

COVID-19 – Legal Information for AGC/MN Members

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President Trump Guidelines

- March 16, 2020, https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf
- “Avoid social gatherings in groups of more than 10 people.”
- “IF YOU WORK IN A CRITICAL INFRASTRUCTURE INDUSTRY, as defined by the Department of Homeland Security . . . you have a special responsibility to maintain your normal work schedule. You and your employers should follow CDC guidance to protect your health at work.”
- Transportation systems sector is listed as included.
<https://www.cisa.gov/critical-infrastructure-sectors>

CDC

- <https://www.cdc.gov/coronavirus/2019-nCoV/index.html>
- Offers guidance to protect yourself and limit spread, such as:
 - “Avoid close contact with people who are sick” and “Put distance between yourself and other people if COVID-19 is spreading in your community. This is especially important for people who are at higher risk of getting very sick.”
 - Close contact = 6 feet
 - Higher risk:
 - Older adults
 - People with heart disease, diabetes, lung disease

Governor Walz Executive Orders

- E.O. 20-01 (March 13, 2020). COVID-19 declared a public health “peacetime emergency.”
 - “All state agencies” to support “healthcare providers” and “public health organizations”
 - MN Dept. Health (MDH) to provide guidance, “including guidance on how to best prevent and reduce community spread”
 - Urges “individual Minnesotans to follow MDH guidance regarding . . . public gatherings, social distancing”
 - Directs “all state agencies” to submit proposed orders and rules.
- E.O. 20-02 (March 15, 2020). Schools closed through March 27, 2020. Identifies “emergency workers” as “critical to State’s response”, non-exclusive list of “emergency workers”

Governor Walz Executive Orders

- E.O. 20-03 (March 16, 2020). The “pandemic presents an unprecedented challenge”. Orders on access to MN Vet. Homes.
- E.O. 20-04 (March 16, 2020). Reminds that violation of E.O. is a misdemeanor, and “inconsistent rules or ordinances of any agency ... are suspended during the emergency.” Orders restaurants, bars, theaters, gyms, amusement facilities, country clubs closed.
- E.O. 20-05 (March 16, 2020). Unemployment insurance measures. “Strict compliance” with Unemployment Insurance Law is suspended, presumes leave of absent is involuntary in 5 circumstances, and COVID payments will not be used “in computing future unemployment tax rate of a taxpaying employer”. Five week benefit limitation for business owners is waived.

Governor Walz Executive Orders

- E.O. 20-06 (March 17, 2020). Lifts restrictions on trucking of essential supplies including “food, medical supplies, and household items, related to the COVID-19 pandemic.”
- E.O. 20-07 (March 17, 2020). Executive branch workforce measures to allow for leave, hiring, reassignment, and transfer of employees between branches. Could have ramifications for MnDOT, Admin.

MDH

- Recommendations as of March 16, 2020
 - Cancel events where 50 people or more would gather.
 - “Events of any size should only be continued if they can be carried out with adherence to guidelines for protecting vulnerable populations, hand hygiene, and social distancing. When feasible, organizers could modify events to be virtual.”
 - Recommends “social distancing”
 - <https://www.health.state.mn.us/diseases/coronavirus/action.html>
- Guidance for Businesses and Employers (<https://www.health.state.mn.us/diseases/coronavirus/businesses.html>)
 - Emphasis is on employment issues (remote working, stay at home if sick, etc.)
 - No guidance on mitigating business impact

State Agencies

- MnDOT – no official guidance as of 3/17/2020 8:05 a.m.
 - MnDOT Twitter Post 3/15 – MnDOT has postponed public meetings and open houses for at least the next 30 days – deferring to MDH.
 - MnDOT Facebook Post 3/13 – same as above.
- Mn Admin – no guidance as of 3/17/2020 8:05 a.m.

MnDOT Standard Specification (2018 ed.)

- 1806.2.A “Excusable, non-compensable delays are delays that are not the Contractor’s or the Department’s fault or responsibility, and that could not have been foreseen by the Contractor. The Department will not compensate the Contractor for excusable, non-compensable delays. Excusable, non-compensable delays include, but are not limited to: (1) Delays due to . . . Epidemics . . . (3) Extraordinary delays in material deliveries the Contractor or its suppliers cannot foresee or avoid resulting from freight embargoes, government acts, or regional material shortages . . . (7) Delays due to acts of the government or a political subdivision other than the Department.”
- 1806.2.B. “Excusable, compensable delays are delays that are not the Contractor’s fault or responsibility, and are the Department’s fault or responsibility” and include . . . “(3) Delays due to Engineer-ordered suspension as specified in 1402.4 ‘Suspensions of Work Ordered by the Engineer.’”

