

**COVID-19 Impact on Bidding,
Contracts & the Workplace**

SLCC Training & Education Program
May 14, 2020

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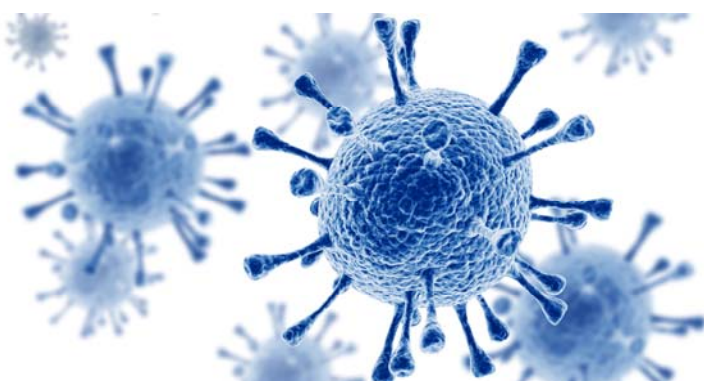


Agenda

-  • Bidding in a COVID-19 Environment
 - Ken Slavens
-  • Force Majeure Impact
 - James Mathis
-  • COVID-19 Impact at the Construction Jobsite: OSHA Guidance (and more)
 - Brad Hiles
-  • Rethinking Buildouts & Floor Plans
 - Melissa Smith-Groff

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Bidding in a COVID-19 Environment

Ken Slavens, Partner

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Dr. Fauci: Second Wave of Coronavirus is “Inevitable”



Dr. Fauci: Second Wave of Coronavirus Inevitable
BY DAVID ORLAND, NATIONWIDE
PUBLISHED 12:47 PM ET APR. 30, 2020 | UPDATED 10:53 AM ET MAY 01, 2020

NATIONWIDE — As states begin to loosen stay-at-home orders and business restrictions, U.S. health officials warn of a possible second wave of the coronavirus later this year.

- **Second wave could hit this winter**
- **Likely to coincide with flu season**
- **More testing and contact tracing is necessary**

While workers and businesses are looking forward to getting the economy going again, many people are also concerned about safety since widespread testing and a vaccine for the virus aren't available yet.

RELATED | The Growing COVID-19 Symptom List

To predict the effects of loosening restrictions prematurely, experts are looking to see what has happened in other countries this year.

Japanese Island Saw Surge in Virus Cases After Restrictions Lifted

Government officials in Hokkaido, Japan, lifted lockdown restrictions on March 19. Hokkaido Governor Naomichi Suzuki had acted swiftly to contain the virus, but it led to a false sense of security. Under pressure from businesses struggling to stay afloat, he eased restrictions.

Once the announcement lifting restrictions came, people gathered in streets and cafes. After hearing about the eased restrictions, people also started traveling to Hokkaido. Dr. Kiyoshi Nagase, the doctor who helped coordinate the Japanese government's response to the pandemic, told JAMA that the immediate gathering of people is likely what kicked off the second wave of coronavirus there.

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Missouri Highways and Transportation Commission

- Job Special Provisions
 - Prevails over General Provisions whenever in conflict therewith
- COVID-19 Safety

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COVID-19 Safety

1.0 Description

The coronavirus disease 2019 or COVID-19 has reached a pandemic stage across the United States, including the State of Missouri. To reduce the impact of COVID-19 outbreak conditions on businesses, workers, customers and the public, the contractor shall be aware of all COVID-19 guidance from the Center for Disease Control (CDC) and other government health mandates. The contractor shall conduct all operations in conformance with these safety directives. The guidance may change during the project construction and the contractor shall change and adapt their operation and safety protocols accordingly.

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COVID-19 Safety

2.0 Safety Plan

The contractor shall include these procedures in the project safety plan as called for in the contract documents and revise the safety plan as needed.

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2.0 Essential Work. In accordance with any state or local Stay at Home Order, care for the infrastructure has been deemed essential and MoDOT is moving forward with construction projects, this project is considered essential and the contractor and their employees, subcontractors and suppliers are considered essential business and performing essential functions.

4.0 Basis of Payment. Compliance with regulations and fees pertaining to Covid-19 is covered under Sec 107 of the Missouri Standard Specifications for Highway Construction. No direct payment will be made for compliance with this provision.

