

Ramping up construction post COVID-19: What you need to know

- Karen B. Groulx, Partner, Toronto
- Lampros Stougiannos, Partner, Ottawa
- Fraser Mackinnon Blair, Senior Associate, Ottawa
- Chelsea Rasmussen, Senior Associate, Toronto
- Dragana Bukejlovic, Associate, Toronto

June 20, 2020

Meet our presenters

大成 DENTONS



Karen B. Groulx
Partner, Toronto
+1 416 863 4697
Karen.groulx@dentons.com



Lampros Stougiannos
Partner, Ottawa
+1 613 783 9648 x/ +1 514 878 8874
lampros.stougiannos@dentons.com



Fraser Mackinnon Blair
Senior Associate, Ottawa
+1 613 783 9647
fraser.mackinnon.blair@dentons.com



Chelsea Rasmussen
Senior Associate, Toronto
+1 416 862 3464
chelsea.rasmussen@dentons.com



Dragana Bukejlovic
Associate, Toronto
+1 416 863 4603
dragana.bukejlovic@dentons.com

Status of construction work in Ontario

Dragana Bukejlovic, Associate, Toronto

June 20, 2020

Status of construction work in Ontario

Timeline

- **March 17, 2020** – State of Emergency declared in Ontario;
- **March 24, 2020** - Ontario ordered the mandatory closure of all non-essential workplaces starting on 11:59 p.m. on Tuesday March 24, 2020. The construction industry was in large part deemed an essential business by the province;
- **April 3, 2020** - Ontario revised the essential workplaces list and further scaled down what types of construction projects were “essential.”
 - Projects associates with healthcare, critical infrastructure, industrial petrochemical, production of PPE, medical devices, residential construction (with existing footing permit or above grade structural permit), maintenance/construction activities to close paused/inactive sites.
 - Maintenance, repair, and property management strictly necessary to maintain safety, security, sanitation, and essential operations.

Status of construction work in Ontario

Timeline

- **May 19, 2020** – Phase 1 – A Framework for Reopening our Province implemented. Lifted essential workplace limits on construction and resume all construction in the province.

Impacts on business

- For some this necessitated the temporary suspension of all or some of their active projects in Ontario.
- Varying degrees of impact.
- Temporary layoffs.
- Force majeure notices.
- Issues with interpretation of the Essential List/ambiguity may have meant disagreements between Owners and contractors on whether Project in question could continue.
- Demobilization and remobilization costs.
- Large equipment stand-by charges.

Tracking costs for delay

Karen B. Groulx, Partner, Toronto

June 20, 2020

Delay claims

Major impacts from COVID-19

- In the context of the COVID-19 pandemic, the most obvious potential source of delay arises from a full project shutdown following, for example, a government directive to suspend all construction, giving rise to increased costs associated with additional demobilization and remobilization of construction forces once work resumes, among other things.
- Suppliers should also anticipate incurring additional costs resulting from acceleration measures that may be requested to make up for lost time once construction resumes, which costs they will seek to pass along to the other contracting party.
- It is also possible that projects will encounter other indirect costs caused by the need to re-sequence portions of the work to account for supply chain disruptions, and the costs of maintaining both idle workers and equipment during a work stoppage.
- Increased worker's compensation claims arising from COVID in the workplace

Delay claims

COVID-19 Major impacts

- Contractual Claims and provisions applicable to impacts arising from COVID-19 for “Force Majeure” relief/Change in Law/Frustration.
- Considering and identifying all possible opportunities to reduce and/or mitigate costs, schedule delays and productivity losses, including acceleration.
- Effectively rolling out new procedures, recovery plans and schedules to all project stakeholders.
- Considering and identifying all possible opportunities to reduce and/or mitigate costs, schedule delays and productivity losses, including acceleration.

Delay claims

COVID-19 Major impacts (Cont'd)

- Effectively rolling out new procedures, recovery plans and schedules to all project stakeholders.
- Supply Chain (availability/delay/insolvency) – hand sanitizers and dispensers.
- Site Safety (COVID measures, quarantines, site shut downs) – increased near miss events due to pre-occupation with COVID measures.
- Labour availability.
- Employment (layoffs/termination).
- Workers Compensation Claims.

Delay claims

Understanding your rights and obligations

- Review the contract.
- Assess and determine if circumstances leading to temporary project suspension warrant an extension of the time for performance of the remaining work as well as the impact on project costs.
- CCDC 2 (Stipulated Price) – GC 6.5.3
- Extends time where Contractor delayed by:
 - labour disputes, strikes, lock-outs, fire, unusual delay by common carriers or unavoidable casualties; abnormally adverse weather conditions, or any cause beyond the Contractor's control (not resulting from default or breach by Contractor).
 - Extension length recommended by Consultant in consultation with Contractor.