MnDOT Standard Specification (2018 ed.)

- 1402.4 SUSPENSIONS OF WORK ORDERED BY THE ENGINEER If the performance of all or any portion of the work is **suspended or delayed by the Engineer in writing for an unreasonable period of time** (not originally anticipated, customary, or inherent to the construction industry) and the Contractor believes that additional compensation, or contract time, or both are due as a result of such suspension or delay, **the Contractor shall submit to the Engineer in writing a request for adjustment no later than 7 calendar days after receipt of notice to resume work.** The request shall set forth the reasons and support for such adjustment.
- Upon receipt, the Engineer will evaluate the Contractor's request. If the Engineer agrees that the cost, or time required for the performance of the Contract, or both have increased as a result of such suspension and the **suspension was caused by conditions beyond the control of and not the fault of the Contractor**, its suppliers, or subcontractors, and not caused by weather, the **Engineer will make an adjustment (excluding profit) and modify the contract in writing accordingly.** The Engineer will notify the Contractor of the determination whether or not an adjustment of the contract is warranted.
- The Department will not allow a contract adjustment unless the Contractor has submitted the request for adjustment within the time prescribed.
- The Department will not allow a contract adjustment under this clause to the extent that performance would have been suspended or delayed by any other cause, or for which an adjustment is provided for or excluded under any other term or condition of this Contract.

MnDOT Standard Specification (2018 ed.)

- 1402.1 – Contractor to provide notice as specified in 1403 and 1402.4, and the failure to do so “constitutes a waiver of the Contractor’s entitlement to compensation or a time extension and releases the Department from responsibility for providing a time extension.”
- 1403.2 – “The Contractor shall notify the Engineer **as soon as a Contract revision appears necessary**. The Contractor shall not start or continue with an activity or Contract Item for which a Contract revision may be necessary without authorization from the Engineer.”
- 1403.3 – Contractor to provide written notice including 7 specific items of information within **5 business days** for first notice under 1403.3.
- 1403.5 – Engineer to respond within **10 business days**.
- 1403.6 – Contractor must provide notice of intent to pursue claim under 1517 within **5 business days** of Engineer’s response.

MnDOT Standard Specification (2018 ed.)

- 1517.1 – No compensation or time if
 - 1517.1(1) Contractor does not provide notice.
 - 1517.1(2) Contractor does not permit Department to keep account of impacts and costs.
 - 1517.1(3) Contractor prevents Department from mitigating impacts and costs.
- 1517.2 – Claim submittal requirements.
 - Factual statements, narratives, documentation – i.e., Claim Book
 - Impact and Cost information
 - Schedule analysis under 1806.1 –
 - Cost narrative and substantiation in auditable format under 1721
- 1517.3 – Certification of claim
- 1517.4 – Audit – 24 categories of data required to be produced.

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MnDOT Standard Specification (2018 ed.)

- Termination 1809
- MnDOT may terminate under 1809(1) for
 - 1.1 – labor or material shortage
 - 1.2 – limitation imposed by law, rule, regulation, or order of the local, State, or Federal government
 - 1.3 – actions of the public enemy
- Compensation governed by 1904, 1905 (pricing of extra work, deleted work).
 - May include force account pricing if a different price cannot be negotiated.

AIA A201 General Conditions (2017 ed.)

- 8.3.1 “If the Contractor is delayed at any time in the commencement or progress of the Work by . . . (3) labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse whether conditions . . . or other causes beyond the Contractor’s control . . . or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.”
- 8.3.2 “Claims relating to time shall be made in accordance with applicable provisions of Article 15.”
- 8.3.3 “This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.”
- 15.1.3.1 Claims to be initiated by written notice to other party, Initial Decision Maker and Architect 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.”
- 15.1.6.1 Claims for time extension shall include “estimate of cost and probable effect of delay on progress of the Work.”

AIA A201 General Conditions (2017 ed.)

