC*, 620 B.R. 820 at 840 (Bankr. S.D.N.Y. 2020); see also, *Sun Operating Ltd. Partnership v. Holt*, 984 S.W.2d 277 (Tex. App. Amarillo 1998) (where the parties have defined the contours of force majeure in their agreements, those contours dictate the application, effect, and scope of force majeure).

2. Force Majeure Does Not Mean Commercial Impracticability or Performance Is Made Less Profitable – It Means Performance Is Impossible or Illegal

Consistent with the narrow interpretation of force majeure clauses, courts seem to loathe

to open the door to contract termination based upon circumstances created by COVID-19 which make performance less profitable or commercially impracticable. Rather, generally speaking, the party invoking force majeure, or its related doctrines of impossibility or frustration of purpose, must show actual impossibility or illegality of performance. *The Lampo Group, LLC*, supra, at *8; *In re: NTS W. USA Corp. v. 605 Firth Property Owner, LLC*, 2021 WL 412067 at *4 (U.S.D.C., S.D.N.Y. 2021).

"It is not enough that the transaction will be less profitable for an affected party or even that the party will sustain a loss." *In re NTS W. USA Corp*., *supra*, at *4. "In New York, a party is not excused from a contract simply because it becomes more economically difficult to perform," *A + E Television Networks*, 2016 WL 8136110, at *13, and "a change in market conditions or an increase in the cost of performance are insufficient grounds to assert" New York's frustration-of-purpose defense. *Health-Chem Corp. v. Baker*, 737 F. Supp. 770, 776 (S.D.N.Y.), *aff'd*, 915 F.2d 805 (2d Cir. 1990). "Quite a bit more is required than demonstrating a desire to avoid the consequences of a deal gone sour." *Id.*

For instance, some COVID-19 opinions on force majeure deal with circumstances where COVID-19 has made performance of the contract less desirable but not outright impossible. For instance, in one case, a plaintiff attempted to cancel a scheduled hotel event hosted by a Marriott hotel, for which COVID-19 restrictions clearly changed the circumstances, and plaintiff claimed that such changes constituted "unforeseen circumstances" such that the Marriott could not fulfill the terms of the contract. *The Lampo Group, LLC*, *supra*, at *8. The Court found that plaintiff did not specify which circumstances it believed constituted force majeure events authorizing contract termination, but "the actual basis appears to be, not the pandemic itself, but the restrictions on

social gatherings, the limitations on the provision of self-service food and beverage, the mask mandates, and other rippling effects of the pandemic." *Id*. The Court declined to rule either way, finding that there were triable issues of fact, and further noting, "It appears that the COVID pandemic plus the attendant restrictions on business operations could, indeed, be deemed a force majeure that would authorize termination of the Agreement. The question is whether these conditions actually made performance of the contract, by either party, illegal or impossible." *Id*.

Similarly, in another case, a party tried to rescind its lease because "[a]s a result of COVID-19, the government shut down orders, and the evisceration of Fifth Avenue retail, performing the Lease no longer gives DUSA what induced it to make the Lease in the first place." *In re NTS W. USA Corp*., *supra* at *4. The court found that the mere fact that Lease was less profitable or advantageous because of issues caused by COVID-19 did not render it impossible to perform, and the Lease was not rescinded under either the doctrines of frustration of purpose or impossibility due to COVID-19. *Id*.

Indeed, as the court noted in *In re NTS W. USA Corp*, many New York courts assessing commercial lease disputes amidst the COVID-19 pandemic have held that the temporary and evolving restrictions on a commercial tenant's business do not warrant rescission or other relief based on the frustration-of-purpose doctrine. *Id*.; *see also*, *Gap Inc. v. 170 Broadway Retail Owner, LLC*, 2021 WL 2653300, at *2 (N.Y. App. Div. June 29, 2021) ("The doctrine of frustration of purpose does not apply as a matter of law where, as here, the tenant was not completely deprived of the benefit of its bargain."); *E. 16th St. Owner LLC v. Union 16 Parking LLC*, 2021 WL 143471, at *2 (N.Y. Sup. Ct. Jan. 15, 2021) ("That their customer base was reduced because of the pandemic is not a basis to find that the frustration of purpose doctrine should apply here."); *35 E. 75th St. Corp.*

v. Christian Louboutin L.L.C., 2020 WL 7315470, at *2 (N.Y. Sup. Ct. Dec. 9, 2020) (rejecting frustration of purpose argument even though "defendant's business model of attracting street traffic is no longer profitable because there are dramatically fewer people walking around due to the pandemic"); *1140 Broadway LLC v. Bold Food, LLC*, 2020 WL 7137817, at *2 (N.Y. Sup. Ct. Dec. 3, 2020) ("[T]he tenant's business was devastated by a pandemic. That does not fit into the narrow doctrine of frustration of purpose."). Similarly, in *Gap Inc. v. Ponte Gadea N.Y. LLC*, 2021 WL 861121 (S.D.N.Y. Mar. 8, 2021). The court found that the tenant in that case did not show that the purpose of the lease – the "operation of a 'first-class retail business' " – "was so completely frustrated by the COVID-19 pandemic that the transaction makes little sense." *Id.* at *8-9 ("The possibility that the stores at issue in this case may suffer particularly adverse financial consequences from the COVID-19 pandemic does not amount to frustration of the purpose of the Lease."). The court also observed that the lease contemplated the possibility that a government restriction might frustrate its purpose, thus "defeating any claim that the possibility was 'wholly unforeseeable.' " *Id.* at *8.

Courts in other jurisdictions have held similarly, finding that COVID-19 does not relieve a party from performance unless performance was made actually impossible or illegal, not simply more difficult. *See*, *Su Jung Shin v. Yoon*, 2020 WL 6044086, at *6 (E.D. Cal. Oct. 13, 2020) (parties to a settlement agreement failed to demonstrate the COVID-19 pandemic made it impossible to perform settlement because they could not make payments); *Fitzpatrick v. Country Thunder Holdings, LLC*, 2020 WL 5947624, at *3 (C.D. Cal. July 24, 2020) (COVID-19 pandemic could not be used to avoid settlement obligations as party failed to demonstrate pandemic made it impossible to pay settlement obligations); *Belk v. Le Chaperon Rouge Co.*, 2020 WL 3642880, at *10 (N.D.

