

A Force Majeure Trap Within Construction Contracts

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Many people in the construction industry believe the force majeure clause waives the requirement for making a claim for an extension of time. This belief, however, is incorrect at least under the A201. If your project is delayed by the coronavirus, you should review your contract to determine your obligations for perfecting force majeure claims. Under the A201, that obligation would include sending a claim for an extension of time.

Yes, the A201 does have a force majeure clause that excuses timely performance (if the Contractor is delayed by "causes beyond the Contractor's control . . . then the Contract Time shall be extended"). See A201, sec. 8.3.1. However, the Contractor cannot take advantage of such clause unless it asserts a timely claim for an extension of time under Article 15. See A201, sec. 8.3.2. Indeed, 8.3.2 provides "Claims relating to time **shall** be made in accordance with applicable provisions of Article 15 [emphasis added]." The use of the word "shall" indicates (strongly) that such requirement is mandatory. A201, sec. 15.1.1 reiterates the mandatory nature of this requirement ("The responsibility to substantiate Claims **shall** rest with the party making the Claim [emphasis added].").

The trap that dooms most extension of time claims (including those based upon force majeure) is found at A201, sec. 15.1.3.1 ("Notice of Claims"). That section sets forth a deadline for asserting such a claim. Specifically, 15.1.3.1 provides:

Claims by either party under this Section 15.1.3 **shall** be initiated within 21 days after the 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 [emphasis added].

The unequivocal requirement of notice is reiterated in A201, 15.1.6.1 "notice as provided in Section 15.1.3 **shall** be given [emphasis added]."

Not only must the Contractor make such claim timely, but the claim itself must also include specific content. See A201, sec. 15.1.6.1. Section 15.1.6.1 provides the claim " **shall** include an estimate of cost and probable effect of delay on progress of the Work [emphasis added]." Under a continuing delay, however, the Contractor need only submit one claim.

Many otherwise valid claims have been rejected because the party otherwise entitled to an extension of time failed to follow the contractually required mandates. If your project is delayed by the coronavirus, it is essential you read your contract thoroughly to understand your rights and obligations. A failure to do so might otherwise doom your claim.

Drew W. Colby, Esq., Partridge Snow & Hahn partner and co-chair of the firm's Construction Practice is ready to advise and answer your contract questions. For additional information and resources, visit Partridge Snow & Hahn's COVID-19 Advisory Group page.