

April 13, 2020

## Design Professionals Delay and Suspension of Services in the time of COVID-19

The COVID-19 pandemic has created difficulty for many individuals and many industries. The construction industry is not immune from the pandemic. While ongoing construction projects in Utah have not seen significant impacts in the last few months, uncertainty relating to financing and long term planning may impact the construction industry moving forward and the global COVID-19 pandemic may impact design professionals through all phases of the design and construction processes. Project interruptions impacting design professionals will likely come in the form of: 1) interruption to project financing and 2) interruption to construction phase schedules. First, if the owners of project, typically the design professionals' clients, are unsure or unable to adequately fund or capitalize the project, the owner may terminate or suspend the project. Second, if the contractor is unable to perform its construction phase work due to uncontrolled delays, including supply chain issues, the owner may again chose to terminate or suspend the project. These project interruptions may have significant impact on design professionals and the services provided and the fees earned.

So, what are design professionals to do to better protect themselves against uncertainty with current projects and with future projects?

Most parties involved with construction projects are familiar with *force majeure* provisions. *Force majeure* provisions are contractual clauses that, in broad terms, govern unexpected circumstances that impact a project and cause project delay. These circumstances will be specific to the contract and typically refer to extreme weather events, flood, fire, earthquakes, and/or "acts of god." When a *force majeure* provision is triggered, parties will likely need to comply with notice requirements in order to maintain contractual rights relating to the force majeure provision. Where the contractual requirements are met, force majeure provisions can be utilized to help reduce risk associated with a project and provide contractual excusable delay for performance.

However, *force majeure* provisions are most commonly found in contracts relating to construction phase work associated with a project. Unfortunately, most design professionals do not have express *force majeure* provisions in their respective agreements with their clients. Those design professionals that do have *force majeure* provisions in their agreements should utilize those contractual provisions where appropriate and ensure that notice is provided pursuant to contractual requirements. Those that do not have *force majeure* provision may need to look to other contract clauses in order to protect against risk of delay or other impacts to the project and/or the design professional's services.

Those other contract clauses will likely be general delay provisions and suspension and termination provisions in the design professional agreement. These impacts can be broken up into the pre-construction phase and the construction phase. Generally, delay, suspension and termination provisions in design professional agreements allow the design professional to suspend services or terminate services when certain conditions are met. These provisions seek to protect the design professional from the delay or suspension of a project and provide for how the design professional shall be provided additional time for completion of services and shall be compensated when the project resumes and provides an avenue for termination if the design professional is not paid.

By way of example, the AIA roster of design professional agreements provide an illustration of suspension and termination provisions and an example of notice requirements to ensure that rights provided under these contract provisions are maintained.

April 13, 2020

## Delay and Additional Services

First, regarding pre-construction phase services, under AIA B101-2017 Article 3, the Architect agrees to perform a scope of Basic Services described as Schematic Design Phase, Design Development Phase, Construction Documents Phase, Procurement Phase, Competitive Bidding Phase, and Construction Phase. The different phases making up the Basic Services are governed by a schedule of performance of the Architect's services. Once the Owner approves the schedule, the "time limits established by the schedule shall not, except for reasonable cause, be exceeded by the Architect or Owner. With the Owner's approval, the Architect shall adjust the schedule, if necessary as the Project proceeds until commencement of construction."

While there are no specific notice provisions under Article 3, AIA B101-201, the Architect should provide the Owner with notice as soon as practicable to ensure that the Architect maintains its rights to equitable extensions where appropriate.

Second, regarding construction phase services and under AIA B101-2017 Article 4, the Agreement sets forth the time limits for the Architect's Construction Phase Services. Under Article 4 the Architect may be entitled to additional services for its construction phase services if the construction schedule goes beyond the time limits set forth in the Agreement. Additional services are addressed in the following provisions:

4.2.4 Except for services required under Section 3.6.6.5 and those services that do not exceed the limits set forth in Section 4.2.3, Construction Phase Services provided more than 60 days after (1) the date of Substantial Completion of the Work, or (2) the initial date of Substantial Completion identified in the agreement between the Owner and Contractor, whichever is earlier, shall be compensated as Additional Services to the extent the Architect incurs additional cost in providing those Construction Phase Services.

4.2.5 If the services covered by this Agreement have not been completed within ( ) months of the date of this Agreement, through no fault of the Architect, extension of the Architect's services beyond that time shall be compensated as Additional Services."

Further, Section 4.2.1 provides in general that the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need for Additional Services, including: "Services necessitated by decisions of the Owner not rendered in a timely manner or any other failure of performance on the part of the Owner or the Owner's consultants or contractors." Thus, Section 4.2.1 may also be utilized to ensure that the Architect is compensated for additional costs incurred as a result of any delay.

## Suspension

Under AIA B101-2017 Article 9, the Architect may suspend services if the Owner fails to make payments to the Architect in accordance with the Agreement.

9.1 If the Owner fails to make payments to the Architect in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Architect's option, cause for suspension of performance of services under this Agreement. If the Architect elects to suspend services, the Architect shall give seven days' written notice to the Owner before suspending services. In the event of a suspension of services, the Architect shall have no liability to the owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Owner shall pay the Architect all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

April 13, 2020

9.2 If the Owner suspends the Project, the Architect shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the Architect shall be compensated for expenses incurred in the interruptions and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

9.3 If the Owner suspends the Project for more than 90 cumulative days for reasons other than the fault of the Architect, the Architect may terminate this Agreement by giving not less than seven days' written notice.

These suspension and termination provisions are found in other AIA documents. Further, most design professional agreements have similar language relating to suspension or termination, but this language may differ and provide more or less protection to the design professional based on the specific agreement.

Where a project is suspended by the owner or where the owner has not made payments in accordance with the agreement, the design professional should provide notice of suspension or termination as provided in the specific agreement. For example, in the example given above, the design professional must give seven days' written notice following nonpayment from the owner to perfect the right to suspend work.

It is also common for design professional agreements to provide general notice provisions whereby the design professional is required to provide notice of delay or suspension

Design professionals should be sure to review their respective agreements to ensure they are complying with any notice provisions

## **Restarting a Suspended Project**

When a project is ready to be restarted, the Owner will typically contact the designers to ask them to continue with their services. However, design professionals should be sure to re-acquaint themselves prior to accepting any new schedules or restart of the project put forth by the Owner. The design professional should examine whether there are changes that need to be made to the project due to the suspension. The design professional should also determine the costs associated with the suspension interruptions and costs to resume services and should evaluate the adjustments, if any, to the remaining fees for the remaining services.

## **Conclusion**

While the example given in this update focuses on the AIA B101-2017 document, most design professional agreements will have similar provisions. It is always important of design professionals to understand their contractual rights, but given the current climate and potential long term impacts of the COVID-19 pandemic, it is more important than ever that design professionals understand their contractual rights to seek additional time for services and rights relating to suspension and termination of services. Moving forward, design professionals should ensure that their agreements have the appropriate protections to help limit liability and risk associated with unknown and unanticipated impacts to projects.

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