

# COVID-19 State and Local Government Considerations

*Presented by*

**Shelly L. Ewald**  
Senior Partner



**703-749-1093**  
**sewald@watttieder.com**

# BASICS: STATE AND LOCAL CONSTRUCTION CONTRACTS

- *Force Majeure/Excusable Delays*
- Suspensions of Work
- Change in Law
- Sovereign Act Doctrine
- Preemption: Federal, State and Municipalities
- Safety/Health Requirements; Protection of Work
- Notice Requirements



# ORIGINS OF *FORCE MAJEURE*

- “Superior Force”
- Concept Originated in the Napoleonic Code (French Civil Law)
- Excused Performance due to Physical Impossibility
- Contrary to the General Rule:
  - *Pacta Sunt Servanda*: Contracts Must Be Enforced as Written
- Historically Difficult to Prove
- Courts will impose “common law” notions such as foreseeability when determining whether an event constitutes *force majeure*.  
*TEC Olmos, LLC v. ConocoPhillips Co.* 555 S.W.3d 176 (Tx. Ct.App. 2018).



## FORCE MAJEURE: UNITED STATES

- *Force Majeure* – Not generally recognized at common law in the United States (statutory in Louisiana);
- Act of God does not relieve parties of contractual obligations absent a Force Majeure Clause. See e.g., *GT&MC, Inc. v. Texas City Ref., Inc.* (1991).
- Prior Defenses – Impossibility, Impracticability, Frustration of purpose
- *Force Majeure* – Contractual Adoption in the U.S.
  - *Force Majeure* Clauses increasingly utilized in EPC contracts since 1980's/90's
  - Burden of proof on party seeking to avoid obligations due to *Force Majeure*
  - *Force Majeure* interpreted narrowly and strictly



# FORCE MAJEURE ELEMENTS

- No universal definition, but common elements:
  - An event that prevents performance of the affected party's contractual obligations
  - The event is beyond the reasonable control of the affected party and not due to its fault or negligence
  - The event was not reasonably foreseeable by the affected party
  - The event could not have been prevented or avoided by the affected party
  - Can include or exclude enumerated events
  - Can be made subject to a requirement to mitigate the effect of the event



# TYPICAL *FORCE MAJEURE* DEFINITIONS PRIVATE CONTRACTS

- “*Force Majeure*” means an act, event or circumstance that affects a Party’s ability to perform its obligations under this Contract to the extent the same is **beyond the reasonable control of the affected Party or its contractors or subcontractors** including, but not limited to, government declared states of emergency, fires, explosions, epidemics, insurrections, sabotage, civil disturbance, war, terrorist attack, revolt, maritime disasters, commercial embargoes and natural disasters (including, but not limited to named storms, tornadoes, floods, earthquakes and lightning); provided that such act, event or circumstance (a) **physically delays or prevents the claiming Party’s performance** of its obligations under this Contract (excluding however obligations to pay money or provide release, defense or indemnification to or for the non-claiming Party); (b) is **beyond the reasonable control of the Party claiming *Force Majeure* and not the result of the fault or negligence of such Party or a member of the such Party’s Group**; and (c) **was not reasonably foreseeable and preventable by reasonable diligence and actions on the part of the Party claiming *Force Majeure***. Notwithstanding the foregoing, *Force Majeure* does not include (i) economic hardship, (ii) strikes (excepting national or regional strikes), (iii) late delivery, (iv) mechanical breakdown of equipment, (v) unavailability of equipment, (vi) price fluctuations with respect to, equipment, supplies or qualified labor, (vii) lack or loss of productivity, except to the extent directly attributable to a qualified *Force Majeure* event, or (viii) normal climatic or weather conditions (including rain, wind, snow, ice, heat and temperature) affecting the Work;



## TYPES OF DELAY – GENERAL RULES

- *FORCE MAJEURE/EXCUSABLE*: Time, but no Money for Delays Beyond the Control of Both Parties
- *COMPENSABLE*: Time and Money
- *CONCURRENT*: Usually Time, but no Money unless Clear Apportionment
- *FORCE MAJEURE*: Excuses Performance of Contractual Obligations and typically provides for a Time Extension and Relief of Liquidated Damages



# AACE INTERNATIONAL RECOMMENDED PRACTICE NO. 29R-03 CONCURRENT DELAY WITH *FORCE MAJEURE* EVENTS GENERAL RULES

<b>Delay Event</b>	<b>Concurrent with</b>	<b>Net Effect</b>
Owner Delay	Another Owner Delay or Nothing	Compensable to Contractor, Non-Excusable to Owner
Owner Delay	Contractor Delay	Excusable but Not Compensable to both Parties
Owner Delay	Force Majeure Delay	Excusable but Not Compensable to both Parties
Contractor Delay	Another Contractor Delay or Nothing	Non-Excusable to Contractor, Compensable to Owner
Contractor Delay	Force Majeure Delay	Excusable but Not Compensable to both Parties
Force Majeure Delay	Another Force Majeure Delay or Nothing	Excusable but Not Compensable to Contractor



