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The Dotted Line: How force majeure contract clauses can plan for the unexpected, *ConstructionDive, ft. Andrew Richards*

Andrew Richards, Co-Managing Partner at Kaufman Dolowich & Voluck, LLP in Long Island, was quoted in an article written by Kim Slowey for Construction DIVE as part of The Dotted Line series, (July 11, 2017) -

Anyone in the construction business can attest to the fact that it's an industry that defines the phrase "stuff happens." And most of the time, there is someone to blame.

Inconsistencies between versions of the plans and specifications; late ordering of long-lead-time specialty items; failure on the part of a subcontractor to adequately allocate resources; mathematical mistakes in the original estimate — all of these can lead to delays in the schedule and higher costs. These are also the result of human error, so each step in the decision-making process that led to the mistake can be evaluated and corrected for the future.

Every 10 years, AIA Contract Documents are reviewed and updated based on industry trends and important court decisions. Learn more and download samples of the 2017 owner/contractor agreements.

But then there are those events no one could have anticipated, and these happenings fall under the category of force majeure — bringing a whole new set of contract-related questions that all parties must address.

What is force majeure?

By definition, a force majeure event is one that could not have been reasonably foreseen and keeps a contractor from fulfilling their obligations under the original terms of the contract.

The American Institute of Architects refers to these unanticipated occurrences in its A201-2017 General Conditions for the Contract of Construction, which is incorporated by reference into many AIA contract agreement forms. ConsensusDocs also mentions these events in some of its contract documents, including the ConsensusDocs 200 Agreement and General Conditions Between Owner and Constructor. . . .

Examples of these scenarios

So, the governmental action exception in the ConsensusDocs might have meant no delay payments, for example, for the subcontractor of one of the many roadwork firms forced to stop work during the New Jersey highway construction shutdown last year or the more recent Illinois stop-work order — both a result of the inability of lawmakers to agree on a budget. As for those who executed a contract directly with the New Jersey Department of Transportation, section 108.11.01.B.2 in one of the agency's sample contracts specifically lists a state shutdown as an excusable, yet non-compensable delay.

Translation: The contractor is getting extra time to finish the contract, but they're not getting any money for it. This would have been a particularly bitter pill for New Jersey highway and bridge workers to swallow, as much of their narrow spring and summer work window

was whittled away by more than three months of inactivity before lawmakers worked out a deal that allowed construction to resume.

Attorney Andrew Richards, co-managing partner at Kaufman, Dolowich & Voluck said this is not unusual, as both private and public contracts list contemplated, or reasonably foreseeable events, that will not win the contractor any compensation. However, if the event slips into the realm of uncontemplated, something no one could have expected, then there's a chance for negotiation of extra fees.

For example, a hurricane during the summer in Florida, Richards said, would be a contemplated event — fairly predictable and most likely subject to an extension of time as a force majeure occurrence. But what about three hurricanes passing through the project's vicinity in the span of two months? "That wouldn't necessarily be contemplated," he said. . .

One of the bigger concerns, Richards noted, is that the same delay and damage clauses are not identical from owner to contractor to subcontractor. If a general contractor agrees to certain delay and damage exceptions, the general contractor should make sure that those same rules are included in its subcontracts. "Otherwise," Richards said, "the general contractor could get hit with damages he can't recover from the owner."

More confusion ensues when events, compensable or otherwise, are not listed in the contract. In that case, Richards said, the parties to the contract would have to turn to experts to define what is a reasonable and/or reimbursable delay under any "no damages for delay" clause.