

## **COVID-19 – What Should I Do On My Construction Project - Right Now?**

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On March 11, 2020, the World Health Organization declared the COVID-19 virus a worldwide pandemic. Governments in Canada and its provinces, and across the world are declaring states of emergency and implementing dramatic health and safety measures daily.

The impacts on our world, our families, businesses and our economic markets is and will continue to be significant and somewhat unpredictable.

What are the specific impacts on construction projects across Canada? More importantly, what should owners, contractors and trades be doing right away to protect their personnel and their projects? What are the best practices in the industry to deal with the pandemic?

This *Building Brief* bulletin is focused on some of the steps and actions that should be taken **right now** to ensure the success of construction projects and the health and well-being of those working on them.

### ***Health and Safety***

- Immediately implement best hygiene practices on site: enforce hand washing requirements, hold project meetings by videoconference, post applicable protocols and circulate by email, monitor who has or might be coming on site from outside the country and needs to be quarantined or self-isolated, make sanitizer readily available, consider arranging for additional temporary washing stations, and remove or check personnel exhibiting symptoms.
- If you are a “constructor” or “prime contractor” or equivalent under applicable provincial occupational health and safety rules, review your obligations for disease and other environmental hazards.
- Consider re-sequencing and re-organizing workflow and schedule to minimize the number of personnel on site at any given time, and to allow maximum social distancing while at site.
- Review your health and safety policies and protocols. Enforce them on the site and in the office. If they don’t specifically address disease and hygiene protocols, update them as soon as possible, drawing on the best practices of industry leaders published in many places online, including the Government of Alberta websites.
- Regularly monitor for public health announcements and orders from applicable government agencies and regulators.

### ***Project Management***

- Consider re-sequencing and re-organizing workflow and schedule to also mitigate delays to the critical path: allow for early ordering and delivery of materials if the supply chain is at risk; store more deliveries off-site if possible; and delay crowded people-intensive work if possible.
- Check that all payment processes are maintained so that the payment cycle is not impacted. Are payment certifiers still able to conduct site inspections to certify work completed or is some alternate arrangement possible? If cheques need to be issued, are signing authorities available? Can a switch be made to automatic or wire transfers?
- It appears that building, fire and other inspectors in most municipalities may not be available to conduct inspections. Check with inspecting authorities regularly to see if appropriate safe accommodations can be made to facilitate their attendance on site to conduct needed inspections or approvals.
- If work on all or a part of the project must be suspended, make sure the completed work or work in progress, and the project site is properly and adequately protected and secured. Establish an appropriate level of monitoring as the pandemic may endure for an extended period of time.

- If construction work has not commenced, seriously consider the personnel, economic, and schedule risks of commencing the work at this time.
- COVID-19 will have wide sweeping and significant impacts, but make sure you carefully and precisely track the impact chain of the pandemic on specific work on your project. Establish an accurate record early and maintain it consistently. When were notices received? What specific work is actually being delayed? What was changed to allow work to proceed? It will be important to segregate COVID-19 related changes, delays and impacts. Consider maintaining a daily impact record noting “due to COVID-19” where appropriate. There are two key parts of a change or delay that will need to be recorded: (1) the right and entitlement to an extension of time or cost increase; and (2) the actual character and amount of the delay and cost increase specifically related to the event.