## EXCUSABLE DELAYS: WMATA PROCUREMENT MANUAL

- If the Contracting Officer determines that the contractor's failure to perform arises from causes which are excusable under the terms of the contract, the Contracting Officer shall not terminate the contractor's right to proceed. Neither shall damages (liquidated or actual) be imposed on the contractor because of any delays occasioned by such causes. Procurement Manual, Section 18-15(c).



# SUSPENSIONS OF WORK

- Typically Require Payment for Work Performed to Date
- Require Contractor to Preserve and Protect the Work
- Require Contractor to Mitigate Damages
- May Limit the Period of Suspension Before Right of Termination
- May Give Rise to a Claim of Unabsorbed Overhead (Eichleay Damages)



## EXAMPLE OF SUSPENSION PROVISIONS: WMATA

- Situations may occur during contract performance causing the Contracting Officer to order a suspension of work. The actions listed below may be taken by the Contracting Officer as authorized by the Stop Work Order clause.
- The Contracting Officer may order the contractor, in writing, to suspend, delay, or interrupt any or all of the contract work for the period of time determined appropriate.
- If the performance of all or any part of the work of this contract is delayed or interrupted: by a specified stop work order, an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption, and the contract shall be modified in writing accordingly. 18-14 Suspension of Work/Stop Order



# CHANGES IN LAW

- Some Contracts include a “Change in Law” provision within the Changes Clause
- Coverage may depend upon how broadly “Law” is defined (Laws, Regulations, Executive Orders, Municipal Orders)
- Executive Orders/Statutes that restrict work or do not include construction as an “Essential Service” could provide an avenue for excuse/recovery



# CHANGE IN LAW DEFINITIONS

“*Changes in Law*” means any amendment, modification, superseding act, deletion, addition or change in or to Applicable Law.

“*Applicable Law*” means all laws, statutes, ordinances, certifications, orders, decrees, injunctions, licenses, Permits, approvals, agreements, rules and regulations, including any conditions thereto, of any Governmental Instrumentality having jurisdiction over any Party, all or any portion of the Site or the Facility or performance of all or any portion of the Work or the operation of the Facility, or other legislative or administrative action of a Governmental Instrumentality, or a final decree, judgment or order of a court which relates to the performance of Work hereunder or the interpretation or application of this Agreement, including (i) any and all Permits, (ii) any Applicable Codes and Standards set forth in Applicable Law, and (iii) Environmental Law.



# SOVEREIGN ACT DOCTRINE

- The Sovereign Act Doctrine, is an affirmative defense inherent in every government contract.
- This defense is premised on the principle that the United States as a contractor cannot be held liable for the government's public acts made as a sovereign or lawmaker.

*Conner Bros. Const., Co., Inc. v. Geren*, 550 F.3d 1368 (Fed. Cir. 2008).



# SOVEREIGN ACTS DOCTRINE

The sovereign acts doctrine provides that “the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign.” *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 69 L.Ed. 736 (1925). The doctrine is an affirmative defense that is an inherent part of every government contract. *Hughes Commc'ns Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed.Cir.1993). It is based on the government's dual roles as contractor and sovereign, and it is designed to balance “the Government's need for freedom to legislate with its obligation to honor its contracts.” *United States v. Winstar Corp.*, 518 U.S. 839, 896, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996) (principal opinion of Souter, J.).



## STATE AND LOCAL EMERGENCY ORDERS:

- Resources for tracking COVID-19 state and local orders and legislation.
- <https://www.nga.org/coronavirus/#states>
- <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx>
- <https://www.wsj.com/articles/a-state-by-state-guide-to-coronavirus-lockdowns-11584749351>