Ohio July 6, 2020) (same); *In re Condado Plaza Acquisition LLC*, supra at 839–40 (COVID-19 pandemic did not affect closing date of real estate contract); *1600 Walnut Corporation v. Cole Haan Company Store*, 530 F. Supp. 3d 555 (U.S.D.C. E.D. Penn. 2021) (retail store which lost money due to mandatory Governor-ordered retail store closures during COVID-19 could not assert force majeure under COVID-19 to avoid paying rent, due to the allocation of risk for such calamities in the commercial lease; the court also held that such measures did not constitute a regulatory taking).

Therefore, to the extent that COVID-19 claims are premised upon contract performance simply costing more money or being less profitable, force majeure may prove a fruitless avenue for recovery and parties will need to look to other contract provisions or other legal theories for relief.

3. Force Majeure and COVID-19 Disputes Will Likely Involve Triable Issues of Fact

While some fact patterns may be relatively clear cases, the reported decisions on force majeure suggest that resolution by pre-trial motion practice may prove difficult and that many will likely need to be submitted to the trier of fact for determination. *See e.g.*, P*alm Springs Mile Assocs. v. Kirkland's Stores, Inc.*, 2020 WL 5411353, at *2 (S.D. Fla. Sept. 9, 2020) (denying motion to dismiss); *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1107–11 (C.D. Cal. 2001) (whether court order prohibiting the installation of medians on highway project made it impossible for contractor to perform obligation to purchase median supplies from subcontractor was an issue of fact); *See*, *In re Frischhertz Const. Co., Inc.*, No. 05-21605, 2007 WL 2965049, at *2–3 (Bankr. E.D. La. Oct. 8, 2007), aff'd sub nom. *Audubon Comm'n v. Roy Frischhertz Constr. Co., Inc.*, 2008 WL 11374338 (E.D. La. Sept. 30, 2008), aff'd in part, rev'd in part on other grounds sub

nom, *In re Roy Frischhertz Const. Co. Inc.*, 401 F. App'x 861 (5th Cir. 2010) (holding with respect to an argument for termination by the contractor of the prime contract under AIA 201 General Conditions Article 14 in the aftermath of Hurricane Katrina, "This will be a fact intensive inquiry requiring the submission of evidence and likely will not be able to be resolved in a summary fashion.").

In sum, with force majeure claims relating to COVID-19 or otherwise, parties can expect to be in litigation for the long-haul through trial, short of an early settlement. This will, of course, increase the costs and risks of litigation for all parties involved.

C. Can A Contractor Achieve An Award of Time Due to Force Majeure?

Turning to construction remedies in the face of COVID-19 under force majeure, given the lack of court opinions related to the construction industry, the following is a discussion of the general rights and remedies of the parties with respect to time awards due to force majeure. In general, force majeure should allow a contractor an extension of time at a minimum due to project shut-downs or delays caused by COVID-19. In addition to granting time to the contractor, this should provide relief to the contractor from any liquidated damages claims asserted by the owner against the contractor.

1. AIA Contracts – Time Awards

In AIA contracts, the A201 General Conditions includes a broad provision relating to awards of time for any "causes beyond the Contractor's control," at Section 8.3.1 as follows:

> If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control; or by delay authorized by the Owner pending mediation and arbitration; or by other causes that the Architect

> determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine..
>
> (Emphasis added.)

Many courts have held that time extensions under section 8.3.1 depend upon whether the qualifying force majeure event was "beyond the reasonable control" of contractor regardless of the reason and regardless of which of the subclauses of section 8.3.1 are invoked. *Watson Labs, Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1107–11 (U.S.D.C., C.D. Cal. 2001); *Unicover World Trade Corp. v. Tri–State Mint, Inc.*, 1994 WL 383244, at *10 (U.S.D.C., D. Wyo. 1993) ("After considering the clause as a whole, the Court finds that 'beyond its control' modifies all of the listed causes in the clause.").

It is important to note that the AIA A201 also requires notice to the owner of events which would cause claims or delays. Section 8.3.2 states that "[c]laims relating to time shall be made in accordance with applicable provisions of Article 15." Section 15.1.5.1 states, "If the Contractor wishes to make a Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary." Section 15.2.1 requires that notice be given "within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later." Therefore, a contractor cannot simply rest upon public knowledge that COVID-19 caused delays to the project's schedule but must put the owner and initial decision maker under the AIA contract on notice of same.

2. Other Construction Contracts – Time Awards

a. Force Majeure Clauses in Non-AIA Contracts

Other construction contracts contain similar force majeure language to that found in the A201 General Conditions. A force majeure clause may look something like the following: "If either party to this Agreement shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of… restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance of such obligation shall be excused for the period of the delay." Although force majeure provisions can be drafted to address many forms of relief triggered by a qualifying event, as a general rule they limit recovery to an extension of time, thereby relieving the contractor of actual or liquidated damages due to failure to complete performance within the time allotted under the contract. Traditional force majeure clauses have the effect of relieving both parties of further performance while the qualifying event remains in effect. But "parties may agree, however, that a force majeure event may have a different result, such as broadening or narrowing excuses of performance and attaching conditions to the exercise and effects of [the] force majeure clause." *See*, *PT Kaltim Prima Coal v. AES Barbers Point, Inc.*, 180 F. Supp. 2d 475, 482 (S.D. N.Y. 2001).

b. "Catch-All" Force Majeure Clauses and "Acts of God"

So long as qualifying force majeure events include those "beyond the control" of the contractor, COVID-19 should generally qualify as a force majeure event. However, disputes can arise with less clear provisions which contain a "catch-all" phrase such as "and such other similar events" or "acts of God." In such instances, it becomes potentially unclear what unspecified events might be captured by the clause by limiting the universe to events or things of the same general nature or class as those specifically enumerated, and "acts of God" itself may not be

sufficiently broad. *See, Great Lakes Gas Transmission Ltd. Partnership v. Essar Steel Minnesota, LLC*, 871 F. Supp. 2d 843, 854, (U.S.D.C., D. Minn. 2012); *Seitz v. Mark-O-Lite Sign Contractors, Inc.*, 510 A.2d 319, 321 (Law Div. 1986); 5 Bruner & O'Connor Construction Law § 7:322. *Relief from disruption caused by COVID-19 pandemic* (Dec. 2020).

