

PROJECT MANAGEMENT AMID COVID-19 - THE TRIAGE

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Managing a project in a time of an acute global crisis is an exercise of triage; in other words, a process of examining the situation, deciding which challenges are the most serious, dealing with those first, and constantly reassessing as you go. The following are high-level suggestions for those engaged in the management of ongoing construction projects. They reinforce many of the comments already made in previous bulletins (see, in particular, our publications dated [March 30, 2020](#) and [April 3, 2020](#)).

Triaging amid the COVID-19 pandemic should follow this sequence:

1. **Maintain site health and safety.**

This is self-evident, and it is certainly the message being conveyed daily by every industry association, union and governmental agency. Its importance is highlighted by the increasing emphasis being placed by government upon taking the necessary enhanced protective measures on site, backed up by a much-increased level of enforcement, as well as the clear and persistent threat of shutting down non-compliant projects.

No project is worth a life.

2. **Notify.**

Assuming your contract contains provisions which deal with extending the contract time due to circumstances such as this, send notification of the actual, or at least threatened, delay. Even if your contract is silent about this, send written notification.

This is not just a “legal thing” – and in fact, the legal aspect of these notices, though important, is secondary. The primary purpose for written notice is to **communicate**, and notice should be considered an essential project management tool. Its purposes are to:

- communicate **status** (actual or threatened disruption),
- communicate **intention** (mitigation efforts required, schedule extension needed), and
- **inform** the other party about matters important for them to know, thereby giving them the opportunity to manage the situation with their own stakeholders and to assist in mitigating the consequences of the

pandemic upon the project.

Having sent this written notice, don't stop the communication flow. Demonstrate that you are on top of this, and keep your counterparty in dialogue. You will never be presented with a better opportunity to demonstrate your professionalism.

3. **Mitigate.**

To mitigate is to take reasonable steps to lessen the consequences of the disruption caused by the pandemic. In practical terms, it is to do your best to maintain progress and schedule. The obligation to mitigate is a legal requirement of parties who find themselves in a force majeure situation such as this one.

What those reasonable steps might be will depend upon the circumstances of each case. For contractors, at the very least, one would expect a revised schedule, with consideration for the possibility of reorganizing workflow and sequencing to make up time lost. It also means implementing and maintaining the necessary measures on site so as to protect the workforce.

4. **Cooperate.**

A spirit of cooperation has not always been a hallmark of the construction process. It is now.

The pandemic is unquestionably disrupting projects. There is now a premium upon **open, continuous, respectful and constructive communication** among the team. Only as a team can the parties work through the day-to-day challenges posed by erratic labour force and material availability, diminished productivity due to enhanced health and safety requirements, the threat of Ministry site inspections and possible shutdowns, and all the rest. If there was ever a time for some pragmatic "give and take", it is now.

This is not to suggest that there won't be disputes and claims arising out of this. There will. There are contractual and other legal issues which are not clear-cut, and our clients are posing sharp questions to us lawyers to which we sometimes cannot give definitive answers. Apart from this, we are already seeing communications between parties that are confrontational, highly positional, and in some cases overtly bullying. It is important to understand that communications like this will inevitably come back to haunt you, if only because they will be read by someone later who will be deciding your dispute and who himself or herself has been seared by the same events we are all now experiencing.

If the dispute can't be resolved, it should probably best be parked. This is not the advice we normally give, but this is not a normal time.

If there was just one piece of project management advice that might supersede everything else, it might be this: maintain focus on the primary objective, which is to work through the disruption as best as possible and

get the project back on track as quickly as circumstances allow, in a spirit of cooperation and fair play.

Last Point: New Contracts / Proposals - How To Address The COVID-19 Pandemic?

The comments throughout this document pertain to ongoing projects where the parties are already in an existing contractual relationship. But what about new contracts? And what about tender calls that may have been concluded prior to the COVID-19 pandemic but where contracts have yet to be let?

The essential considerations governing new contracts intended to be let amid the pandemic are these:

1. Must the contract be let or can the project wait?

We appreciate that, with all the advance planning, permitting and financing having been put in place, it may initially be considered prohibitively difficult to delay letting new work at all. Owners must, however, consider that even if such projects go to tender, they will almost certainly be met by reluctance among contractors to make any firm commitment regarding schedule performance, at least until the pandemic has subsided to the point where the availability of labour and materials can be considered restored to pre-pandemic levels. The situation within the industry today is certainly very fluid, but the possibility should be recognized that a successful tender call, at any price, is unrealistic and may remain so for at least a number of weeks.

If feasible, delaying new work may in fact prove the best strategy at the moment.

2. Ensure that the prospective contract addresses delay due to the pandemic, and allocates the risk rationally.

A force majeure clause which expressly references epidemic and pandemic events is obviously beneficial. This is so even if the current pandemic subsides to a point where schedule certainty can return to pre-pandemic levels. Media reports have mentioned the possibility of a second wave of the COVID-19 event which may arrive before a vaccine can be developed.

At a minimum, a force majeure clause should prescribe notice requirements, confirm the obligation to mitigate, and indicate how the risks of the event are to be allocated between the parties. The most common form of force majeure provision for a stipulated price contract provides that the contractor is entitled to an extension of the schedule by at least the duration of the event, with no entitlement to costs of the delay unless the event was the fault of the owner. Other force majeure clauses could include other terms to suit, for example, a provision stipulating that if the force majeure event continues beyond some defined period of time, the owner and contractor (or either of them) have the right to terminate the contract.

The point is that this COVID-19 pandemic has placed a renewed importance upon force majeure provisions in contracts, and any contracts going forward should be carefully reviewed to ensure that this risk is dealt with.

3. *“I went to tender before the pandemic, and am now ready to award. What do I do?”*

The complication here, of course, is that the tender process took place before the massive disruption of the COVID-19 event became widely known. The owner would like to accept the most desirable among the tenders submitted, but must now consider the ramifications of the pandemic.

To some extent, there is a judgment call to be made. Assuming the proposed form of contract was a CCDC 2, or another contract form which clearly allocated the risk of an event beyond the control of the parties, the owner potentially has a number of options available, including:

- a. assuming the tender terms permit this, extending the time for acceptance of the bid to accommodate the likely period over which the pandemic will remain;
- b. accepting the bid, then immediately invoking the force majeure provision (GC 6.5.3.4 in CCDC 2), delaying the start of the work and granting an extension of the Contract Time to suit the delay until the pandemic passes;
- c. negotiating with the acceptable bidder to immediately issue a zero-dollar Change Order delaying the start of the work and extending the Contract Time; or
- d. cancelling the tender.

The choice of option should be carefully considered together with the terms of the tender call itself. Obviously, the options set out above assume an owner who is otherwise prepared to accept that the force majeure event has occurred and that it will impact the construction schedule.

Concluding Remarks

In addition to the content provided in this document, readers may also wish to visit the [McMillan COVID-19 Resource Centre](#) and, in particular, view the recent webinar provided by the authors, held on March 31, 2020, and accessible here. McMillan’s team of construction lawyers continues to be fully available to answer your construction and project-related questions. If you have any questions or concerns you would like to discuss, please do not hesitate to contact Jason Annibale (jason.annibale@mcmillan.ca) or Glenn Grenier (glenn.grenier@mcmillan.ca).

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

The logo for mcmillan, featuring the word in a lowercase, sans-serif font. The 'm' and 'c' are in a dark red color, while the 'm', 'i', 'l', 'l', 'a', and 'n' are in a light blue color. The logo is positioned in the upper left corner of a banner image that shows a low-angle view of a modern glass skyscraper against a clear sky.

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