

**SMITH
CURRIE**
& HANCOCK LLP

Practical Considerations for Dealing with COVID-19

PRESENTED BY:

Brian S. Wood | Smith, Currie & Hancock LLP

Current State of Pandemic

<https://coronavirus.jhu.edu/map.html>

JOHNS HOPKINS UNIVERSITY & MEDICINE CORONAVIRUS RESOURCE CENTER

COVID-19 Map FAQ →

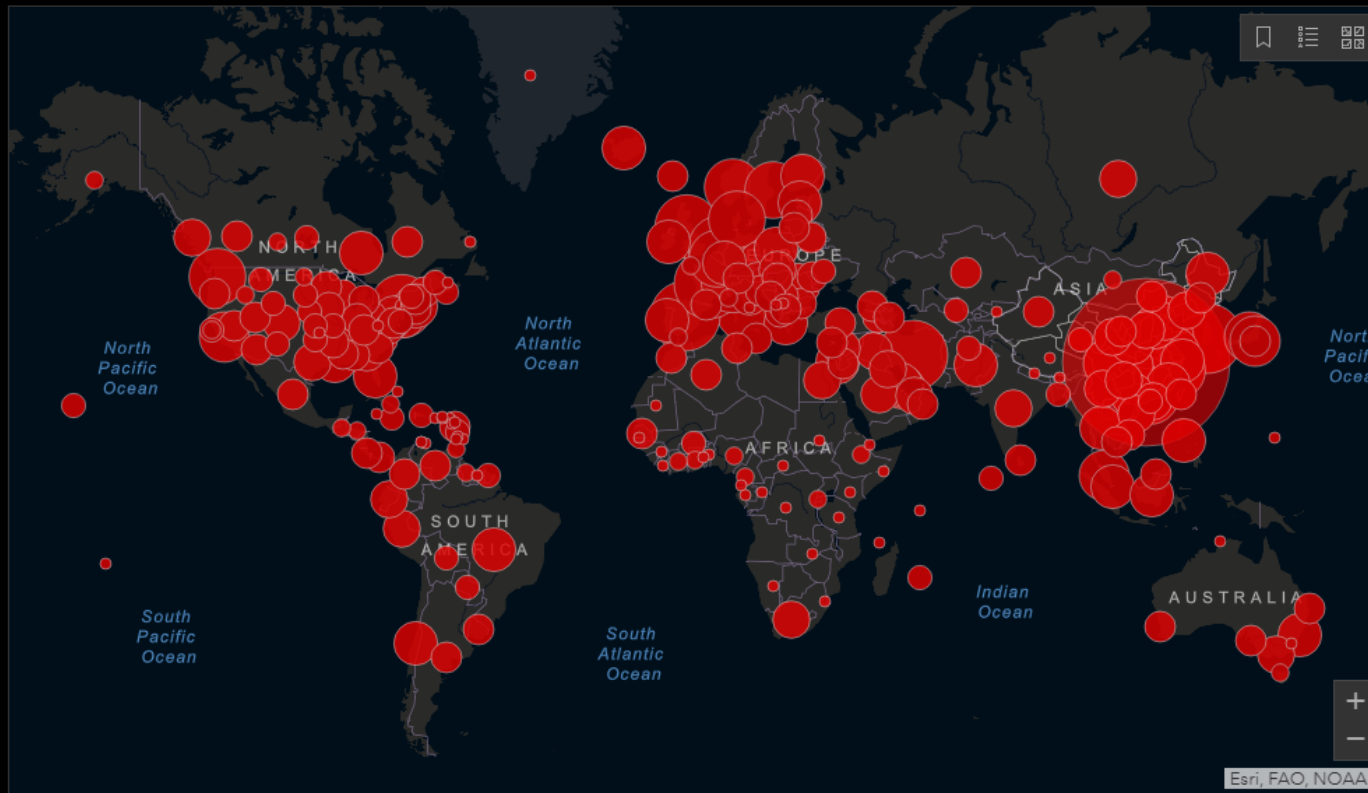
Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)

Total Confirmed

214,894

Confirmed Cases by Country/Region/Sovereignty

- 81,102 China
- 35,713 Italy
- 17,361 Iran
- 13,910 Spain
- 12,327 Germany
- 9,052 France
- 8,413 Korea, South
- 7,769 US
- 3,028 Switzerland
- 2,642 United Kingdom
- 2,056 Netherlands
- 1,646 Austria
- 1,550 Norway
- 1,486 Belgium



Cumulative Confirmed Cases

Active Cases

156

countries/regions

Lancet Inf Dis Article: [Here](#). Mobile Version: [Here](#). Visualization: JHU CSSE. Automation Support: [Esri Living Atlas team](#) and [JHU APL](#).