For example, in *TEC Olmos, LLC v. ConocoPhillips Company*, 555 S.W.3d 176 (Tex. App. Houston 1st Dist. 2018), *review denied*, (Aug. 30, 2019), the court held that the specified events in the clause (fires, floods, storms, and acts of God) were limited to natural or man-made disasters. Indeed, the term "act of God" has traditionally been held to include natural disasters such as earthquakes, hurricanes and tornadoes. *See, American Nat. Red Cross v. Vinton Roofing Co., Inc*., 629 F. Supp. 2d 5, 9 (D.D.C. 2009) ("'[a]n Act of God' is the result of the direct, immediate and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention, and is of such character that it could not have been prevented or avoided by foresight or prudence."). *See also*, *Gleeson v. Virginia Midland Ry. Co*., 140 U.S. 435, 439 (1891); *R & B Falcon Corp. v. American Exploration Co*., 154 F. Supp. 2d 969, 973 (S.D. Tex. 2001) ("To determine whether a certain event excuses performance, a court should look to the language that the parties specifically bargained for in the contract to determine the parties' intent, rather than resorting to any traditional definition of the term.") (recognizing that courts have also found "sudden deaths and illnesses" to be acts of God). Therefore, whether COVID-19 qualifies as an "act of God" or "similar event" may be subject to dispute.

c. Unforeseeability As A Requirement

There is also a split of authority in terms of whether the event arguably excusing performance must have been unforeseeable at the time the parties negotiated their agreement.

Compare *TEC Olmos, LLC v. ConocoPhillips Company*, 555 S.W.3d 176, 184 (Tex. App. Houston 1st Dist. 2018), review denied, (Aug. 30, 2019) (relief under a "catch-all" excuse provision requires a showing of unforseeability); P*hibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D. N.Y. 1989) (similar holding) with *Perlman, supra,* at 1248 ("Because the clause labelled 'force majeure' in the Lease does not mandate that the force majeure event be unforeseeable or beyond the control of Perlman before performance is excused, the district court erred when it supplied those terms as a rule of law."); *Drummond Coal Sales, Inc. v. Kinder Morgan Operating LP "C"*, 2017 WL 3149442 (N.D. Ala. 2017) (similar holding).

While some courts will interpret the force majeure clause strictly as is, others also demand a showing of unforeseeability and imply that term into the contract. "The events covered by a force majeure clause depend on the specific language of the contract, but generally, an event must be both outside of the control of the parties and unforeseeable." *In re Flying Cow Ranch HC, LLC*, *supra*, at *2; see also, *U.S. v. Hampton Roads Sanitation Dept*., 75 Env't. Rep. Cas. (BNA) 1842, 2012 WL 1109030 (E.D. Va. 2012) (force majeure clause implicitly included unforeseeability as an element because best efforts language in clause "includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any such event"); *Watson Laboratories, Inc.*, *supra*, 178 F. Supp. 2d 1099 (under California law, elements of a common law force majeure defense, such as the requirement that a force majeure event be beyond the party's reasonable control, are often read into the force majeure provision of a contract); *Sabine Corp. v. ONG Western, Inc.*, 725 F. Supp. 1157 W.D. Okla. 1989) (rejecting requirement of unforeseeability where clause did not specify that the event must be unforeseeable); *Kodiak 1981 Drilling Partnership v. Delhi Gas Pipeline Corp*., 736 S.W.2d 715 (Tex. App. San Antonio 1987), writ

refused n.r.e., (Oct. 7, 1987) (finding that other courts' holdings requiring that a specified force majeure event also be unforeseeable had not been approved by any Texas court, state or federal); *Oosten v. Hay Haulers Dairy Employees & Helpers Union*, 45 Cal.2d 784, 291 P.2d 17, 20–21 (1955) (quoting Corbin on Contracts § 1342); see also N*issho–Iwai Co., Ltd. v. Occidental Crude Sales, Inc*., 729 F.2d 1530, 1540 (5th Cir.1984) ("We can not [sic] always be sure what 'causes are beyond the control' of the contractor.... No contractor is excused under such an express provision unless he shows affirmatively that his failure to perform was proximately caused by a contingency within its terms; that, in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive.")

Further note that because foreseeability may be required to demonstrate force majeure relief, relief may only be available under those contracts which pre-date COVID-19. For example, in regards to a contract that was amended in April 2020, at least one court called into question the possibility that COVID-19 disruption was known at the time of the contract's amendment. The court reasoned this was due to COVID-19 being nationally on the horizon. Further, the court noted that the party seeking relief had failed to give notice to the contract counter-party, as required by the contract. *The Lampo Group, LLC*, supra, at *8.

d. Notice of Claim and Perfecting Claim

Force majeure clauses frequently require the party seeking relief to undertake certain actions to preserve its right to relief. Common requirements include: (1) providing timely notice; (2) mitigating the loss; and (3) bearing the burden of proof with respect to the claim. *See*, *Sun Operating Ltd. Partnership* v. Holt, 984 S.W.2d 277 (Tex. App. Amarillo 1998) (where force majeure clause said nothing about requiring due diligence or reasonable steps

to avoid or overcome force majeure event, trial court's instruction to jury that interruption in the production could not be deemed force majeure event unless the well operators had exercised due diligence and taken all reasonable steps to avoid, remove, or overcome the effects, was reversable error); *Virginia Power Energy Marketing, Inc. v. Apache Corp*., 297 S.W.3d 397 (Tex. App. Houston 14th Dist. 2009) (force majeure clause requiring a party to use "reasonable efforts" to mitigate the effects of the qualifying event did not extend to requiring the party to deliver the product to locations in direct contravention of the agreement's express terms concerning delivery locations).

e. What if the Contract Doesn't have a Force Majeure Clause?

Even if the contract does not include a force majeure clause, a claimant may not be entirely out of luck, as some jurisdictions have statutes which imply into every contract the concept of force majeure, or, at a minimum, impossibility and frustration of purpose, which will be fully discussed in Section V below.

