

As we continue to address the many challenges facing the construction and surety industries arising from COVID-19, CNA Surety desires to periodically provide you with relevant and thoughtful information. Because the contracts entered into by our surety customers vary depending on the nature and location of the work and the identity of the parties, no “one-size-fits-all” answer or approach will fit every situation. This bulletin will help you identify certain clauses and issues that you may want to closely consider. The chart below can guide you in evaluating obligations and rights under existing contracts and in drafting and negotiating new contracts for future work. Further, the illustrative letters attached may aid in documenting the impacts on your projects. As always, the entire CNA Surety team is available to assist you and your attorney as you navigate through these challenges.

<i>Issue</i>	<i>Terms</i>	<i>Comments</i>
Delays/ Time	Delays/ Extensions of Time and/or Force Majeure	<p><i>Consider concepts such as:</i></p> <ul style="list-style-type: none"> • Government Action or Directive • Public Emergency • Labor/ Material/ Supply Chain Disruptions • Delivery Delays • “Unavoidable Casualties” (from AIA documents) • Other factors beyond the Contractor’s control • Avoid “Owner fault” trigger • Avoid offsets for float or unexcused delays
	Suspensions/ Work Stoppages	May have triggers of Owner or Governmental action (or inaction, i.e. Owner is late making payments, approving submittals, etc.).
	Termination by Contractor	For extended shutdown or due to Owner’s own impacts. May or may not be to Contractor’s benefit.
	Termination for Convenience	Owner would terminate. May or may not be to Contractor’s benefit.
	Compliance/ Changes in Law	May support position that Contractor can’t maintain schedule (or work at all) due to Government action.
Additional Work/ Costs	Timely Prosecution / Acceleration Changed Conditions	Compensable? What are triggers/ requirements? Avoid terms that may require acceleration or recovery at Contractor’s expense.
	Additional Work Protection of Work	Pre-shutdown work to prepare/ protect site and store materials, demobilize Post-shutdown work to remobilize, renew any damaged work. Who is responsible for site/ security during shutdown? Contractor should not bear cost of “force majeure” work. Does Contractor’s insurance provide adequate coverage?
	Storage of Materials	Additional storage time and/or quantities? Unanticipated storage of equipment or materials?
	Equipment Rental	Longer rental periods? Fees to return equipment and then remobilize on site?
	Guaranteed Maximum Price Unit Pricing	Contractor should not bear risk or cost of “force majeure” work or price escalations.
<i>(continued on the next page)</i>		

Contractor Change Requests/ Communication/ Documentation	Notice (<i>may be in terms such as Delay, Changes, Additional Work, Suspension/ Work Stoppage and Claim</i>)	Comply with all notice provisions. When required? What type of notice and content? Impacts, duration and costs may not be fully known – <i>include what you can, reserve the right to supplement as more is known</i>
	Delays Additional Work Changes/ Change Orders	What process is required? Meet terms and timing. Document impacts, delays and additional costs carefully. Avoid “force majeure” risk transfer to Contractor (unless covered by insurance).
	Claims	What are triggers? When do they occur? Document impacts, delays and additional costs carefully
Owner Change Order Requests (existing contracts)	<p><u>Closely review all change order requests from upstream parties.</u></p> <p>We became aware of an owner proposing change orders that unfairly impose on the contractor all the costs associated with a government ordered suspension of work. The owner requested that the contractor perform the following additional work (apparently with no additional time or compensation) despite the existence of a <i>force majeure</i> event under the contract:</p> <ul style="list-style-type: none"> • prepare the site for suspension; and • “maintain” the site during the suspension (how would this be accomplished if under a mandatory stay at home order); and • restore the site/ repair work as if the suspension did not occur. <p>Confirm your current contract terms. Avoid contractual changes that might impose responsibility for Covid-19 related impacts without additional time and compensation.</p>	

We are attaching examples that may be a helpful reference in preparing any notices you might send on your existing projects. We encourage you to consult with your attorney about whether and when notices may be required under any specific contract and what the notices should include. Also, good documentation in support of any delays, costs and other impacts is important. Here’s a list of the sample notices:

- Sample Notice of Potential Delays and Costs Due to Covid-19
- Sample Notice of Access Delays and Costs following Governmental Shutdown Order
- Sample Notice of Actual Delays and Costs Due to Covid-19

Work with your attorney. Document now more than ever. Be careful what you sign. Reach out to your **CNA Surety contacts for assistance.**

SAMPLE NOTICE A - POTENTIAL DELAYS AND COSTS DUE TO COVID-19

This sample letter is for illustration. It is not legal advice.

Consult with your attorney. Any notices must comply with your specific Contract terms.

[ON YOUR LETTERHEAD]

[DATE]

[OWNER/ PROJECT REPRESENTATIVE NAME, ADDRESS AND EMAIL ADDRESS]

Re: [PROJECT NAME/ DESCRIPTION]
Notice of Potential Delays and Cost Impacts Due to COVID-19 Pandemic

Dear [Name of Designated Representative]:

As you know, the President has declared a national emergency and the Governor has declared a state emergency due to the COVID-19 pandemic (the "Pandemic"). This letter gives notice of potential delays, additional costs and other impacts to the Project as a result of the Pandemic.

We remain committed to the Project and do not intend to be adversarial. However our [contract/subcontract] requires us to notify you of any impacts that may lead to extra costs or the need for additional time. Further, we must work in a safe and reasonable manner and in compliance with governmental direction.