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COVID-19 Safety

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COVID-19 Safety

4.0 Basis of Payment

Compliance with regulations and laws pertaining to COVID-19 is covered under Sec. 107 of the Missouri Standard Specifications for Highway Construction. No direct payment will be made for compliance with this provision.

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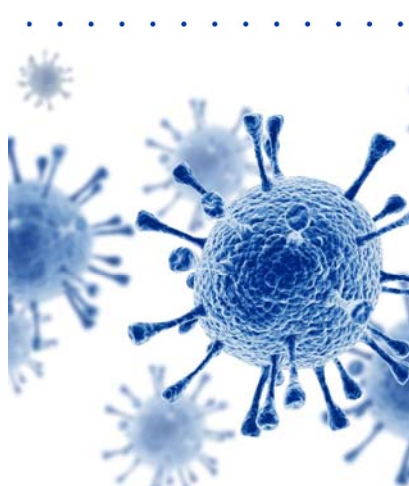
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Bidding in a COVID-19 World

Uncertainty = Problems for Everyone



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What Do We Know?


Experts, like Dr. Fauci, say there will be a second wave.

Presents Questions:

- Management and crews unable to access the job site or access it fully?
- Disruption of availability of the work force?
- Disruption of vendors and suppliers?

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Can We Rely on *Force Majeure* Clauses?

Force Majeure:

The failure of a party to a contract to perform because it encountered unanticipated obstacles which were beyond its reasonable control , and which it could not reasonably have avoided or mitigated, is the core concept of *force majeure*.

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First Inquiry

Is the “event” specifically a listed occurrences in the contract clause?

- If “yes,” that is a pretty easy determination.
- What if the clause is not specific?
 - May define *force majeure* as “any event arising from causes beyond the control” of the party seeking to raise the defense

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What if the Clause is Not Specific?

- If you can affirmatively answer that the delay falls within the clause
- Need to consider foreseeability of the event
- Restatement of Contracts says the courts need to ask, “was the event foreseeable by the party raising the defense?”

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Foreseeable Event

- One court that looked at this issue said:
 - *“using [its] best efforts to anticipate any potential force majeure event and [its] best efforts to address the effects of any such event both during and after its occurrence to prevent or minimize any resulting delay ‘to the greatest extent possible.’ ”*
- This analysis incorporates both a foreseeability (anticipate) requirement and a duty to mitigate (address impacts)

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Bidding in a COVID-19 World

Addressing
“Second Wave”=
More Certainty, or
More Risk?

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Should You Address Potential “Second Wave” in Bid?

- The Problem: We just do not know what is going to happen
 - Risk in planning as if it will happen
 - Risk in planning as if it will not happen
- There is no “right” answer
 - The “right” question: How do you allocate the risk?

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Option #1

- **Do not address it in your documents or negotiations**
 - As an owner, let the contractor proceed based on its own evaluation of the risk
 - If the potential risk is known, the costs of the risk should be incorporated into the project costs whether specifically addressed or not

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Option #1

- **Do not address it in your documents or negotiations**
 - As an owner, let the contractor proceed based on its own evaluation of the risk
 - If the potential risk is known, the costs of the risk should be incorporated into the project costs whether specifically addressed or not

- ✓ Owner can argue against relief if sought later that the risk was common knowledge and the contractor should have accounted for it in the price
 - Least amount of control by the owner
- ✓ If you have a contractor who does not include the risk, but a new wave develops, or if the contractor did not adequately assess the risk, virtually assured of claims and disputes over the impacts
- ✓ If the contractor does consider the risk and accounts for it in the bidding, but a new wave does not develop, owners will be paying for a risk that never came to fruition

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Option #2

- **Make available the best information available**
 - Disclaim any responsibility for the accuracy
 - But require the contractor to consider it when pricing the work

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Option #2

- **Make available the best information available**
 - Disclaim any responsibility for the accuracy
 - But require the contractor to consider it when pricing the work

- ✓ Expects the contractor to calculate the risks based on the projected conditions and include in the price of the project
- ✓ Rolls the pricing of the uncertainty into the contract at the front end rather in the back end through claims and disputes
- ✓ Owner may be paying for an event that does not happen
 - What if no “second wave” materializes?
 - What if the “second wave” is manageable and does not impact the project?