D. Can A Contractor Be Awarded Compensation/Lost Productivity Claims Due to Force Majeure?

As noted, not all construction projects were shut down due to COVID-19. Instead, in many areas construction was allowed to continue, subject to contractors abiding by COVID-19 restrictions such as social distancing, wearing personal protective equipment ("PPE"), washing hands, and establishing supervision over the compliance of COVID-19 restrictions. In such cases, contract performance was not rendered impossible or illegal, but it was conditioned such that it went more slowly – and even more slowly yet as workers contracted COVID-19 resulting in quarantines of labor forces and groups of workers being out sick. These events created lost productivity issues for most contractors. For instance, for those activities where workers must be close together to assure proper installation, once workers had to socially distance, now only a few

workers could be in a designated area at one time and performance took longer. Similar issues were encountered by contractors trying to send laborers up elevators in tower projects – if only a few could go up the elevator at a time due to social distancing, then all of a sudden it took well over an hour to get workers up the tower to start the actual installation work for the day, thereby limiting the number of available hours that actual work could be done and slowed performance or caused overtime work to be incurred to catch up. All of these events resulted in additional costs to contractors, and many contractors are still trying to recover those costs.

Force majeure clauses typically entitles the contractor to additional time but are not ideally suited for claims for additional compensation, which typically have to be pursued by the contractor under other contract provisions and alternative theories. Such other provisions include emergency provisions, work directives, change order provisions, suspension and termination provisions, and change in law provisions.

For instance, Section 10.4 of the A201, relating to emergencies, may apply, as it provides as follows: "In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7."

Further, change orders and change directives (Articles 7 and 15 of the A201) may entitle the contractor to additional compensation, depending upon the circumstances and how they were drafted, particularly if the owner issued written directives as a result of the pandemic that directed the contractor to keep working during the pandemic (i.e., rather than just take the additional time it would have been entitled to under the force majeure clause) and even altered the contractor's

work (such as by imposing COVID-19 measures). The availability of such relief will likely turn on how the situation was documented at the time and how each party gave notice to the other.

If on the other hand, the owner issued a stop work notice as a result of COVID-19 rather than keep the contractor working, the contractor may be entitled to additional compensation where it complies with the conditions set forth in the contract and stop work notice if applicable. If the owner actually suspended or terminated the contract based upon the force majeure event, the contractor may be entitled to additional compensation depending upon the language of the pertinent clauses.

Finally, many contracts contain a "change-in-law" provision which allows for an adjustment in price or time in the event of a governmental order or change to applicable law makes the contract performance more difficult.

IV. Can The Contractor Terminate Its Contract Due To COVID-19?

A. Article 14 of the A201 General Conditions

Termination of a construction contract due to COVID-19 is likely to be an uphill battle given that, in most instances, COVID-19 only resulted in a temporary shut-down of work, and in many instances, did not result in any shut-down of work at all but simply made work more difficult.

AIA Contracts contain a force majeure provision at Article 14 of the A201, most notably at section 14.1.1, 14.1.2 and 14.1.4. Section 14.1.1 allows the contractor to terminate the prime contract if all of the following are met:

> § 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:
>
> .1 Issuance of an order of a court or other public authority having

jurisdiction that requires **all Work** to be stopped

.2 An act of government, such as a declaration of national emergency that requires **all Work** to be stopped;…

(Emphasis added.)

Section 14.1.1 is a force majeure clause because it provides excuses the performance of a party (the contractor) when events outside their control make performance impossible or impracticable. *See, FORCE-MAJEURE CLAUSE*, Black's Law Dictionary (11th ed. 2019); 5 Bruner & O'Connor Construction Law § 7:322. *Relief from disruption caused by COVID-19 pandemic* (Dec. 2020) (identifying termination and cancellation provisions as force majeure clauses); *see also In re CEC Entertainment, Inc., et al.*, No. 20-33162, 2020 WL 7356380, at *5 (Bankr. S.D. Tex. Dec. 14, 2020) (a force majeure clause is a "contractual clause that excuses performance of contractual obligations—either wholly or for the duration of the force majeure—upon the occurrence of a covered event which is beyond the control of either party of the contract").

Section 14.1.1 is very restrictive as it imposes at least the following three conditions upon the contractor: (i) Work must have stopped for at least 30 consecutive days – not just 30 days, but 30 *consecutive* days; (ii) the stoppage must be through no act or fault of the contractor or its subcontractors; and (iii) *ALL* Work must have stopped.

B. What "Work" Must Have Stopped Under Article 14 of the A201

As noted, to invoke Article 14's termination provision, the contractor must demonstrate that ALL Work was stopped for a consecutive 30 days.

Section 14.1.1 uses the capitalized version of the word "Work," referencing the definition set forth in Section 1.1.3, which defines work as included the "labor, materials, equipment and services" that the contractor is required to provide "to fulfill the Contractors obligations." *See*, *In re Frischhertz Const. Co., Inc.*, 2007 WL 2965049, supra at *2–3.

As set forth in Section 1.1.3 of the A201, the term "Work" means "the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project."

The key inquiry is not whether a government order stopped work by its terms but whether work actually stopped due to the order. *Audubon Comm'n v. Roy Frischhertz Constr. Co., Inc*., 2008 WL 11374338, at *1 (E.D. La. Sept. 30, 2008), *aff'd in part, rev'd in part sub nom*, *In re Roy Frischhertz Const. Co. Inc*., 401 F. App'x 861 (5th Cir. 2010) ("the act of the government need not by its own terms require work stoppage for thirty consecutive days. Instead, it must only be the cause of an actual work stoppage for thirty consecutive days").

As with other force majeure provisions, the contractor bears the burden of proof that its termination was justified. *See*, *California Farm Bureau Fed'n v. State Water Res. Control Bd*., 51 Cal. 4th 421, 436 (2011), as modified (Apr. 20, 2011) ("The burden of producing evidence as to a particular fact rests on the party with the burden of proof as to that fact."); see also 5 Bruner & O'Connor Construction Law § 18:35 *Contract termination for cause—Termination for cause clauses* (Aug 2020) ("As the terminating party, the contractor must shoulder the burden of proving the requisite circumstances justifying a 30-day suspension and termination.").

C. Seven Days' Notice and Opportunity To Cure Is Required

In addition to showing a 30 consecutive day stoppage of all Work, the contractor must also provide a seven-day cure notice required under Section 14.1.3. Because the cure period is designed to allow for a cure of the condition within that seven days, the contractor must actually

demonstrate the complete stoppage of ALL Work for a total of 37 days. *See*, 5 Bruner & O'Connor Construction Law § 18:35. *Contract termination for cause—Termination for cause clauses—American Institute of Architects termination for cause clauses—Termination by contractor for cause* (Aug 2020) (Section 14.1.1 gives the owner "37 consecutive days in which either to resolve or to mitigate the causes of the work stoppage").

