



Trend Alert

Design Professional

Contractual considerations during uncertain times

In a global crisis, design firms may worry about their potential legal liability if they are unable to complete their services as contemplated under their contracts. This trend alert will provide some guidance as firms consider their risk exposure.

What happens if your firm can't provide services because of a global emergency? Would architects and engineers see increased litigation arising out of their inability to deliver professional services agreed to in their contracts? Widespread impacts of mandatory shutdowns, shelter-in-place orders and shocks to the global economy may normalize project failure and be eclipsed by more important issues like health and safety. Although claims do tend to increase during an economic downturn, certain business segments may see little or no litigation if the economic impacts are too substantial and no longer act as an incentive to chase money.

On the other hand, owners may see their projects canceled as construction lenders recall loans, leaving them in financial peril. This could give rise to an argument that were it not for contractor and design professional delays that pushed completion dates past the date that emergencies were declared, the projects would have been completed and profitable. We saw such "missed market" claims during the financial crisis in 2008 and 2009—mostly in the high-end residential and hospitality sectors.

Time to be proactive

The Design Professional unit of AXA XL encourages every design firm to make a clear-eyed assessment of their potential liability as soon as possible after a crisis arises. We urge you to take the following steps:

1. Consult with competent legal counsel to guide you through a review of your agreements and the applicability of any contract defenses, should the need arise;
2. Become familiar with certain contract clauses and how they may work together to guide a conversation with your clients;
3. Consider changes to future contracts, especially those you are about to execute;
4. Double-down on your efforts to communicate with your clients and to manage project change; and
5. Finally, and most importantly, remember that the well-being of your employees and the safety of the public come first; any decisions you make should start from this point.

Read your contracts

With the help of your attorney, review and analyze your contracts. Look first to see if there are any clauses that obligate you to notify the client of a delay or of your inability to provide services under the contract. Determine if and when you are required to provide notice, who must be copied and the method of delivery.

Next, look for clauses that might offer you some protection, terms that address your rights in the event of unforeseen conditions or delays, excusable conditions or nonpayment. For example:

Force Majeure	<p>A force majeure (or “act of God”) clause excuses or delays performance when an unforeseen event beyond your control renders performance extremely difficult or impossible. These provisions typically apply to both natural catastrophes and human events, ranging from flood and fire, to labor strikes and war. These provisions vary widely in their interpretation by states and provinces, with some jurisdictions strictly construing their application. For example, while clauses that expressly reference disease and outbreaks have a much greater chance of being enforced by a court of law during such conditions, many force majeure clauses have a “catch all” or “savings” clause that could capture a global outbreak, depending on the laws of your jurisdiction.</p> <p>If your contract doesn’t have a force majeure clause or is otherwise silent on these issues, work with your lawyer to develop language for future contracts, proposals and contract amendments. (The current American Institute of Architects [AIA] and the Engineers Joint Contracts Documents Committee [EJCDC] owner-design professional agreements do not contain specific force majeure clauses, but offer other clauses that have similar protections. The EJCDC E-500 has a clause that allows the engineer an equitable adjustment if its progress is impaired.)</p>
Delays	<p>While not all agreements contain a force majeure clause that specifically references a current crisis, you might find some relief in the section of your agreement that discusses delays. For example, the “Delays” chapter in the <i>AXA XL Contract Guide for Design Professionals</i> provides language where the design professional is not responsible for delays caused by conditions beyond its control. This clause operates in part like a force majeure clause. (See <i>Resources</i>.)</p>
Changed Conditions	<p>Another contractual provision that might provide relief is the section that discusses conditions that were not previously contemplated by the parties. A Changed Conditions clause addresses some of the issues that might show up in a force majeure clause and creates a mechanism for renegotiating the agreement in light of the current circumstances. (See <i>Resources</i>.)</p>
Termination and Suspension of Services	<p>You should also look at the provisions that govern termination and suspension of services to determine if there is any contractual relief. The <i>Contract Guide</i> chapters “Termination” and “Suspension of Services” provide sample provisions that allow the design professional to terminate or suspend their services when conditions beyond their control adversely affect their ability to perform, for example, or if the owner is unable to make payment. Some firms may see their projects halted or suspended due to funding problems. (See <i>Resources</i>.)</p>

Some standard industry owner-general contractor contracts allow the contractor to terminate or suspend or to delay under certain conditions, and these might give the A/E some protection.