Contractor's Risk Mitigation Provisions

- 11.4 “The Owner . . . May purchase and maintain insurance that will protect the Owner against loss of use of the Owner’s property, or the inability to conduct normal operations, due to fire or other causes of loss. The Owner waives all rights of action against the Contractor and Architect for loss of use of the Owner’s property, due to fire or other hazards however caused.”
- 15.1.7.1 Owner waives claims for “consequential damages” including damages for “rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons”

AIA A201 General Conditions (2017 ed.)

- 14.1.1 Termination by Contractor due to work stoppage for 30 consecutive days for any of the following reasons:
 - .1 order of public authority having jurisdiction that requires all Work to be stopped;
 - .2 act of government, such as a declaration of national emergency, that requires all Work to be stopped;
- 14.1.2 termination by Contractor due to repeated suspensions or delays or interruptions of the “entire work by the Owner” constituting in aggregate 100 percent of total days scheduled for completion or 120 days in 365 day period, whichever is less.
- 14.1.3 If cause exists under 14.1.1 or 14.1.2, Contractor may provide 7 days written notice to Owner and Architect, terminate, and recover payment for Work executed, and reasonable overhead and profit on Work not executed, and costs incurred by reason of such termination.

AIA A201 General Conditions (2017 ed.)

- 3.18.1 “. . . the Contractor shall indemnify and hold harmless the Owner . . . From and against claims . . . Including but not limited to attorneys’ fees, arising out of or resulting from performance of the work, provided that such claim . . . is attributed to bodily injury, sickness, disease or death . . . but only to the extent caused by the negligent acts or omissions of the Contractor, Subcontractor . . .”
- Owner cannot be indemnified for its own negligence. Minn. Stat. 337.02, 337.05.
- Recommend that CGL insurance to determine if coverage is available to cover Contractor from risk of liability claims for improper COVID19 management practices.

AGC-MN Subcontract

- 12. “Terms among the Contract Documents should be interpreted consistently and, where irreconcilable, the terms in this Prime Contract first then this Agreement shall prevail.”
- 12. “Neither Party shall be in default hereunder for any failure or delay up to forty-five (45) days of any duty caused by an act of God, war, embargo, civil disturbance, strike, or other occurrence beyond the Parties' control.”

ConsensusDocs 205

- 10.1 “If Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of Constructor include ... (a) acts or omissions of Owner, Design Professional, or others . . . (j) epidemics; (k) adverse governmental actions . . .”
- 10.2 “In addition, if Constructor incurs costs as a result of a delay that caused by items (a) through (d) in 10.1, Constructor may be entitled to an adjustment in the Contract Price . . .”
- 10.3, 10.4 Prompt notice of delay is required.

ConsensusDocs 205

- 14.1 – contractor indemnity obligation extends to “claims for bodily injury and property damage” and unlike the AIA A201 does not specifically include sickness or disease.

FAR

- FAR 52.249-10
 - (b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if ---
 - (1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include –
 - (vi) Epidemics
 - (vii) Quarantine restrictions
 - (ix) Freight embargoes
 - (2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of the delay . . .”

FAR

- Burden is on the Contractor to demonstrate actual delaying effect of the event of delay.
- Suspension and Constructive Suspension
 - FAR 52.242-14
- Constructive Suspension:
 - (1) contract performance was delayed
 - (2) government directly caused the delay
 - (3) delay was for an unreasonable period of time
 - (4) delay injured the contractor in the form of additional expense or loss.
 - Periodic starting and stopping doesn't count.

Insurance Coverage

- Depending on your insurance program and the specific language of your insurance policies, coverage for COVID-19 losses may be potentially be available. Exclusions may apply . . .
- First Party Business Interruption
 - Physical loss or damage issue
- Builder's Risk
 - Look for upcoming webinar/information from AGC affiliate CSDZ
- CGL insurance
 - Protect against liability for third party claims
- E&O insurance
 - Protect against liability for third party claims stemming from professional malpractice
- Pollution liability
- Performance and Payment Bonds to protect against subcontractor default and bankruptcy
- D&O insurance
 - Protect against shareholder claims that management of business was negligent in response to COVID
- Micro-captives – check with your broker

Comment

- New jobs, bidding, negotiating
 - foreseeability
 - Negotiate clauses providing relief for COVID issues.
- Keep excellent records on each project.
- Develop project specific strategies and lines of communication
- Examine your specific situation to look for risk mitigation opportunities
 - Contract relief
 - Insurance relief
 - Etc.
- The community needs you to keep critical infrastructure running.