Therefore, it will be a rare circumstance that a contractor can point to a stoppage of ALL Work for a consecutive 30-day period through no fault of the contractor. If the contractor has done any Work at all at any time during the claimed 30-day period, it cannot terminate. Moreover, if the failure to perform Work was in part due to the contractor's fault at all, even if just in part, that similarly eliminates the contractor's ability to terminate under Article 14.1.1. The sum and substance is that Article 14's termination provisions are designed as a draconian remedy available only in the severest of circumstances, and are unlikely to be capable of being triggered simply based upon difficulties in the performance of the Work during COVID-19 for instance.

D. Contractors Risk a Finding of Termination in Bad Faith

Contractors who attempt to terminate their contracts always risk a determination that their termination was in bad faith. *See*, 5 Bruner & O'Connor Construction Law § 18:35, *Contract termination for cause—Termination for cause clauses—American Institute of Architects termination for cause clauses—Termination by contractor for cause* (Aug 2020) ("Of paramount risk to any contractor that actually stops work is the possibility that the work stoppage will be viewed in hindsight as having been caused by other circumstances and thus unjustified. If so, the work stoppage itself would constitute a breach of contract.").

First, the contractor must not itself be in breach when giving the seven day notice. If the contractor is in breach, the court will likely find the termination was in bad faith and is itself a breach of contract. *See, Winter v. Pleasant*, 222 P.3d 828, 837–38 (Wyo. 2010) (it was unnecessary to determine whether work actually stopped under Section 14.1.1.1.4 because at the time contractor attempted to terminate they had already breached the Prime Contract "due to numerous construction defects and changing plans without written change order documentation").

Second, the contractor must not have "unclean hands," or pursuing the termination for improper and inequitable purposes. *See*, *Burger v. Kuimelis*, 325 F. Supp. 2d 1026, 1039 (N.D. Cal. 2004) (unclean hands doctrine prevented a party from avoiding liability under a contract on the basis of illegality where they entered into the contract intending to violate HUD regulations as the doctrine "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief") (citations omitted).

Given the potentially severe consequences of the termination decision, termination is always a risky option for a contractor.

V. Common Law Theories—Impossibility and Frustration of Purpose

A. Implied Force Majeure Provisions

As set forth above, many courts enforce force majeure clauses according to their terms, and the force majeure contract terms should control over common law theories. *See*, *Perlman* supra, at 1248 ("The language in the force majeure clause ... is unambiguous and its terms were specifically bargained for by both parties. Therefore, the [common law] 'doctrine' of force majeure should not supersede the specific terms bargained for in the contract.").

However, the common law elements of force majeure defenses are read into force majeure provisions of a contract where the provisions of a contract are silent. *Watson Labs., Inc., supra,* at 1107–11 (C.D. Cal. 2001) ("[E]lements of the common law force majeure defense are often read into the force majeure provision of a contract.") (dicta—Court found force majeure event was within the control of party and so under either common law of force majeure or the express terms of the contract relief was unavailable); *see also* 5 Bruner & O'Connor Construction Law § 7:322. *Relief from disruption caused by COVID-19 pandemic* (Dec. 2020) (California requires proof that a force majeure event was not foreseeable even relevant contract provisions do not expressly provide for this requirement); *Nissho–Iwai Co., Ltd.*, *supra*, at 1540 ("the California law of force majeure requires us to apply a reasonable control limitation to each specified event, regardless of what generalized contract interpretation rules would suggest"); *Neal–Cooper Grain Company v. Texas Gulf Sulphur Company*, 508 F.2d 283, 293 (7th Cir.1974) (applying elements of Uniform Commercial Code impracticability defense despite the fact that the contract contained a force majeure clause that specifically enumerated excusing events). In California, there is a statute embodying the common law force majeure defenses. *See,* Cal. Civ. Code § 1511.

B. Impossibility and Frustration Under the Restatement (Second) of Contracts

In addition, the concepts of impossibility and frustration of purpose are often invoked. The Restatement (Second) of Contracts provides for relief when, after a contract is made, an event occurs that makes a party's performance impracticable or that substantially frustrates the party's purpose through no fault of that party and the non-occurrence of the event was a basic assumption underlying the contract. Restatement (Second) of Contracts, §§ 261, 264, and 265. The Restatement speaks in terms of impracticability as § 261 excuses contract obligations where,

after the contract is made, a party's performance is made impracticable without his fault by the occurrence of an event or non-occurrence of which was a basic assumption under which the contract was formed. Similarly, § 263 provides excuse where there occurs the destruction, deterioration or failure to come into existence of the thing necessary for performance. Section 264 addresses the inability or significant hindrance of performance by governmental regulation or order.

Many courts have adopted the Restatement (Second) of Contracts characterization of the doctrines of impossibility, impracticability, and frustration. *See, e.g., Boston Plate & Window Glass Co. v. John Bowen Co.*, 335 Mass. 697, 141 N.E.2d 715 (1957); *Baetjer v. New England Alcohol Co.*, 319 Mass. 592, 66 N.E.2d 798 (1946); *Butterfield v. Byron*, 153 Mass. 517, 27 N.E. 667 (1891).

Under the impossibility doctrine, "where from the nature of the contract it appears that the parties must from the beginning have contemplated the continued existence of some particular specified thing as the foundation of what was to be done, then, in the absence of any warranty that the thing shall exist ... the parties shall be excused ... [when] performance becomes impossible from the accidental perishing of the thing without the fault of either party." *Boston Plate & Window Glass Co.*, *supra*, at 700, quoting *Hawkes v. Kehoe*, 193 Mass. 419, 423, 79 N.E. 766 (1907).

By contrast, under the doctrine of frustration, "[p]erformance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by [the] fortuitous event...." *Lloyd v. Murphy*, 25 Cal.2d 48, 53 (1944). "Frustration of purpose" is a doctrine that offers a defense to the enforcement of a contract when "the reasons for performing the contract cease to exist due to an unforeseeable event which destroys the reasons for performing

the contract." *See*, *Structure Tone v. Universal Servs. Grp., Ltd*., 929 N.Y.S.2d 242, 246 (1st Dep't 2011). However, the frustration of purpose doctrine does not excuse nonperformance when "the parties have expressly agreed to the contrary." Cal. Civ. Code § 1511(2).