Data sources: [WHO](#), [CDC](#), [ECDC](#), [NHC](#) and [DXY](#) and local media reports. Read more in this [blog](#). [Contact US](#). [FAQ](#).

Downloadable database: [GitHub](#): [Here](#). Feature layer: [Here](#).

Total Deaths

8,732

3,122 deaths
Hubei China

2,978 deaths
Italy

1,135 deaths
Iran

623 deaths
Spain

148 deaths
France France

84 deaths
Korea, South

71 deaths
United Kingdom United Kingdom

58 deaths

Total Recovered

83,313

56,927 recovered
Hubei China

5,389 recovered
Iran

4,025 recovered
Italy

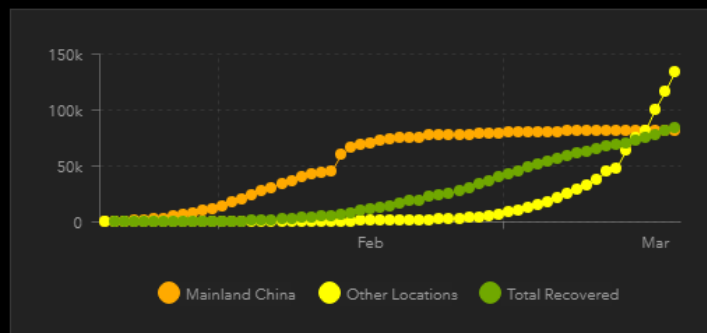
1,540 recovered
Korea, South

1,313 recovered
Guangdong China

1,250 recovered
Henan China

1,216 recovered
Zhejiang China

1,081 recovered



Actual

Logarithmic

Daily Cases

Last Updated at (M/D/YYYY)

3/18/2020, 3:33:03 PM

Coronavirus-Related Restrictions Affecting Construction

March 16-18, 2020

CALIFORNIA

San Francisco, Santa Clara, San Mateo, Marin, Contra Costa, and Alameda counties issued shelter-in-place orders requiring individuals to stay inside their homes, except for essential activities. For exemptions, see:

<https://www.smithcurrie.com/publications/california-law-notes/what-construction-work-may-continue-following-the-bay-area-counties-coronavirus-shelter-in-place-orders/>

Sonoma, San Benito, Santa Cruz, Monterey, Mendocino, and Palm Springs have since issued similar orders

CITY OF BOSTON

The City of Boston (Mayor Walsh) issued an order suspending all regular activity at construction sites in Boston

PENNSYLVANIA

On March 17, Governor Wolf suspended all highway construction projects In Pennsylvania

Potential Impacts to Construction

The background of the slide is a faded, high-angle photograph of a construction site. In the center, a concrete bucket is suspended from a crane. Several construction workers wearing hard hats are visible in silhouette, working on a structure of rebar. The sky is a pale, hazy blue.

Delays and disruptions

Suspensions

Termination (for convenience)

Material, equipment, and labor price escalations

Other cost increases

Health and safety issues

Delays and Disruptions

- Material supply disruptions
- Equipment supply disruptions
- Unavailability of labor or lost time due to employee illness
 - Actual illness of employee,
 - Quarantine due to exposure,
 - Other government (including OSHA) restrictions, or
 - Owner or Contractor mandated jobsite health and safety restrictions
- Inability to work due to “shelter-in-place” or similar orders

Suspension Concerns

- De-mobilization and re-mobilization costs
- Material, equipment, and labor unavailability upon re-mobilization
- Price escalations upon re-mobilization
- Collective bargaining agreement obligations
- Required to stay on standby mode?
- Unabsorbed home office overhead

Termination for Convenience Concerns

- Full cost recovery for termination (cancelled subcontract and purchase order fees, restocking fees, minimal salvage value for specially manufactured goods, etc.)
- Substantial reduction in unit-priced quantities – very early termination can result in unamortized fixed costs spread over reduced quantities

Health and Safety Concerns

- Balancing contractual duties to perform with contractual and legal duties to keep employees and others safe
- OSH Act General Duty Clause, Section 5(a)(1): Provide employees with a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm”
- Ability to procure PPE (i.e. due to shortages of respirators)
- Difficult decision-making with respect to uncertain exposures (when to quarantine employees, to stop work, etc.)