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Option #3

- **Make available the best information available**
 - The parties can agree on what to expect
 - Parties can agree to an adjustment to price and/or time if conditions differ

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Option #3

- **Make available the best information available**
 - The parties can agree on what to expect
 - Parties can agree to an adjustment to price and/or time if conditions differ

- ✓ Assures the contractor it can bid based on the current working assumptions
 - Owner is not paying for the potential “worst case scenario”; if the assumptions are wrong, the contract will be adjusted
 - In theory, should generate lower bids or prices
- ✓ Owner will not know the actual final cost of the project until it is over, not something all owners want or can accept
- ✓ Monitoring the system to determine if the “actual” exceeded the “projected” can be time consuming and expensive
- ✓ If the “actual” exceeds the “projected” it is possible to end up in disputes over what the adjustment should be

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Bidding in a COVID-19 World

- Consider using a clause with language similar to the AIA General Conditions modified to fit your needs
- Section 3.7.4 of the General Condition
 - “Concealed or Unknown Conditions”

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Section 3.7.4, “Concealed or Unknown Conditions”

- “Differ materially from those indicated in the Contract Documents”
- Require “prompt notice”
- Architect or IDM can address initial issues and make a recommendation

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Covid-19 Contractual Best Practices

James Mathis, Partner

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Covid-19 Force Majeure – How a Court Would Analyze

- Pre-Pandemic Contracts
 - Contract language controls
 - In the event that contract is silent, or ambiguous, case law controls
 - In Missouri and in Illinois, case law is very fact-specific, and therefore any outcome would be unpredictable
 - No reported case law on force majeure arising from Covid-19 pandemic
 - In our review of dozens of force majeure clauses (in construction context and otherwise), we have found no clause where Covid-19 pandemic would not be considered a force majeure event

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Covid-19 Force Majeure – How a Court Would Analyze

- Post-Pandemic Contracts
 - Covid-19 Pandemic is NOW a known event, even if what comes next is NOT known
 - Therefore, specific drafting of what is and what is not a force majeure event is crucial and subject to negotiation
 - Continuation of orders?
 - “Second spike” / renewed orders?
 - Workplace outbreak?
 - Economic downturn / economic effects on owner?
 - Increased costs / unavailability of equipment/supplies?

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Covid-19 Force Majeure – How a Court Would Analyze

- Post-Pandemic Contracts
 - What does force majeure event affect?
 - Deadlines?
 - Costs?
 - Change orders to reflect “new normal”?
 - Funding / bonding sources?
 - How will force majeure affect those material terms?
 - Excused delay?
 - Shared pain on increased costs?

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Covid-19 Other Considerations

- Frustration of Purpose / Commercial Impossibility
 - Force Majeure generally protects builders
 - These similar doctrines protect owners
 - In Missouri, the concept of commercial frustration provides “if the happening of an event not foreseen by the parties . . . has destroyed or nearly destroyed . . . the object or purpose of the contract, then the parties are excused from further performance”
 - How financially healthy is the ultimate user of the project, particularly if that user is a third party?

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Best Practices



A man in a dark suit and red tie is shown from the chest up, holding a glowing white orb with both hands. The orb contains the text "PREDICT THE FUTURE" in black capital letters. The background is a dark, smoky blue.

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Best Practices?



A meme featuring Aragorn from "The Lord of the Rings" with a serious expression, holding a small object in his hand. The text "ONE DOES NOT SIMPLY" is at the top and "PREDICT THE FUTURE" is at the bottom, both in white capital letters with a black outline.

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Next Best Practices (if predicting the future does not work)

01

Discuss buyer/owner side risk of business and economic downturn

02

Discuss builder risk of delays and cost increases

03

Negotiate and draft a specific process for risk sharing/allocation related to Covid-19 developments

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A Non-Construction Case Study - MLB



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A Non-Construction Case Study - MLB

- On March 26, MLB and the MLB Players Association entered into a revolutionary agreement regarding the then-in-doubt (and still in doubt) 2020 Season:
 - An agree-to-agree process on season start date and length of season
 - Emergency advance payments for 60 days for all players under contract
 - Pro-rated salary based on the number of games actually played
 - Provisions for service time and other player benefits if no 2020 season

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COVID-19 Impact at the Construction Jobsite: OSHA Guidance (and more)

Brad Hiles, Attorney

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OSHA's COVID-19 Risk Pyramid

Lower Risk -- for Workers with minimal occupational contact with the public/other coworkers