Whereas impossibility or impracticability focuses on an unexpected occurrence of an intervening act, which act makes performance impossible or, at a minimum, an undue hardship, the concept of frustration focuses on a party's principal purpose in making the contract. If the contract is frustrated without that party's fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract is based, the doctrine excuses performance as the supervening event causes a failure of consideration or total destruction of the expected value of the performance. Compare *Facto v. Pantagis*, 390 N.J. Super. 227, 915 A.2d 59 (App. Div. 2007) (impracticability), with, *NPS, LLC v. Ambac Assur. Corp*., 706 F. Supp. 2d 162 (D. Mass. 2010) (frustration).

The principal question in both kinds of cases remains "whether an unanticipated circumstance, the risk of which should not fairly be thrown on the promisor, has made performance vitally different from what was reasonably to be expected." *See*, *Lloyd*, supra at 54 (frustration); *Mishara Constr. Co., Inc. v. Transit-Mixed Concrete Corp*., 310 N.E.2d 363 (Mass. 1974) (impossibility).

C. Less Profitability Does Not Mean Impossibility or Frustration of Purpose

As with force majeure clauses, it not enough that performance will be less profitable for an affected party or even that the party will sustain a loss. *Rockland Dev. Assocs. v. Richlou Auto Body*, 570 N.Y.S.2d 343, 344 (2d Dep't 1991). Changed economic circumstances also provide no basis for changing the parties' bargain. Restatement (Second) of Contracts § 265 (1981) ("It is not

enough that the transaction has become less profitable for the affected party or even that he will sustain a loss."); *see also* 30 Williston on Contracts § 77:96 (4th ed.) (a party's "performance will be excused where the loss nearly or completely destroys the purpose that all parties to the bargain contemplated."). "It is not enough that [defendants] had in mind some specific object without which [they] would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense." Restatement (Second) of Contracts § 265 (1981). Nor is the defense available if the terms of the contract impose the relevant risks on one of the parties. *Strauss v. Long Island Sports, Inc.*, 401 N.Y.S.2d 233, 238 (2d Dep't 1978).

Therefore, contractors cannot expect to gain more relief through impossibility and frustration defenses if the same relief would have been foreclosed by the contract's force majeure clause.

VI. Federal Projects – Force Majeure and Lost Productivity

A. Delays Under the FAR

Federal Acquisitions Requisition ("FAR") § 52.249-10 and 52.249-14 govern termination of a contractor for causing delay on a Federal project. Whereas previous sections of this paper discussed the contractor's right to terminate, this section discusses the opposite – the risk that the contractor has of being terminated for cause for delay on a Federal project unless such delay is excusable. Presumably, most contractors were able to avoid termination on Federal projects if the cause for delay was indeed COVID-19. These termination provisions are nevertheless the backdrop for the reverse, which is the contractor's request for an extension of time.

FAR § 52.249-10 relates to Government's right to hold a contractor in default for delay,

among other reasons. However, FAR § 52.249-10(b) provides that the contractor may not be held in default and may not be terminated or charged with damages if "The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor." Examples that are given by the FAR include "delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor," "Acts of God," "Acts of the Government in either its sovereign or contractual capacity," and "Epidemics," among others. FAR § 52.249-10(b)(1).

FAR § 52.249-14 deals with "Excusable Delays" and provides, "Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God …, (2) acts of the Government in either its sovereign or contractual capacity, …(5) epidemics, (6) quarantine restrictions,... In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor." Notably, the contractor must notify the Government within 10 days of the beginning of the delay in order to be excused from delays on account of such events. FAR § 52.249-10(b)(2).

Under the excusable delay clause, the contractor has the burden of proving that the delay was excusable under the terms of the default provision of the contract. 48 C.F.R. § 52.249–10(b). When the contractor is seeking extensions of contract time, for changes and excusable delay, which will relieve it from the consequences of having failed to complete the work within the time allowed for performance, it has the burden of establishing by a preponderance of the evidence not only the existence of an excusable cause of delay but also the extent to which completion of

the contract work as a whole was delayed thereby. 48 C.F.R. § 52.249–10(b). *Morganti Nat., Inc. v. U.S.*, 49 Fed.Cl. 110 (2001), *aff'd* 36 Fed.Appx. 452, 2002 WL 1271968 (2002), rehearing and rehearing en banc denied.

Not just any delay counts; the contractor must demonstrate critical path delay. To prove that delay was excusable under terms of default provision of contract, a government contractor must demonstrate that the excusable event caused a delay to the overall completion of the contract, i.e., that the delay affected activities on the critical path. 48 C.F.R. § 52.249–10(b). *Morganti Nat., Inc., supra,* 49 Fed.Cl. 110. The fact that a government contractor may also have caused concurrent delay is not fatal to the contractor's claim for additional time due to excusable delay; if a period of delay can be attributed simultaneously to the actions of both the government and the contractor, there are said to be concurrent delays, and the result is an excusable but not a compensable delay. 48 C.F.R. § 52.249–10(b). *Morganti Nat., Inc*., *supra*, 49 Fed.Cl. 110.

To establish entitlement to an extension based on excusable delay, federal contractor must show that the delay resulted from unforeseeable causes beyond the control and without the fault or negligence of the contractor, and that the unforeseeable cause delayed overall contract completion, in that it affected the critical path of performance. 48 C.F.R. § 52.249–10(b)(1). *Sauer Inc. v. Danzig*, 224 F.3d 1340 (2000), on remand 2001 WL 865382.

If the contractor is successful, the Federal government cannot assess liquidated damages against a contractor for a failure to timely complete work under a contract if the delay in completing the work arises from unforeseeable causes, such as acts of the government, that are beyond the control and without the fault or negligence of the contractor. *K-Con Building Systems, Inc. v. United States*, 115 Fed.Cl. 558 (2014).

B. Claims for Additional Compensation under the FAR

Contract changes and equitable adjustments are governed by FAR 52.243–4, which permits the government to make changes to the general scope of the contract via oral or written change orders, and gives the contractor the right to an equitable adjustment in costs and time required for performance. FAR 52.243–4(a)–(d).