Other contract provisions	<p>As you develop a better sense of possible contract defenses, look at other clauses like “Timeliness of Performance” and “Standard of Care” as they may grant relief if a client demands performance. For example, the “Timeliness of Performance” chapter in the <i>Contract Guide</i> has sample language that says, “many factors outside the Consultant’s control may affect the Consultant’s ability to complete the services” and that the “schedule shall be equitably adjusted” for “delays or other causes beyond the Consultant’s reasonable control.” (See <i>Resources</i>.)</p> <p>Several industry agreements, including the AIA B101™, § 2.2, and the “Standard of Care” chapter in the <i>Contract Guide</i> tie the design professional’s standard of performance to what other design professionals would do “currently practicing under similar circumstances at the same time and in the same or similar locality.” This underscores the need to reject elevated standard of care provisions and agree to the same level of performance of a prudent design professional practicing in the same discipline down the street from your office. In other words, if no other design professional could complete their services in the midst of a global crisis, then neither could you.</p>
General Conditions clauses	<p>Some standard industry owner-general contractor contracts allow the contractor to terminate or suspend or to delay under certain conditions, and these might give the A/E some protection. For example, the AIA A201™ General Conditions of the Contract for Construction, § 8.3.1, allows a contractor an extension of time for delays caused by events that you might find in a force majeure clause, like labor disputes, fire, adverse weather conditions and “other causes beyond the contractor’s control.” The EJCDC C-700 2018, 4.05.C., grants the contractor additional time (but not additional money) in the case of delay caused by “epidemic.” To the extent the contractor is entitled to an extension of time for delays caused by an outbreak, so might the design professional, too.</p> <p>The AIA A201, § 14.1.1, also allows the contractor to terminate or suspend the work when a public authority orders all work to stop, or there is an “[a]ct of government, like the declaration of a national emergency, that requires all Work to be stopped.” This rationale could also apply to a design professional.</p>

Equitable doctrines may provide relief

Ask your lawyer if you have any available relief outside of the contract in the (hopefully unlikely) event your client seeks to compel your contractual performance in the midst of a global crisis.¹ Many states and provinces recognize the equitable legal doctrines of impossibility, frustration of purpose, or impracticability that excuse a party from their contractual obligations when it is impossible or extremely difficult to fulfill them.

During a crisis, countries may restrict travel. Communities, states and provinces could issue shelter-in-place orders, lockdowns, mandatory work stoppages and various quarantine requirements. These orders and directives may impact projects differently, depending on whether or not a project is deemed “critical infrastructure” or part of an essential service. Local public agencies may scale back design- and construction-related services by closing their permitting counters, no longer providing plan review, and canceling construction inspections. The impact to ongoing projects could be substantial.

In general, a party is excused from performing its contractual obligations when it is impossible to do so, as measured by an objective standard. Many courts will also discharge a party’s contractual duty when performance is impractical as measured by a subjective standard where that party experiences extreme and unreasonable difficulty that was not anticipated. Finally, a contractual obligation might be discharged due to frustration of purpose where a supervening event that was not reasonably foreseeable destroys the purpose of the contract.

A shelter-in-place order or government-issued shutdown of a project could satisfy one or all of these doctrines. But the line may not be so clear-cut. Consider a situation where there is only a limited number of city inspectors or an industry-wide shortage of personnel. This may cause your firm a hardship, but it might not rise to the level of “impossibility.” Moreover, consider a situation where much of your community is shut down under a shelter-in-place order but some of your projects are deemed essential or critical.

Resources

For more information and sample clauses, see the “Certifications, Guarantees and Warranties,” “Changed Conditions,” “Delays,” “Standard of Care,” “Suspension of Services,” “Timeliness of Performance,” and “Termination” chapters of the [AXA XL Contract Guide for Design Professionals](#).

¹ Firms may experience added pressure to certify, guarantee or warrant that certain conditions exist in the field in the absence of a governmental inspector. Firms are advised to refrain from assuming liability outside their contractual scope of services. If they do, firms should obtain strong waivers and defense and indemnity provisions from clients.

Think communication, safety, information

Reviewing and analyzing your contracts is just one part of the risk management equation. View the current situation as an opportunity to increase your efforts to document change and manage client expectations. Ramp up your communication with clients and other project stakeholders, as appropriate, to remind them that you value your relationships and reinforce the importance of working together to move ahead with the project as soon as possible. Focus on solutions and not finger-pointing, and work with contractors and owners collaboratively. Keeping the lines of communication open with the client may also help you get paid, perhaps sooner rather than later.

Remember, regardless of what your contract says, it’s always worth trying to renegotiate your agreement or reach a mutual termination or suspension. You don’t need a contract term to tell you that you can do this; you and your client can just both agree to it.

Stay on top of developments that might impact a project’s schedule. A government order may frustrate your ability to deliver services on all, some, or none of your projects, and what is announced today could change next week.

Continually revisit your protocols for the well-being of your employees, including social distancing best practices, site review procedures, and work-from-home guidelines. While the safety of your employees (and the public) come first, these issues could certainly impact project delays and work stoppage, too.

Finally, don’t hesitate to reach out to us at the Design Professional unit of AXA XL Insurance for assistance. Understand that project schedules will need to be updated with your clients. Other professionals, contractors or suppliers on the project may be experiencing difficulties. If you have reviewed the project with your leadership and client team and believe that the project may be in trouble, consider reaching out for additional guidance. Involve your corporate counsel / lawyer early in the process. During challenging times, the best course is to be proactive. We’re here to help.

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