Delay claims

Understanding your rights and obligations (Cont'd)

- No entitlement to payment for costs incurred by such delays (unless resulting from actions by Owner or Consultant).
- No entitlement to extension unless Notice in Writing of cause of delay given not later than 10 Working Days after commencement of delay.

Delay claims

Understanding your rights and obligations

- GC 6.5.2:
 - If the Contractor is delayed in the performance of the Work by a **stop work order** issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor or any person employed or engaged by the Contractor directly or indirectly, then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as a result of such delay.
- Under this provision, the risks of delays and increased costs arising from unanticipated impacts of the pandemic are assumed by the owner.

Delay claims

Understanding your rights and obligations

- GC 10.2.7 of CCDC 2 (Stipulated Price):
- 10.2.7 If, subsequent to the time of bid closing, changes are made to applicable laws, ordinances, rules, regulations, or codes of authorities having jurisdiction which affect the cost of the Work, either party may submit a claim in accordance with the requirements of GC 6.6 – CLAIMS FOR A CHANGE IN CONTRACT PRICE.

Delay claims

Understanding your rights and obligations

- Review the Contract.
- Assess and determine if circumstances leading to temporary project suspension warrant an extension of the time for performance of the remaining work as well as the impact on project costs.

Delay claims

Understanding your rights and obligations

- Understand the notice requirements in your contract.
- Owners: avoid inadvertently waiving compliance with contractual and notice obligations.
- Contractors/Subcontractors: be vigilant about the possibility of lapse of time.

Delay claims

Understanding your rights and obligations

- Even where a project was not shut down, there may be a delay impact associated with increased health and safety protocols (staggered work schedules, sanitization, site planning to facilitate physical distancing, work site mobility).
- Documentation/data collection is key.
- Maintain audit trail of new measures implemented.
- Record extra carrying costs/overhead costs incurred due to temporary suspension.
- Identify revised completion date for work.
- Ensure that the contractor submits a construction schedule that indicates the progress of the work as of the date of suspension.

Delay claims

Understanding your rights and obligations

- Consider delay disruption methodology and identify areas of impact as a result of delay.
- Consider what new activities have been rolled out that you need to consider (i.e. upgrading IT infrastructure and other technology).
- Effectively roll out new procedures, recovery plans and schedules to all project stakeholders (assists to ensure that schedule and cost risks are mitigated).
- Consider practical approaches to prepare for the inevitability of delay impact claims;
 - Increased industry collaboration;
 - Increased movement to IPD?

Key start-up considerations

Fraser Mackinnon Blair, Senior Associate, Ottawa

June 20, 2020

Issues:

- Identifying contract provisions that may be triggered by ramping up activities.
 - Determining exposure or entitlement to claim.
 - Weighing practical options vs. legal rights.
- Discussion of certain return to work concerns being raised by industry.

CCDC 2 – Stipulated price contract

Obligations of the contractor

- **GC 3.5**

- *1. ...submit...a construction schedule that indicates the timing of the major activities of the Work and provides sufficient detail of the critical events...to demonstrate that the Work will be performed in conformity with the Contract Time*
- *3. ...advise the Consultant of any revisions required to the schedule as a result of extensions of the Contract Time as provided in Part 6.*

- **GC 3.7.1**

- *3. ...be as fully responsible to the Owner for acts and omissions of Subcontractors, Suppliers and of persons directly or indirectly employed by them...”.*

CCDC 2 – Stipulated price contract

Obligations of the contractor (cont'd)

- **GC 3.1.2**
 - *...shall be solely responsible for construction means, methods, techniques, sequences, and procedures and for co-ordinating the various parts of the Work under the Contract*

CCDC 2 – Stipulated price contract

Obligations of the contractor (cont'd)

- **GC 9.4**
 - 9.4.1... “shall be solely responsible for construction safety at the *Place of Work* and for compliance with the rules, regulations and practices required by the applicable construction health and safety legislation and shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the *Work*.”
- **GC 10.2.4**
 - “...give the required notices and comply with the laws, ordinances, rules, regulations, or codes **which are or become in force** during the performance of the *Work* and **which relate to...the preservation of public health.**”

CCDC 2 – Stipulated price contract

Obligations of the contractor (cont'd)

- **GC 10.2.7**
 - “If, subsequent to the bid closing, changes are made to applicable laws, ordinances, rules, regulations...which affect the cost of the *Work*, either party may submit a claim in accordance with...GC 6.6”

Practical considerations

- Labour force/Trade concerns:
 - New projects on hold. If launched, may result in greater stress on trades, suppliers and labour pool.
 - Large spread in pricing, reflective of who has work (high) and who does not (low).
- Scheduling:
 - Impact on sequencing: can project schedule be re-ordered to reflect availability of materials/labour/equipment without significant disruption to critical path.
 - Brace for impact of acceleration measures.
 - Communication with key suppliers and trades.
 - Liquidated damages and other exposure?