For any changes pursuant to FAR 52.243–4, the contractor bears the burden of establishing its costs to justify an equitable adjustment *Daly Construction, Inc. v. Garrett,* 5 F.3d 520, 522 (Fed.Cir.1993). An actual cost approach, as distinguished from a total cost approach, is preferred. *Wunderlich Contracting Co. v. United States,* 173 Ct.Cl. 180, 351 F.2d 956, 964–65 (1965). Under the total cost approach, the contractor simply provides evidence of the total cost of completing the contract and compares that to the pre-bid estimates to compute damages without showing an "approximate extent" to which additional costs were attributable to the actions by the government. *Id.* Instead, to establish actual costs, a contractor should provide an approximate allocation of the time and costs associated with the change orders, separate from costs that would have been incurred as part of the contract. *See, Id.* at 966. The contractor "need not prove his damages with absolute certainty or mathematical exactitude. It is sufficient if he furnishes the court with a reasonable basis for computation, even though the result is only approximate." *Id.* at 968 (citations omitted); *see also Daly Construction, Inc. v. Garrett, III,* 5 F.3d 520, 522 (1993) (affirming Board's denial of compensation because plaintiff failed to establish some "reasonable method for computing the requested compensation"); see also, *Edge Const. Co. v. United States*, 95 Fed. Cl. 407, 415 (2010) (Contractor's costs associated with lost productivity, under contract awarded by Department of Veterans Affairs for construction of national cemetery,

due to unseasonable weather conditions, rain, freezing conditions, and mud were not recoverable via equitable adjustment, pursuant to federal acquisition regulations providing for extension of time for excusable delays, but providing equitable adjustments only for changes ordered or directed by government, since delays that contractor experienced from unusually severe weather conditions were not caused by government.)

Absent a provision in a government contract under which the government assumes an obligation for a risk of delay, the default clause in the contract limits the contractor to a time extension when a delay is caused by an "act of government"; however, even in such circumstances, the changes clause can be used to provide an equitable adjustment when the government violates its implied duty to cooperate, 48 C.F.R. §§ 52.243–4, 52.249–10. *Ryco Const., Inc. v. U.S.*, 55 Fed.Cl. 184 (2002).

Nevertheless, FAR § 52.242-14 may provide an avenue for claims for additional compensation as it states that "The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government." *See,* FAR § 52.242-14(a). However, a contractor's claims are limited and specifically not allowed (1) "for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved . . .," and (2) "unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract." *Id.* at (c). Therefore, as with many other similar provisions and other force majeure clauses, contractors must give notice as soon as possible once a qualifying event occurs.

Moreover, to be successful under the FAR, contractors must show that the delay is caused by the government's action or inaction, and to the extent a delay is caused by the fault or negligence of the contractor, no adjustment is warranted. *Sergent Mech. Sys., Inc. v. U.S.*, 34 Fed.Cl. 505, 526-27 (1995); *George Sollitt Const. Co. v. U.S.*, 64 Fed.Cl. 229 (2005) (holding that under the standard Suspension of Work clause found in government fixed-price construction contracts, the United States may be liable for causing delays to contract work; if the contractor suffers increased costs because of government action or inaction which effectively suspends the contractor's progress on contract work, the clause may provide a remedy). Therefore, relief under such provisions is technically more limited and may be dependent upon how the paper trail and circumstances transpired. For instance, it may be necessary to be able to show not only that COVID-19 occurred, but that something more was required by the Government of the contractor as a result of COVID-19 and/or that the Government interrupted or otherwise affected the work.

VII. Does A Contractor Have a Duty To Hold Bids Open for Projects Delayed Due to COVID?

Many contractors have experienced the situation where a project they bid on pre-COVID-19 was shelved during COVID-19 and then perhaps months or over a year later, an owner or general contractor wishes to hold them to their bid without a cost increase. In general, subcontractors are pushing back on general contractors and saying no to such demands.

This is an issue on public works projects. At least in California, the law is that if the general contractor relied upon the subcontractor's bid and was awarded the prime contract, the subcontractor has a duty to keep its bid open for a reasonable time which is considered an irrevocable offer. If the subcontractor unreasonably delays in executing a subcontract, then the general contractor can terminate and replace the subcontractor and pursue the subcontractor for

excess costs incurred based upon the replacement subcontractor under the Subletting and Subcontracting Fair Practice Act, found at California Public Contracts Code Section 4100 *et seq*.

However, if the general contractor unreasonably delays in subcontracting to the point where there are changed circumstances, then the subcontractor is released from its obligations. *William A. Drennan v. Star Paving Company*, 51 Cal.2d 409, 415 (1958).

Further, if the subcontract which is presented for signature is substantially different from the bid, then it is considered a counteroffer and the subcontractor is not required to sign the subcontract as is (and if it refuses, it is not liable). In such circumstances, the general contractor cannot claim detrimental reliance on the bid or promissory estoppel, if the general contractor has taken actions which undercut that reliance or sent a new subcontract (i.e., a new counteroffer) that does not comply with the original offer, the bid. *See, e.g., Flintco Pacific, Inc. v. TEC Management Consultants, Inc*., 1 Cal.App. 5th 727, 733-736 (2016).

If a general contractor delayed for over a year to subcontract, and particularly if there are substantial cost escalations involved, it seems more likely than not that the subcontractor would be relieved of its bid. By contrast, where just a few months have gone by, it becomes more questionable, and one must look at the totality of the circumstances.

VIII. Labor/Employment-Related Issues Due to COVID-19

On top of everything else, COVID-19 caused substantial labor and employment issues.

First, the shortage labor itself caused issues, ranging from the inability to find sufficient labor to staff jobsites. Among other things, contractors often faced union labor shortages. To maintain required union ratios, some contractors were forced to hire more journeymen (where apprentices were in short supply), charging them to project owners at apprentice rates but still

paying them at journeymen rates.

Second, contractors had to deal with vaccine mandates in several states and counties until the U.S. Supreme Court struck down mandatory vaccine requirements. Because some laborers refused to vaccinate, the mandates (while in effect) resulted in workers leaving companies and shifted the labor force.