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OSHA's COVID-19 Guidance for the Construction Workforce

- Link to the Guidance:
<https://www.osha.gov/Publications/OSHA4000.pdf>.
- "What has been will be again, what has been done will be done again, there is nothing new under the sun." (Ecclesiastes 1:9)
- Wearing masks is *recommended*, not mandatory.
- "Encourage" workers to stay home if sick.
- Helpful link to EPA's "List N" for cleaning chemicals:
<https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2>

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9 Points Every Construction Contractor Should Address

1. Consider developing a written COVID-19 Prevention, Preparedness and Response Plan.

2. Decide whether to mandate face coverings/masks or make them voluntary. If mandatory, secure a supply.

3. Train employees to recognize symptoms.

4. Will there be a temperature checkpoint to enter the site?

5. What's your plan when workers must be within 6' of each other?

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Face Coverings, Masks and Respirators



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300 Log Recordkeeping Criteria for COVID-19 Illness

1. There is objective evidence that a COVID-19 case may be work-related. For example, a number of cases developing among workers who work closely together without an alternative explanation; and
2. The evidence was reasonably available to the Company. For example, the Company was given information by employees or the Company learns of information regarding employees' health and safety in the ordinary course of business.

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Miscellaneous Points

- Abnormally high rate of anonymous complaints relate to protections against COVID-19.
- On-Site OSHA Inspections are not happening.
- Fatality, hospitalization, amputation and eye injury Investigations are going the RRI route (Non-mandatory Investigative Tool)
- Fatality investigations related to COVID-19 are full-blown but virtual (still no on-site).

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Rethinking Buildouts & Floor Plans

Melissa Smith-Groff, Partner
Co-Chair, Corporate Real Estate Practice

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Designed for **Active Engagement**


Real Estate as **Brand and Productivity**


Landlords have **Upper Hand**

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Short-Term Effect of COVID-19

- Leasing activity
- Workplace changes:
 - Install cough and sneeze guards, barriers on desks and cubicles
 - Eliminate open space, shared desks or hoteling
 - Change furniture configurations
 - Rework or close communal areas
 - Avoid density in space
 - Increase cleaning
 - Address concerns with common areas in a building (time slots, mask use, elevator usage, touch screens)

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Long-Term Effect of COVID-19

- Work from Home
 - Effective, productive output
 - Flexibility to decrease space
 - Financial and operational impact
- Return to Workplace
 - Industry mandate
 - Social distancing norms
 - Changes to the workplace

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Changes to the Workplace


- Reconfigure air ventilation systems
- Outdoor gathering spaces
- Windows that open
- Hand sanitizer dispensers built into desks
- Lower density
- Using materials that are less hospitable to germs
- Eliminate touch screens and reduce need to contact commonly touched items
- Increase humidity to lower infection
- Flextime

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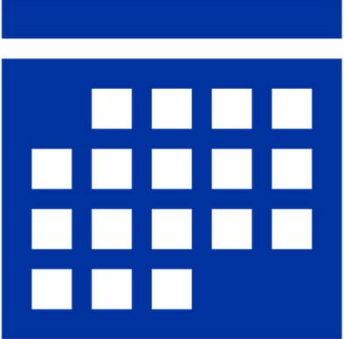



Discussions on
Rent Relief


Tenants have
Upper Hand


Tenants are
Staying Put

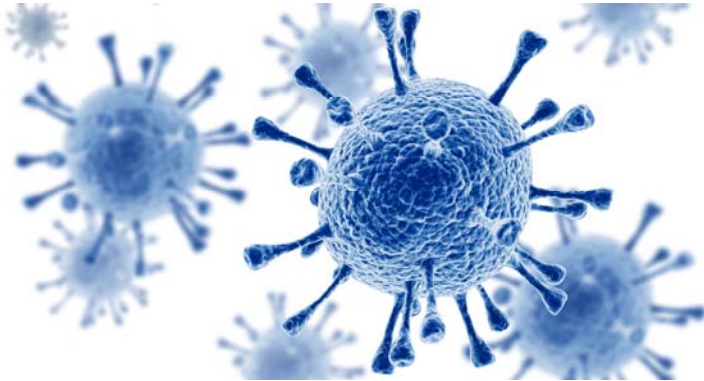

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Decisions and Actions will
Take Time to Enact


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Closing Comments


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