Takeaways

- Ramping up will affect scheduling, costs and risks.
- Contract is the starting point.
- Maintain dialogue with key stakeholders.
- Develop a backup plan throughout all levels of the construction pyramid.

Health and Safety Considerations

Chelsea Rasmussen, Senior Associate, Toronto

June 20, 2020

Duties and potential liability under OHS Legislation

- General duty to take all precautions reasonable in circumstances under OHS legislation across Canada
- Public health guidance likely considered a “reasonable precaution”
- Fines or charges under OHS legislation
- Claims by employees and others?

Health and Safety considerations for ramping up

- Conduct hazard assessments and tailor your plan to your workplace or site
- Use current, correct messaging from a trusted source as basis for plan (e.g. public health guidance, Ministry of Labour guidance, World Health Organization, Centre for Disease Control, etc.)
- Employee screening
 - Active screening (questionnaires)?
 - Temperature screening?
- Training and communication
 - Required under OHS
 - Can help reduce risk of work refusals

Drafting and negotiating construction contracts post COVID-19

Lampros Stougiannos, Partner, Ottawa

June 20, 2020

Issues to consider

Give thought to:

- Defining COVID-19 (e.g. pandemic vs. government measures)
- Distinguishing between events prior to contract execution and events following contract execution
- Distinguishing between COVID-19 and other “events”
- Determining form(s) of available relief
 - Delay
 - Cost
- Termination & suspension clauses
- The dispute resolution process

Focus on standard contracts

CCDC 2 – Stipulated price contract

- **GC 6.5.2**
 - *If the Contractor is delayed in the performance of the Work by a **stop work order** issued by a court or other public authority [...] then the Contract Time shall be extended [...]. The Contractor shall be **reimbursed** by the Owner for reasonable costs incurred by the Contractor as the result of such delay.*
- **GC 6.5.3**
 - *“If the Contractor is delayed in the performance of the Work by: [...] .4 **any cause beyond the Contractor's control** other than one resulting from a default or breach of Contract by the Contractor [...] then the **Contract Time shall be extended** [...] The Contractor shall **not be entitled to payment for costs** incurred by such delays [...]”*

Focus on standard contracts

CCDC 2 – Stipulated price contract (cont'd)

- **GC 7.2.2**
 - *If the Work is suspended **or otherwise delayed** for a period of 20 Working Days or more **under an order of a court or other public authority** [...] the Contractor may [...] **terminate the Contract** by giving the Owner Notice in Writing to that effect.*

Focus on standard contracts

CCDC 3 – Cost plus contract

- **GC 6.5.2**
 - *Equivalent provision to CCDC 2 regarding stop work orders*
- **GC 6.5.3**
 - *“If the Contractor is delayed in the performance of the Work by: [...] .4 **any cause beyond the Contractor's control** other than one resulting from a default or breach of Contract by the Contractor [...] then the **Contract Time shall be extended** [...] Any of the Contractor's Fee, the GMP and the Target Contract Price **shall be adjusted** as the result of such delay.”*
- **GC 7.1.7**
 - *The Owner may, if **conditions arise which make it necessary** for reasons other than as provided in paragraphs 7.1.1 and 7.1.4, terminate this Contract [...].*

Focus on standard contracts

CCDC 3 – Cost plus contract (cont'd)

- **GC 7.2.2**
 - *If the Work is: [...] **stopped** for a period of 20 Working Days or more **under an order of a court or other public authority** [...] the Contractor may [...] **terminate the Contract** by giving the Owner Notice in Writing to that effect.*

Takeaways

- The key issue comes down to who will assume schedule and cost risks associated with the pandemic
- Prepare a risk matrix
- Consider cost-benefit of allocating risks to contractor (contingencies)
- Agree principles early on
- Don't ignore the dispute resolution process

Thank You

大成 DENTONS



Karen B. Groulx
Partner, Toronto
+1 416 863 4697
Karen.groulx@dentons.com



Lampros Stougiannos
Partner, Ottawa
+1 613 783 9648 x/ +1 514 878 8874
lampros.stougiannos@dentons.com



Fraser Mackinnon Blair
Senior Associate, Ottawa
+1 613 783 9647
fraser.mackinnon.blair@dentons.com



Chelsea Rasmussen
Senior Associate, Toronto
+1 416 862 3464
chelsea.rasmussen@dentons.com



Dragana Bukejlovic
Associate, Toronto
+1 416 863 4603
dragana.bukejlovic@dentons.com