Additionally, many employers have struggled to figure out the many changing laws related to workplace requirements (masks, quarantines, etc.) OSHA mandated that contractors provide PPE to workers. Certain jurisdictions mandated that work could continue on job sites only so long as COVID-19 related precautions were taken, including providing PPE for workers and adhering to social distancing. Some even required that contractors have a designated supervisor to watch over workers to assure that the requirements were adhered to.

With respect to workers compensation, California and a few jurisdictions have created an automatic presumption that an employee contracted COVID-19 on the job. For instance, in California, SB1159 was enacted to codify Executive Order N-62-20, which created a rebuttable presumption for eligibility for workers' compensation benefits in certain situations, including where there is an "outbreak" at the employee's worksite. Thus, if there is an "outbreak" at the worksite and an employee catches COVID-19, there is a presumption that it is an occupational injury (happened in the workplace) such that they can apply for and receive workers comp benefits. While this may seem like a problem for employers, there is in fact a silver lining –there is a protection to employers in that if the "injury" is covered by the workers' compensation system then there is an automatic prohibition by statute on the employee suing its employer for negligence. That is, negligence claims arising in the course and scope of employment are

preempted under the Workers Compensation Act ("WCA"). *See,* Cal. Labor Code 3600(a) ("Liability for the compensation provided by this division, in lieu of any other liability whatsoever... shall, *without regard to negligence*, exist against an employer for injury ... arising out of an in the course of the employment...") (emphasis added); *Fermino v. Fedco, Inc.* 7 Cal.4th 701, 710 (1994) ("Both the language and the legislative history of the [WCA] make clear that the Legislature, in setting the terms of the compensation bargain, was focused on eliminating 'common law tort concepts of negligence.'"). Therefore, what seems like it creates more risk for employers should in fact limit their liability to their employees.[2]

Employers have also faced, and continue to face, new OSHA laws and reporting requirements, the subject of which is too great to go into in this paper, and the laws continue to change as well. Employers are encouraged to seek legal counsel to discuss their needs.

Luckily, labor shortages and vaccine mandate issues related to COVID-19 seem to have resolved themselves for now, although with new COVID-19 cases on the rise, contractors are not yet in the clear on all labor-related issues.

IX. Dealing With Material Escalation Issues

One thing that has not been resolved is material escalation problems on construction projects, an issue that seems to be getting worse as a result of inflation, continued supply chain problems, and now even the war in Ukraine. Some construction managers report that that they are receiving material increase notifications from subcontractors every 30 to 60 days. The price of drywall, insulation, framing and steel have been rising. Steel has been going up as well, made

[2] Thank you to the employment law group at Higgs Fletcher & Mack, LLP in San Diego, California, especially Edwin Boniske, Esq. and Francisco Loayza, Esq., for providing insight into the issue of workers compensation claims resulting from COVID-19.

worse by the bombing and closure of the ArcelorMittal plant in Ukraine, one of the largest steel mills in the world.

General contractors will want to lock in their subcontractors and suppliers into fixed price contracts as soon as possible, and to protect themselves in their contracts with owners against future price increases. Alternatively, general contractors may wish to work out arrangements with owners for owners to purchase the material directly to avoid the risk of cost escalation.

Subcontractors and suppliers will want to make sure that their bids and purchase orders clearly state that prices are held open for only 30 days but subject to change thereafter. While most subconcontractors may be good about this with respect to their bids, they often forget to include provisions in the subcontract about timing including that their prices are good so long as notice to proceed is given by a certain date and the work is capable of being completed by a certain date. Subcontractors need to make sure that the same timing restrictions make it into the subcontract agreement in case there are delays, so that they have the right to ask for cost escalation because the time for performance was a material term of the subcontract agreement.

On Federal projects, where there are no change orders allowed for the most part, there nevertheless may be some flexibility in some federal contracts to allow a re-bidding of certain work scope if the costs have increased to such a degree that it is outside of the normal course for reasons outside of the contractor's control or changes in the law.

X. Conclusions and Future Outlook

COVID-19 issues were not uniformly felt throughout the construction industry but were very specific to the impact on each region. It appears that the aftermath of COVID-19 is the same in that respect in that the effects are not uniform, with the exception that labor shortages

seem to be mostly resolved, and supply chain problems seem to persist. Otherwise, certain industries are relatively unaffected whereas others are still seeing dramatic shifts and are still working through claims and problems from the COVID-19 era. For example, here are some observations:

- Certain contractors have been able to negotiate with owners their lost productivity claims from COVID-19 or even turn their contracts into time and material contracts due to their leverage, whereas others are still fighting for compensation through the claims process.
- With respect to material escalation, some contractors have negotiated to de-risk their contracts and push that risk to the owner, whereas others may be hit hard with cost escalation.
- Bridge builders report that due to the cost of steel, new public works bridge projects seem to be slow. By contrast, other contractors report that they are seeing increased volume due to government money directed toward infrastructure projects.
- In certain areas of the country, hospitality builders are building hotels as fast as developers can permit them, whereas in other areas of the country, the market has all but dried up and hospitality contractors are hurting for work (particularly in areas which previously relied upon a high traffic of business travelers and less vacation travelers).

Further, in the midst of inflation, material increases and continued supply chain problems, the country may be headed into a recession which will further strain those areas which may already be feeling the pinch. Particularly, in a recession, subcontractors tend to feel the brunt of it given the large amounts of labor and material they typically have to front before

being paid. As subcontractors show signs of weakening, owners and general contractors will again wish to impose joint checking and other measures to make sure that their payments are used for proper purposes.

Last but not least, because COVID-19 cases are on the rise again (albeit less severe), as contractors settle their force majeure and lost productivity claims, if they have ongoing work on the same contracts, they should be sure to reserve claims for future problems in case they again find themselves having to quarantine workers and experiencing delays on those same projects.

All in all, most contractors interviewed for this article are cautiously optimistic for the future. However, as Oscar Wilde said in the 1800's, "To expect the unexpected shows a thoroughly modern intellect."

Click here for a free resource, a Timeline of Construction Remedies Under California Law, which contains common deadlines on public and private works projects, in an easy-to-use format designed for every day desktop use by construction professionals to make sure deadlines for mechanics' liens, stop notices, payment bond claims and other claims are not missed:

https://higgslaw.com/wp-content/uploads/2020/08/WORLEY-TIMELINE-OF-CALIFORNIA-CONSTRUCTION-REMEDIES-final.pdf