### ***Force Majeure Clauses***

- Most construction contracts have a “force majeure” or allowable delay clause of some sort, a provision that allows for delays that are outside the control of a party. In the standard CCDC contract documents, this is set out in GC 6.5.1 (for government orders) and GC 6.5.3 (for events beyond the contractor’s control). If not expressly exempted, COVID-19 could trigger a delay claim under such provisions.
- Check your contract provisions to understand the specific definitions of what is a force majeure event and what is not. The occurrence of a pandemic will typically be sufficient for a claim if there has been an actual delay, and there must be direct causal link between the event and specific work. Typically, the event must render the work “impossible” to perform.
- Review the exact wording of your delay related contract terms. Each force majeure clause or allowable delay clause may be different, be triggered by different events and have their own different procedures. Courts will not deem or read into a contract that there is an automatic right to extend the schedule just because of events beyond a party’s control. They will enforce the agreed terms of the contract.
- Check and carefully follow the notice requirements of the contract. Prompt notice is likely required in order to be protected by a force majeure clause. Courts will enforce these notice requirements. Usually, there is no requirement for multiple notices for a continuing force majeure event, but there is a need to be precise. Simply providing notice that the COVID-19 pandemic will or could result in project delays is probably not going to be adequate. Many contractors are proactively providing a “head’s up” notice of possible delays. These are prudent and good practice, but may not constitute a proper and compliant notice triggering the contract’s delay provisions. Details of the actual delay and the direct causal link between the event and specific work should be described in detail with supporting documentation to follow.
- Make sure you take appropriate actions to mitigate any delays or damage to the project. Courts and most contracts will require you to have made a reasonable effort to avoid or minimize the consequences of the impact of COVID-19. If a certain supply of goods is at risk of being cut-off in the supply chain, did you consider stockpiling or seeking alternatives, for example?
- Even if the contract provides for an entitlement to schedule extension, it may not allow for additional costs related to the extension or it may only allow for “reasonable” direct costs. Again, you will want to check the specific wording of your contract in order to best know and understand your rights, entitlements and obligations.
- Record every action, notice, identified risk to the critical path, meetings where COVID-19 and schedule were discussed. When did you first become aware of jeopardy to the critical path of the schedule? When did you first give notice? What responses did you get from others? What remedial action plans discussed, rejected and implemented? As noted above, consider segregating or specifically identifying COVID-19 related changes, delays and impacts in a daily

impact record noting “due to COVID-19” where appropriate. Track and aggregate the actual, direct impact to schedule and costs.

### ***Construction Contracts***

- Force majeure and delay clauses are not the only important contract terms to consider.
- Most standard construction contracts will allow either party to suspend or even terminate all or a part of the scope of work, or the entire contract, if delays outside of anyone’s control persist for an extended period of time.
- Consider the indemnification and limitation of liability clauses for potential damage claims.

What is your responsibility and risk for the conduct of subcontractors and suppliers? If any one of them suspends or terminates their subcontract, what are the risks to the whole project?

### ***Insurance***

- Check your existing insurance policies to verify if there is any coverage available for COVID-19 impacts, including builder’s risk and business interruption policies.
- As with your contracts, insurance policies will require notice and these may be strictly enforced.
- Insurers will also require clear and demonstrated causal connection between COVID-19 and the claimed loss. So, once again, it will be essential to maintain accurate records of events and impacts.

### ***Proactive Communications Strategy***

- The pandemic is very quickly evolving with new information and reactions in the market and industry almost hourly. Any plan of action or state of affairs will need constant re-checking and re-evaluating.
- Knowing your contractual and other legal rights and obligations is important, and if and when it may be necessary to enforce those rights, but the most important actions to take for the success of construction projects in this quickly evolving COVID-19 situation will be to making sure all parties involved are working together in the best interests of the workers on site, their own personnel, the communities in which the project is being undertaken, and the ultimate completion of the project, rather than being focused on strictly enforcing their rights and remedies.
- Best practices in this quickly changing and unique construction environment will require proactive communication and coordinate with the entire project team on an established regular, even daily basis.
- It would be prudent to assemble and confirm emergency contact information including cell phone numbers and alternate contacts.
- Don’t forget to communicate beyond the project team to landlords, tenants, shippers, disposal sites, and others in the larger supply chain.
- It is fair to say that no one saw this coming, and no one yet knows how it will continue to develop or impact projects. Communication and alignment of strategies and efforts between owners, contractors, consultants, the trade contractors and regulators will be essential. Key relationships can be strengthened through a cooperative and emphatic approach.