Is Your Construction Contract COVID-19 Proof?

Are you an owner, general contractor, or subcontractor currently performing your obligations pursuant to a construction contract? Are you drafting, negotiating, or preparing to enter into a construction contract in the near future?

If you answered yes to either of the above questions, it is imperative that you review or consider incorporating a force majeure clause into your contract.

Even before the World Health Organization declared COVID-19 ("Coronavirus") a global pandemic on March 11, 2020, construction projects across the country were being impacted due to China, the world's largest producer of steel and other goods, being at the epicenter of the outbreak. Now, as the federal government and private employers begin implementing protective measures to prevent the spread of COVID-19, construction projects will most certainly be impacted even more by the virus.

As such, if you are in the construction industry it is essential that you review your current or future contracts for a force majeure clause and the applicable notice requirements. A standard provision in many contracts, a force majeure clause, relieves both parties of their contractual obligations upon the occurrence of a **specifically defined** event that is unforeseeable at the time of contracting or is out of a parties' control, making performance impossible or impracticable. The force majeure clause may also include specific time-sensitive notice requirements that should be strictly adhered to.

In Michigan, force majeure clauses are narrowly construed; meaning that a clause "will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified." *Kyocera Corp. v. Hemlock Semiconductor, LLC,* 313 Mich. App. 437, 447, 886 N.W.2d 445, 451 (2015). Thus, in regard to COVID-19, a contract's force majeure clause is most likely applicable if it contains the term "pandemic," "disease," or "viral outbreak."

However, merely because a force majeure clause might be applicable does not mean a party can immediately stop preforming his or her contractual obligations. In order to invoke a force majeure clause, a contracting party must not have of been the cause of the delaying event or failed to prevent it by exercising prudence, due diligence, and care. *See Erickson v. Dart Oil & Gas Corp.*, 189 Mich. App. 679, 688, 474 N.W.2d 150, 155 (1991); *Cordoba v. City of Detroit*, No. 221391, 2001 WL 1009308, at 3 (Mich. Ct. App. Sept. 4, 2001). According to Michigan common law, "a party's failure to explore or utilize available options to overcome the delaying condition can constitute lack of due diligence." *Id.* If you are in the construction industry and your work is being negatively impacted by COVID-19 or have questions or concerns regarding your contract, please feel free to contact McAlpine PC at (248)373-3700.