

INTERPRETING FORCE MAJEURE IN THE WAKE OF DISASTER

BY CHRIS HANVEY

For contractors performing work in the Gulf Coast, the recent hurricanes have raised some complex legal issues associated with defining force majeure and assigning risks.

Force majeure contract clauses include language that defines the event, the notice requirements and the terms of the schedule extension. Events such as unusually severe weather or a labor strike have clear start and end dates. It gets more complicated when a major event not only directly impacts the work but also creates potentially changed working conditions after work resumes. This circumstance leads to several questions regarding the contractual language with respect to allowable project extensions, responsibility for mitigating the event's impacts, as well as the costs associated with mitigation efforts.

There are two primary difficulties in defining force majeure events that encompass the magnitude of events like Hurricanes Katrina and Rita:

- dealing with continuing impacts associated with the disasters (e.g., a reduced labor force, accessible transportation and material availability); and
- defining the responsibility and liability for mitigating the event's immediate and continuing impacts.

CONTINUING IMPACTS

For many projects in the hurricanes' paths, a force majeure event was declared, project personnel secured the site, and the workforce left the project site until the hurricanes passed. However, the hurricanes devastated large areas along the Gulf Coast, leading to massive evacuations; destroying houses and buildings; and demolishing infrastructure and utilities such as roads, power lines, gas lines and running water. Although by strict definition of most force majeure clauses the event had ended, the impacts continued delaying and disrupting these projects. With reduced labor availability, no

available housing, limited utilities, higher wage requirements for cleanup and repair, and transportation and communication issues, projects under way suffered and could continue to suffer productivity impacts and schedule delays.

Do the continuing impacts of such events constitute force majeure? Is the contractor entitled to additional schedule extensions as a result of these impacts? There are no clear-cut answers to these questions, and they are likely not addressed in the contract. Contracts that do address these issues substantially increase the likelihood of the parties mitigating the impact of the event.

Force majeure clauses should clearly define what constitutes a force majeure event as well as what is considered the end of the event.

Although the damage from the hurricane may continue to affect a contractor's ability to perform the work as it had originally planned, this issue is separate from the actual force majeure event. The force

majeure event should end at the time work is allowed to resume, even in a limited capacity. The affected party should be allowed a schedule extension, without compensable damages, for this time period, unless the contract language indicates otherwise.

In areas that could be massively affected by force majeure events, such as hurricanes or earthquakes, the parties should consider additional contract language to address a force majeure event's continuing impact on the work progress. This separate language should address issues such as:

- reduced labor availability and productivity;
- impacts on utilities necessary to perform the work;
- lack of basic utilities and housing for labor;
- site availability; and
- impacts on material and equipment suppliers.

Because the basic premise behind force majeure provisions is that none of the parties should be liable for damages associated with the event, it may be in the parties' best interest to establish conditions in which they both bear some responsibility for costs. For example, they may assume responsibility for the following:

- making a fair determination of schedule extensions and liquidated damages;
- making allowances for productivity impacts;
- providing living and transportation facilities;
- higher material costs;
- higher cost for specialty contractors due to high market demand;
- increasing labor pay rates;
- providing basic utilities; and
- improving site access.

Implementing contract language can more clearly define force majeure events as well as what the parties accept as risk. These provisions can lead to amicable resolutions and lessen the potential for conflict.

This discussion does, however, lead to the question of what constitutes reasonable mitigation efforts during the force majeure event.

RESPONSIBILITY FOR MITIGATION

Most force majeure provisions include language concerning mitigation (e.g., "...the contractor shall use all *reasonable*

efforts to mitigate the impact of the force majeure event on the project.").

What constitutes a "reasonable effort to mitigate?" Mitigation could include simply securing the site or more complex efforts such as building temporary housing, providing utilities and basic necessities, increasing wage rates/per diems and accelerating the work.

Obviously these solutions cost money, and the purpose of force majeure provisions is to protect the parties from financial damage. At what point does the contractor's responsibility to perform the work under the terms of the agreement supersede the force majeure provisions, and when does "reasonable" exceed the amount of money the contractor is willing to expend to mitigate the event's impacts? If there are continuing impacts, who is responsible for the costs associated with mitigating those impacts?

Under traditional force majeure clauses, the contractor has the right not to expend excessive money as a result of the event. Although the contractor is entitled to non-compensable schedule extensions, which may require the contractor to pay project extension costs, the owner also has every right to expect the contractor to meet the terms of the contract. If the contractor does not, the owner may suffer losses in revenue from late product production.

Under traditional force majeure clauses, the contractor's remedy is limited to a schedule extension equal to the duration of the force majeure event. Alternatively, the owner should expect that the contractor will make all reasonable efforts to complete the work in a timely fashion to mitigate impacts to future revenue expected from the project.

However, some problems remain. Current force majeure contract provisions do not adequately address the parties' responsibilities for mitigating the impacts of force majeure events, and subjective terms such as "reasonable" are used to describe the parties' responsibilities. What is reasonable to the contractor may not be reasonable to the owner. Each party differently defines reasonable mitigation costs.

CLEAR CONTRACT LANGUAGE

The most effective way parties can protect their interests is to clarify contract language regarding reasonable mitigation efforts. If the contract language is unclear, it is nearly impossible to accurately iden-

tify potential risks associated with performing a project. In turn, parties may underestimate the potential risks, leading to disputes.

Parties should consider the following when writing a force majeure contract clause:

- What is a clear definition of "reasonable" for each party?
- What are considered reasonable mitigation costs for force majeure events?
- What mitigation efforts (securing the facilities, employee living costs, hourly rate increases, temporary housing, etc.) might be necessary and when should these be employed?
- Which party or parties are responsible for these costs, and are these shared?
- Are potential mitigation efforts included in other contract provisions?
- How long should one party incur these costs?
- What impact do these mitigation efforts have on potential schedule extensions?
- What threshold cost would allow either party to terminate the contract without penalty?

When writing a force majeure contract clause, parties should consider whether

UNDER TRADITIONAL FORCE MAJEURE CLAUSES, THE CONTRACTOR HAS THE RIGHT NOT TO EXPEND EXCESSIVE MONEY AS A RESULT OF THE EVENT.

their requests are reasonable regarding the contract language. One-sided contractual language is not beneficial to projects and often leads to parties feeling unfairly treated. The contract language, if unclear or ambiguous, can be construed against the party that drafted the contract.

Including specific contract language to define the end of force majeure events and outline mitigation responsibilities can help clarify ambiguity. By increasing risk awareness, clarifying responsibilities and reducing the potential for significant conflicts, all parties can successfully endure the event and its immediate and prolonged impacts.

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