Subcontract Provisions for Possible Relief

“Force Majeure” clause

Delay provisions (other than force majeure)

Changes and Claims clauses

Suspension of Work clause

Termination for Convenience clause

Escalation clauses (not typical)

Specific inclusions, exclusions, and qualifications in the scope of work

Force Majeure

- “Force Majeure” – translated from French as “superior force”
- Contract provision excusing a party’s performance obligations when certain events or circumstances beyond that party’s control delay performance or make performance commercially impracticable, illegal, inadvisable, or impossible
- Examples of force majeure: war, riots, earthquakes, hurricanes, lightning, explosions, energy blackouts, unexpected legislation, lockouts, slowdowns, and strikes

Sample Force Majeure Provision – Private Form Contract

ConsensusDocs 200, Section 6.3:

DELAYS AND EXTENSIONS OF TIME.

- 1) *If Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Constructor, **Constructor shall be entitled to an equitable extension of the Contract Time.** Examples of causes beyond the control of Constructor include, but are not limited to, the following: (a) acts or omissions of Owner, Design Professional, or Others; (b) changes in the Work or the sequencing of the Work ordered by Owner, or arising from decisions of Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by Owner pending dispute resolution or suspension by Owner under §11.1; (e) transportation delays not reasonably foreseeable; **(f) labor disputes not involving Constructor; (g) general labor disputes impacting the Project but not specifically related to the Worksite; (h) fire; (i) Terrorism; (j) epidemics; (k) adverse governmental actions;** (l) unavoidable accidents or circumstances; (m) adverse weather conditions not reasonably anticipated. Constructor shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8.*

Sample Force Majeure Provision – Private Form Contract

AIA A201-2017

§8.3 Delays and Extensions of Time

§8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by

- 1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor;
- 2) by changes ordered in the Work;
- 3) **by labor disputes, fire, unusual delay in delivery, unavoidable casualties, adverse weather conditions** documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control;
- 4) by delay authorized by the Owner pending mediation and binding dispute resolution; or
- 5) by other causes that the Contractor asserts, and the Architect determines, justify delay, **then the Contract Time shall be extended for such reasonable time as the Architect may determine.**

Sample Force Majeure Provision – Federal Contract

FAR 52.249-14:

EXCUSABLE DELAYS (APR 1984)

*(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are **(1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes,** and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. Default includes failure to make progress in the work so as to endanger performance.*

Sample Force Majeure Provision – Subcontract

“If the Subcontractor’s work is delayed, hindered, suspended, disrupted, interfered with, rendered less efficient or more costly, or adversely affected in any way by any cause whatsoever whether such delays or hindrances are avoidable or unavoidable, anticipated or unanticipated, reasonable or unreasonable (including, but not limited to, acts or omissions of the Contractor or the Owner, the Architect or other subcontractors, **by unusually severe weather, by acts of God, by unavoidable casualties, war, strikes, picketing, boycott, lockouts, or by any other reason beyond the Subcontractor’s control and without fault or contribution by the Subcontractor**), the sole and exclusive remedy of the Subcontractor shall be to receive from the Contractor an extension of time for each day of proven actual, excusable, and non-concurrent delay to the Subcontractor’s work which, at the time of such delay, was on the Project’s critical path.”

Force Majeure Clause Issues

- If only in the prime contract, is there a flow-down clause?
- Does it cover epidemics/pandemics?
- Excusable, but not compensable, delays (i.e. time extensions, but no additional compensation)
- Impacts must be caused by the event and not other causes
- Was it unforeseeable?
- Was the delay actually caused by the force majeure event or was it caused by an independent act of Owner or Contractor? (could give basis for compensable delay – see delays and changes section)

Delay Clause Issues

- Is it broad enough to cover epidemics/pandemics?
- Does it contain “no damage for delay” language?
- What are the notice provisions?
- Was the delay actually caused by the force majeure event or was it caused by an independent act of Owner or Contractor?
- Was the Coronavirus-caused delay the only delay (i.e. are you responsible for a concurrent delay)
- Is it a critical path delay (i.e. is there float in the schedule?)
- Did you adequately mitigate damages?

Changes Clause Issues

- Most changes and claim provisions address changes or impacts to the work directed or caused by the Owner, Contractor, and parties under their control or by conditions for which the Owner or contractor expressly assume the risk (permitting delays, differing site conditions, utility relocation delays, etc.)
- If the change or impact was caused by an independent act of Owner or Contractor (e.g. restrictions on work hours or conditions that are prudent, but not mandated by the government), subcontractor may be entitled to an equitable adjustment (compensable change)
- If the contract includes qualifications (inclusions, exclusions, terms of performance, etc.), a contractor or subcontractor may be entitled to additional compensation irrespective of whether impact is caused by third parties or a force majeure event
- Changes clauses often contain duty-to-proceed language requiring the contractor or subcontractor to proceed with construction pending a dispute over a change or claim

Suspension of Work Clause Issues

- Does it cover suspensions mandated by government agencies or otherwise caused by a force majeure?
- Some suspension clauses provide excusable time extensions, but no compensation for suspensions
- Some suspension clauses restrict overhead and profit on suspension costs
- Many suspension clauses do not address price increases (price escalation) resulting from the suspension

Termination Clause Issues

- Some termination for convenience clauses provide for compensation for the work performed to the date of termination, but do not address additional costs incurred as a result of the termination. These can include:
 - Termination fees and costs associated with settlement of purchase orders and subcontracts;
 - Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of terminated materials, including, but not limited to, restocking fees and losses incurred in salvage; and
 - Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data.

