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Construction Impacts from COVID-19 and Wisconsin's Safer at Home Order

Wisconsin Gov. Tony Evers' original Safer at Home order went into effect at 8 a.m. March 25, 2020 (Original Order). On April 16, 2020, the Original Order was extended by Emergency Order #28 effective 8 a.m. April 24, 2020, (Extended Order). To combat COVID-19, the orders require individuals present in the State of Wisconsin to stay at home unless the individual meets one of several defined exceptions. The Extended Order relaxes some restrictions implemented under the Original Order and extends the Original Order until 8 a.m. May 26, 2020.

Under both the Original Order and the Extended Order, certain types of construction are allowed to continue.

First, under the Extended Order, individuals may leave their residences "to provide any services or perform any work necessary to offer, provide, operate, maintain and repair Essential Infrastructure." Construction is considered "Essential Infrastructure," including, but not limited to, the following:

- Construction required in response to this public health emergency;
- Hospital construction;
- Construction of long-term care and assisted living facilities;
- Public works construction;
- School construction;
- "Essential Business and Operations" construction, as defined in Section 13 of the Extended Order;
- Construction necessary for "Essential Governmental Function," as defined in Section 12 of the Extended Order; and
- Housing construction, except optional or aesthetic construction that should be avoided, except as permitted as a "Minimum Basic Operation," as defined in Section 14 of the Extended Order.

Unlike the Original Order, the Extended Order permits optional or aesthetic construction so long as it is permitted as a Minimum Basic Operation. In particular, Minimum Basic Operations include "aesthetic or optional exterior residential construction and lawn care, if all the operations are performed by one person in a room or confined space, including a car or truck. No more than one employee or worker may be on the site at a time. Services may not require a signature by the recipient. Aesthetic or optional exterior work requiring more

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than one person on the site are prohibited."

As stated in the orders, the definition of "Essential Infrastructure" shall be construed broadly to "avoid any impacts to essential infrastructure, broadly defined." However, the Evers administration has cautioned against overly expansive interpretations.

Second, under both the Original Order and Extended Order, an individual may leave their residence to operate an "Essential Business and Operation." Building and construction tradespersons and other trades are considered "Essential Businesses and Operations," including, but not limited to, "plumbers, electricians, carpenters, laborers, sheet metal, iron workers, masonry, pipe trades, fabricators, finishers, exterminators, pesticide application, cleaning and janitorial staff for commercial and governmental properties, security staff, operating engineers, HVAC, painting, moving and relocation services, forestry and arborists, and other service providers who provide services that are necessary to maintaining the safety, sanitation and essential operation of residences, Essential Activities, Essential Governmental Functions and Essential Businesses and Operations."

Impacts of COVID-19 on Construction Schedules and Contracts

The general outlook in the construction industry as a result of the COVID-19 pandemic is to expect delays in project schedules for the duration of the Safer at Home order and beyond. The key factors contributing to project delays from a construction perspective include disruptions in material and equipment supply chains, labor shortages and delays in governmental approvals and on-site inspections. Further, contractors must abide by newly created safety measures that comply with federal and state public health guidelines, such as limitations on the number of workers permitted on a site at a given time and maintaining other social distancing recommendations. These delays are certain to have impacts on project completion deadlines and performance obligations under a construction contract. Below are some key construction contract provisions that may be affected by project delays caused by the COVID-19 crisis.

Force Majeure

In the context of a construction contract, force majeure refers to events or conditions under which one party may be excused from performance for the duration of the delay, and typically includes situations that are both unforeseen and beyond the reasonable control of a party. The American Institute of Architects (AIA) form of construction contract does not expressly contemplate the COVID-19 pandemic, but does permit an extension of time for unusual delays in

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deliveries, other causes beyond the Contractor's control and "other causes that contractor asserts, and Architect determines, justify delay." *See AIA A201-2017, Section 8.3.1, General Conditions of the Contract for Construction*. The ConsensusDocs form of construction contract, on the other hand, provides more specific examples of situations that are beyond the control of the contractor, including epidemics and adverse governmental actions, which more clearly captures the current COVID-19 situation.

Notice

Contractors must comply with the required notice provisions within a construction contract in order to rely upon a force majeure delay. Under projects governed by an AIA form of construction contract, claims for additional time must be initiated within 21 days after the occurrence of the event given rise to such claim. For those projects utilizing a ConsensusDocs form of contract, the contractor must give prompt written notice to the owner after first recognizing the delay. The ConsensusDocs contract further provides that the contractor must take reasonable steps to mitigate the effect of the delay. Applying this provision to the COVID-19 crisis if, for example, imports of materials are stalled from overseas, the contractor may be required to examine other alternative sources of such materials domestically.

The foregoing contract provisions will likely be utilized by a contractor as a result of project delays from the COVID-19 pandemic. The following two clauses in construction contracts may be helpful tools in controlling construction projects from an owner's perspective.

Suspension

A suspension clause allows an owner to temporarily suspend a construction project for a short period of time for any reason by providing written notice to the contractor. Owners should be aware, however, that if the project is suspended by the owner utilizing a suspension clause, the contractor will typically have a corresponding right to terminate the contract after a certain period of time, upon which the owner will be responsible for paying for the work already performed, costs incurred by reason of the termination (such as mobilization costs and costs to terminate subcontracts and purchase orders) and, in some cases, profit and overhead of the contractor for work not performed. Further, under the ConsensusDocs form of construction contract, a contractor has the right to unilaterally terminate a project that is stopped for at least 30 days because of an order of the government or a national emergency.

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Termination for Convenience

In addition to the right of suspension, an owner also has the right under most construction contracts to terminate for convenience. When such a termination right is exercised, the contractor must immediately stop all work, mobilize the project, preserve the work and terminate all subcontracts and purchase orders. Similar to amounts owed under a contract suspension, when a construction contract is terminated for convenience, an owner is required to pay for work already performed, costs incurred by reason of the termination and, in some cases, a termination fee or other profit and overhead of contractor.

If you have any questions about the impact of the coronavirus pandemic impacting your construction project or business, contact your Reinhart attorney.

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