



The Soto Law Group, P.A.

# CONSTRUCTION PRACTICE GROUP

Legal Information for the Construction Industry

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## TOP TEN CONSTRUCTION CLAUSES – PART 4 THE FORCE MAJEURE CLAUSE (HURRICANE SEASON IS UPON US!)

This is the fourth in a ten-part series analyzing critical construction clauses. In this installment, the force majeure clause is examined. The first three articles addressed: (i) [Indemnification](#); (ii) [Mutual Waiver of Consequential Damages](#); and (iii) [Liquidated Damages](#).

### A. Overview

The phrase “force majeure” derives from the French for a “superior force.” A force majeure clause is a contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled. Typical force majeure events include, but are not limited to, acts of nature, such as floods and hurricanes, and acts of people, such as riots, strikes, war, and acts of terror.

The force majeure clause is an important protection device for the contractor because a force majeure event that occurs during a construction project may result in a delay in performance or increased cost of performance. For the purposes of this article, the term “Contractor” shall be used, however, the considerations discussed herein apply with equal force to subcontractors, suppliers, consultants, etc. Consider the potential risk to a contractor if a major hurricane makes landfall during the project. Performance can be delayed for weeks. Even when access to the project is reestablished and construction is resumed, the resulting materials shortages can cause material prices to dramatically increase. A contractor who has protected himself with a force majeure clause will be protected from an owner’s delay claims or refusal to pay the increased costs.

### B. Sample Force Majeure Provisions

The American Institute of Architects’ General Conditions of the Contract for Construction (AIA Document A201-2007) contains a model force majeure provision:

#### § 8.3 Delays and Extension of Time

§8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes that the Architect determines may justify delay, then the Contract time shall be extended by Change Order for such reasonable time as the Architect may determine.

ConsensusDOCS A200 (2011) also contains a model force majeure provision:

#### 6.3 DELAYS AND EXTENSIONS OF TIME

6.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of the Contractor, the Contractor shall be entitled to an equitable extension of the Contract Time.

Examples of causes beyond the control of the Contractor include, but are not limited to, the following: acts or omissions of the Owner, the Architect/Engineer or Others; changes in the Work or the sequencing of the Work ordered by the Owner, or arising from decisions of the Owner that impact the time of performance of the Work; transportation delays not reasonably foreseeable; labor disputes not involving the Contractor; general labor disputes impacting the Project but not specifically related to the Worksite; fire; terrorism, epidemics, adverse governmental actions, unavoidable accidents or circumstances; adverse weather conditions not reasonably anticipated; encountering Hazardous Materials; concealed or unknown conditions; delay authorized by the Owner pending dispute resolution and suspension by the Owner under Paragraph 11.1. The Contractor shall submit any requests for equitable extensions of Contract Time in accordance with the provisions of Article 8.

**6.3.2** In addition, if the Contractor incurs additional costs as a result of a delay that is caused by acts or omissions of the Owner, the Architect/Engineer or Others, changes in the Work or the sequencing of the Work ordered by the Owner, or arising from decisions of the Owner that impact the time of performance of the Work, encountering Hazardous Materials, or concealed or unknown conditions, delay authorized by the Owner pending dispute resolution or suspension by the Owner under Paragraph 11.1, the Contractor shall be entitled to an equitable adjustment in the Contract Price subject to Paragraph 6.6.

Several aspects of these force majeure provisions merit discussion. First, the AIA provision only provides the Contractor with an extension of time. From the perspective of a contractor, it is also advisable to negotiate entitlement to additional payment caused by force majeure events, including, but not limited to, increases in labor and materials prices and additional general conditions for the extra time on the project. The ConsensusDOCS version authorizes an adjustment in the contract price; however, a Contractor's entitlement to adjustments does not extend to *all* of the events entitling the Contractor to an extension of time and is limited to those delays caused by the Owner, Architect/Engineer, or others and does not include any other force majeure-type events. Both versions also encompass events beyond standard force majeure events, such as acts or neglect of the Owner or Architect or changes ordered in the work. For the contractor, this expansive language is welcome but the owner may wish to eliminate the language or limit extensions of time to certain enumerated events.

### C. Florida Case Law Examples

In *S&B/Bibb Hines PB 3 Joint Venture v. Progress Energy Fla., Inc.*, 365 Fed. Appx. 202 (11th Cir. 2010), the contractor entered into two multimillion dollar fixed-price contracts dealing with the construction of two electric generating plants in Polk County, Florida. During the course of performance, four hurricanes struck Polk County and three hurricanes hit the Gulf Coast, resulting in a shortage of labor and materials and a corresponding increase in the cost of construction for the contractor. Global economic forces also contributed to an unanticipated increase in the contractor's materials costs. The contractor filed a lawsuit in federal court to recover approximately \$40 million in additional compensation over and above the contract's firm, fixed price. The court dismissed the contractor's claims, finding the force majeure clause in the parties' contract unambiguously *prohibited* additional compensation:

*Should contractor be delayed in the commencement, performance, or completion of the Work due to any of the conditions provided for under Section 37B, Force Majeure, Contractor shall be entitled to an extension of time only, provided however, that in no event shall Contractor be entitled to any increased costs, additional compensation, or damages of any type resulting from such Force Majeure delays.*

(emphasis added). The court found that a plain reading of the contract indicated that the parties intended to include all labor and materials costs in the firm, fixed price, even those arising from force majeure events. This case underscores the importance of not only including a force majeure provision into your contracts, but ensuring such provisions include entitlement to increase in materials and labor costs and additional general conditions for the extra time on the project.

Although the hurricane example above resonates with contractors in Florida, force majeure provisions have been utilized in numerous additional situations, for example, when attendance at the 2002 Salt Lake City Winter Olympic Games was negatively affected by numerous terrorist acts nationwide and the global war on terror (*see Cartan Tours v. ESA Servs.*, 833 So. 2d 873 (Fla. 4th DCA 2003)), and when a design error in machinery prevented an industrial company's compliance with environmental regulations. *See St. Joe Paper Co. v. State Dep't of Envtl. Regulation*, 371 So. 2d 178 (Fla. 1st DCA 1979).

As the foregoing cases clearly demonstrate, a carefully crafted force majeure clause can protect a Contractor from numerous unexpected events that would otherwise destroy or greatly reduce the value of a project or contract. Consult with an attorney knowledgeable in construction so that together you can create a force majeure provision suitable for your business.

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