# MISSING COMMA IN DEFINITION OF ESSENTIAL SERVICES CREATED HAVOC IN ATLANTA

Executive Order  
Office of the Mayor  
City of Atlanta

2020 MAR 23 PM 8:49

EXECUTIVE ORDER NUMBER 2020-21  
BY THE MAYOR

DECLARING, IN ACCORDANCE WITH SECTION 2-181(A) OF THE  
CITY OF ATLANTA CODE OF ORDINANCES, THERE TO BE AN

EMERGENCY IN EXISTENCE WITHIN THE  
JURISDICTIONAL LIMITS OF THE CITY OF ATLANTA  
DUE TO THE EXISTENCE OF AN EXTREME LIKELIHOOD  
OF LOSS OF LIFE OR PROPERTY WITHIN THE  
LIMITS OF THE CITY OF ATLANTA DUE TO THE  
CONDITION OF THE COVID-19 PANDEMIC  
AFFECTING ALL INDIVIDUALS LIVING IN THE  
LIMITS OF THE CITY OF ATLANTA TO LEAVE  
THEIR PLACE OF RESIDENCE; TO PERMIT  
THIS ORDER TO LEAVE THEIR PLACES OF  
RESIDENCE TO PROVIDE OR RECEIVE CERTAIN  
ESSENTIAL SERVICES; TO ENGAGE IN CERTAIN  
ESSENTIAL BUSINESS AND GOVERNMENT  
OPERATIONS INDIVIDUALS EXPERIENCING HOME  
ISOLATION BUT URGING THEM TO FIND SHELTER  
WITH OTHER ENTITIES TO PROVIDE IT; AND TO  
CEASE NON-ESSENTIAL OPERATIONS WITHIN  
THE CITY OF ATLANTA TO PREVENT  
ESSENTIAL GATHERINGS OF ANY NUMBER  
FOR OTHER PURPOSES.

WHEREAS, pursuant to Section 2-181(a) of the Code of the City of Atlanta, the Chief Executive of the City, shall have the emergency powers of the Mayor when, in the mayor's opinion, there is an extreme likelihood of an unusual condition; and

WHEREAS, pursuant to Section 2-181(b) of the Code of the City of Atlanta, the Chief Executive of the City, shall have the right to exercise the powers of the Mayor upon a declaration of emergency:

- (1) To use employees of the city other than employees of the police department in the safety and preservation of life, limb, and property;
- (2) To close streets and sidewalks and to close public places when an emergency exists;
- (3) To impose emergency curfew regulations;
- (4) To close business establishments within the affected area.

(c) For purposes of this Order, individuals may leave their residence to provide any services or perform any work necessary to the operations and maintenance of "Essential Infrastructure," including, but not limited to public works construction, airport operations, utility, water, sewer, gas, electrical, oil refining, roads and highways, railroads, public transportation, taxi/rideshare, solid waste collection and removal, internet, and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services, business infrastructure, communications, and web-based services), provided that they carry out those services or that work in compliance with Social Distancing Requirements as defined herein, to the extent possible.

# STATE AND LOCAL ORDERS: PREEMPTION DOCTRINE

- Preemption occurs when law at a higher level of government is used to overrule authority at a lower level. State law can be used to preempt local ordinances, and federal law can be used to preempt state law.



# PREEMPTION DOCTRINE ILLUSTRATED: MASSACHUSETTS GOVERNOR'S ORDER (STATE V. MUNICIPALITY)

This Order supersedes and makes inoperative any order or rule issued by a municipality that will or might in any way impede or interfere with the achievement of the objectives of this Order. With respect to work and travel in particular, any order or rule issued by a municipality is hereby made inoperative to the extent: (1) such municipal order or rule will or might interfere with provisions of this Order ensuring the continued operation of COVID-19 Essential Services; or (2) such municipal order or rule will or might interfere with the free travel anywhere within the Commonwealth of any person who is a member of any COVID-19 Essential Workforce where such travel is made in connection with the ongoing operation of COVID-19 Essential Services.



# SUPPLY CHAIN INTERRUPTIONS

- The Convention on the International Sale of Goods
- Applies to Sale of Goods between Parties who are residents of Signatory States
  - Adopted by +90 Countries, including the United States and China
- Article 79 of the CISG codifies *Force Majeure* principles
- Impediments beyond the Contractor's control are excused if the other members of the supply chain can demonstrate impediment beyond their control prevented performance.



# SUPPLY CHAIN INTERRUPTIONS

## CONVENTION INT'L SALE OF GOODS: ARTICLE 79

- (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
  - (a) he is exempt under the preceding paragraph; and
  - (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
- (3) The exemption provided by this article has effect for the period during which the impediment exists.
- (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
- (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.



# NOTICE REQUIREMENTS

- Must Be Addressed to Authorized Representative (CO, PM, etc.)
- Confirm Instructions Given by Any Unauthorized Persons
- Describe Impact including Delays, Suspension of Work and Limitations on Personnel
- Identify Any Costs Incurred for Protection of Work/Employees Due to Working in a Proscribed or Limited Manner
- Identify any Impacts to Supply Chain
- Identify Impacts of Re-starting Work, including Acceleration, Change in Methods or Manner of Performance