Other Potential Relief: Common Law

- **Impossibility of Performance:** When performance becomes actually impossible to perform (e.g. law or order prohibits construction)
- **Commercial Impracticability:** When performance is physically possible, but unfeasibly difficult or costly to perform and will result in a substantial hardship to the performing party
 - Will excuse performance where the excused party did not have control over (or was not at fault for) the condition
 - The excused party must not have expressly or impliedly assumed the risk of the duties becoming impracticable
 - NOTE: Not all jurisdictions recognize commercial impracticability

Insurance Coverage for Business Interruptions

- Many contractors and subcontractors carry “Business Interruption” insurance policies (a.k.a. business income insurance), that cover the loss of income that a business suffers after a disaster.
- Business interruption policies may contain “civil authority” coverage that covers loss of business income resulting from government-mandated closures of business premises that directly causes loss of revenue. These include business closures due to curfews or other work closures.
- Some contractors carry “contingent business interruption” policies that cover losses due to disruption of a supplier’s business operations and ability to supply project materials.

Business Interruption Coverage Issues

- Potential problems with Business Interruption
 - Requirement for “direct physical loss or damage,” including in “civil authority” and “contingent business interruption” policies
 - Shelter-in-place orders may trigger such coverage, but a question is whether a construction project site would qualify as covered property or “premises”
 - Exclusions for epidemics, pandemics, and viruses
 - “Period of restoration” limits on coverage
- Property insurance policies differ widely and must be read carefully



Recommendations

Recommendations for Current/Pending Contracts

- Closely monitor federal, state, and local government actions that might affect construction in general, and your project(s) in particular
- Verify sources of supply for all open subcontracts and purchase orders (ask vendors and subcontractors to confirm in writing)
- Review subcontract force majeure, delay, changes, claims, suspension, termination, and notice provisions (and prime contract provisions incorporated by a flow-down clause)
- Immediately notify contractor of any current or potential delays resulting directly or indirectly from COVID-19, including any cost/price impacts

Recommendations for Current/Pending Contracts

- Track and document all impacts to work and efforts to mitigate, including attempts to find alternative sources and means of performing
- Carefully analyze whether performance is feasible before considering, or claim a right not to proceed
- Review all insurance policies for business interruption coverage and provide notices required by such policy(ies)

Recommendations for Future Subcontracts

- Include provisions specifically addressing delays and cost impacts resulting directly or indirectly from epidemics and pandemics (expressly including COVID-19). Provisions should address:
 - Disruptions to material and/or equipment supply;
 - Illness of Subcontractor's workforce and/or unavailability of labor;
 - Government quarantines, shelter-in-place orders, closures, or other mandates, restrictions, and/or directives;
 - Owner or Contractor restrictions and/or directives; and/or
 - Fulfillment of Subcontractor's contractual or legal health and safety obligations associated with COVID-19.

Sample COVID-19 Clause

Epidemic Rider

Notwithstanding any provision(s) of this Subcontract, if as a direct or indirect result of any virus, disease, contagion, including but not limited to COVID-19 (individually or collectively, "Epidemic"), Subcontractor's work is delayed, disrupted, suspended, or otherwise impacted, including, but limited to, by (1) disruptions to material and/or equipment supply; (2) illness of Subcontractor's workforce and/or unavailability of labor; (3) government quarantines, shelter-in-place orders, closures, or other mandates, restrictions, and/or directives; (4) Owner or Contractor restrictions and/or directives; and/or (5) fulfillment of Subcontractor's contractual or legal health and safety obligations associated with an Epidemic; then Subcontractor shall be entitled to an equitable adjustment to the Subcontract schedule and duration to account for such disruptions, suspensions, and impacts. To the extent any of the causes identified herein results in an increase in the price of labor, materials, or equipment used in the performance of this Subcontract, or other costs of performance of the Subcontract, Subcontractor shall be entitled to an equitable adjustment to the Subcontract price for such increases, provided Subcontractor presents documentation of such increases (including the original prices and/or estimates) and evidence of Subcontractor's reasonable efforts to find alternative sources of material or equipment supply and/or labor at the original/non-impacted prices and/or estimates.



Questions?

Brian Wood

202.735.2451

bswood@smithcurrie.com