We anticipate that the Pandemic will delay our work and negatively impact productivity, including potential impacts to labor, personnel, manufacturing, equipment, materials and transportation. These impacts are likely to adversely affect the critical path of the Project schedule and/or result in increased work and costs. Specifically, the potential delays, costs and impacts may include:

- State or local orders which stop or suspend construction activities. *Describe work stoppages or limited access to work site.*
- Schedule disruption: *Describe delays/ impacts/ inefficiencies/ out of sequence work, whether critical path or not.*
- Supply disruption/ cost escalations: *Describe delays in material, supplies or equipment, price increases/ rental increases/ reprocurement costs.*
- Labor disruption: *Describe labor shortages and/or illness among labor force.*
- Additional Work and costs to prepare the site, suspend work, and resume work: *Describe additional work and costs.*

This Pandemic is a continuing situation. Therefore, the full extent of these Pandemic delays and costs are not yet known and the impacts cannot yet be completely identified or quantified. These delays and costs are beyond our control and through no fault of our own. We will keep you informed as additional information becomes available.

We look forward to working with you to address the impacts of the Pandemic at the proper time and to move the Project toward successful completion. We reserve all rights and remedies afforded by the contract, governmental direction, by applicable law and in equity, including the right to seek an extension of time and an increase in our Contract Price.

Wishing you the best during this time,

[SIGNATURE]

**SAMPLE NOTICE B – ACCESS DELAYS DUE TO COVID-19
FOLLOWING STATE OR LOCAL ORDER**

*This sample letter is for illustration. It is not legal advice.
Consult with your attorney. Any notices must comply with your specific Contract terms.*

[ON YOUR LETTERHEAD]

[DATE]

[OWNER/ PROJECT REPRESENTATIVE NAME, ADDRESS AND EMAIL ADDRESS]

Re: [PROJECT NAME/ DESCRIPTION]
**Notice of Access Delays and Cost Impacts Due to COVID-19 Pandemic
Following Governmental Order**

Dear [Name of Designated Representative]:

On ____ [DATE]_____, our access to [project site/area/specific equipment] was impeded because of the ongoing COVID-19 pandemic (the “Pandemic”) and the state and/or local order to stop or suspend construction activities. The effects of the Pandemic are unprecedented. The scheduled work that cannot be performed falls along the critical path, and our inability to perform the work as scheduled will necessarily negatively impact completion of the Project. We understand that access will be impaired for the next [number] days and possibly longer.

The Project schedule and our construction cost will necessarily be affected by the Pandemic. We cannot tell you how much added time and increased construction cost to expect until the situation is resolved. However, initially, we request an extension of time for each day that our access to this [project site/area/specific equipment] is impeded. Once we have sufficient information to know the overall extent of the delay, we will submit a request for a time extension and additional compensation relating to the potential inefficiency, disruption, rescheduling, acceleration, overtime, stacking of trades, dilution of supervision, material/ supply disruptions and any other impact costs as well as extended overhead and equipment costs for this delay.

We look forward to working with you to address the impacts of the Pandemic at the proper time and to move the Project toward successful completion. We reserve all rights and remedies afforded by the contract, governmental direction, by applicable law and in equity.

Wishing you the best during this time,

[SIGNATURE]

SAMPLE NOTICE C – ACTUAL DELAYS AND COSTS DUE TO COVID-19

This sample letter is for illustration. It is not legal advice.

Consult with your attorney. Any notices must comply with your specific Contract terms.

[ON YOUR LETTERHEAD]

[DATE]

[OWNER/ PROJECT REPRESENTATIVE NAME, ADDRESS AND EMAIL ADDRESS]

Re: [PROJECT NAME/ DESCRIPTION]
Notice of Delays and Cost Impacts Due to COVID-19 Pandemic

Dear [Name of Designated Representative]:

As you know, the President has declared a national emergency and the Governor has declared a state emergency due to the COVID-19 pandemic (the “Pandemic”). This letter gives notice of certain delays, additional costs and other impacts to the Project as a result of the Pandemic.

We remain committed to the Project and do not intend to be adversarial. However our [contract/subcontract] requires us to notify you of any impacts that will lead to extra costs or the need for additional time, and this letter gives you that notice. Further, we must work in a safe and reasonable manner and in compliance with governmental direction.

The Pandemic has and will continue to delay our work and will negatively impact productivity, including potential impacts to labor, personnel, manufacturing, equipment, materials and transportation. These delays and costs are beyond our control and through no fault of our own. They will adversely affect the critical path of the Project schedule and will require additional work and costs. Specifically, the known delays, costs and impacts include:

- State and/or local orders which have suspended construction activities. *Describe governmental orders, work stoppages or limited access to work site.*
- Schedule disruption: *Describe delays/ impacts/ inefficiencies/ out of sequence work, whether critical path or not.*
- Supply disruption/ cost escalations: *Describe delays in material, supplies or equipment, price increases/ rental increases/ procurement costs.*
- Labor disruption: *Describe labor shortages and/or illness among labor force.*
- Additional Work and costs to prepare the site, suspend work, and resume work: *Describe additional work and costs.*
- Additional General Conditions: *Describe additional costs for supervision, overtime, disruption, overhead, etc.*

Currently, we are able to provide the following documentation in support of our claim for additional time and costs:

[List available documentation, such as daily reports, impact schedule, photos, emails, invoices from suppliers, correspondence, photos, etc.]

We initially request an extension of Contract time of a minimum of [] days, together with additional costs relating to the Pandemic. The full extent of these Pandemic delays and costs are not yet known and the impacts cannot yet be completely identified or quantified. We will continue to keep you informed and will provide additional information and documentation regarding our requests for additional time and costs as it becomes available.

The Pandemic was unanticipated, unforeseeable and beyond our reasonable control. We look forward to working with you to address the impacts of the Pandemic at the proper time and to move the Project toward successful completion. We reserve all rights and remedies afforded by the contract, governmental direction, by applicable law and in equity.

Wishing you the best during this time,

[SIGNATURE]