



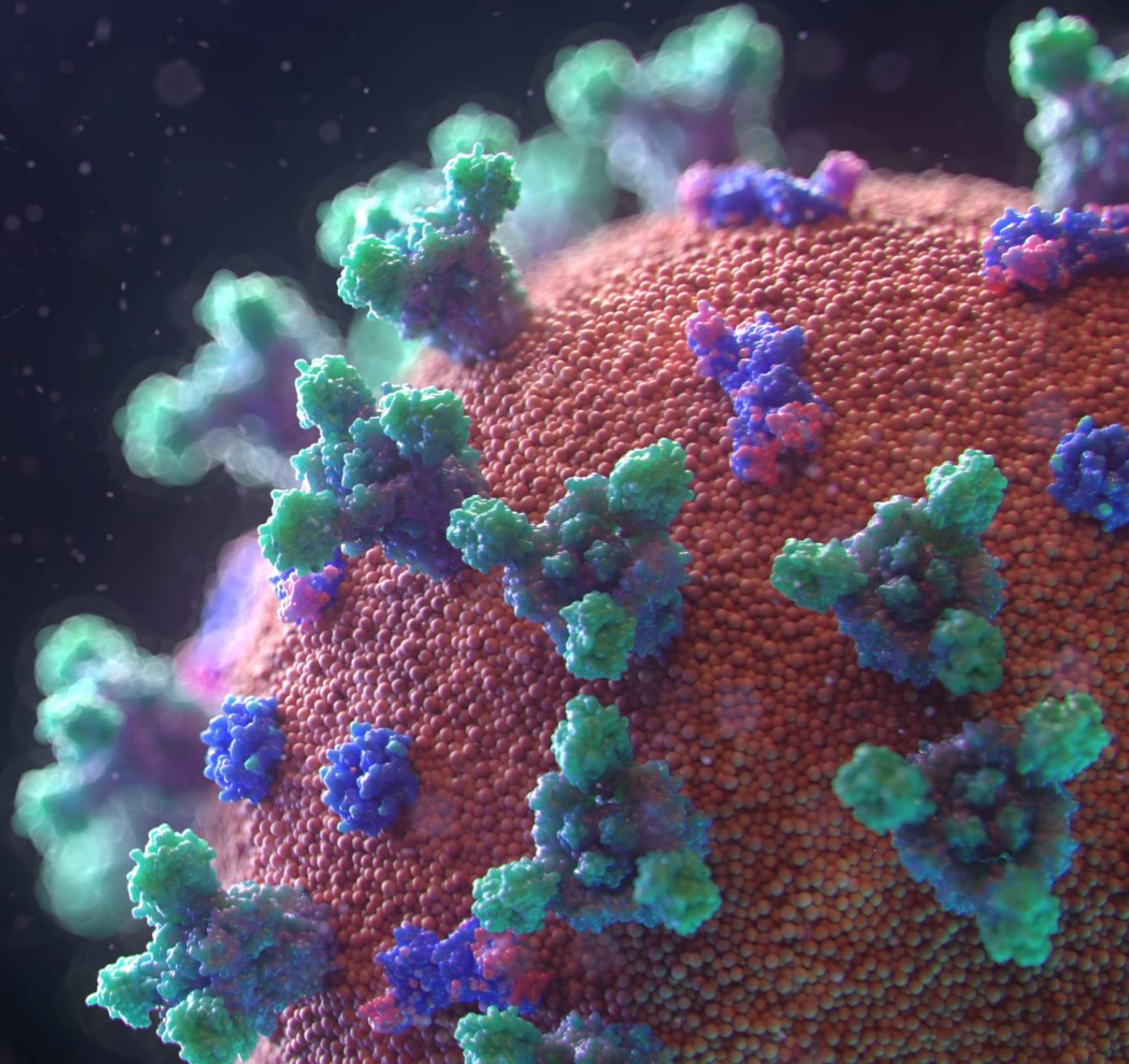
# COVID-19's Impact on Public and Private Construction Projects

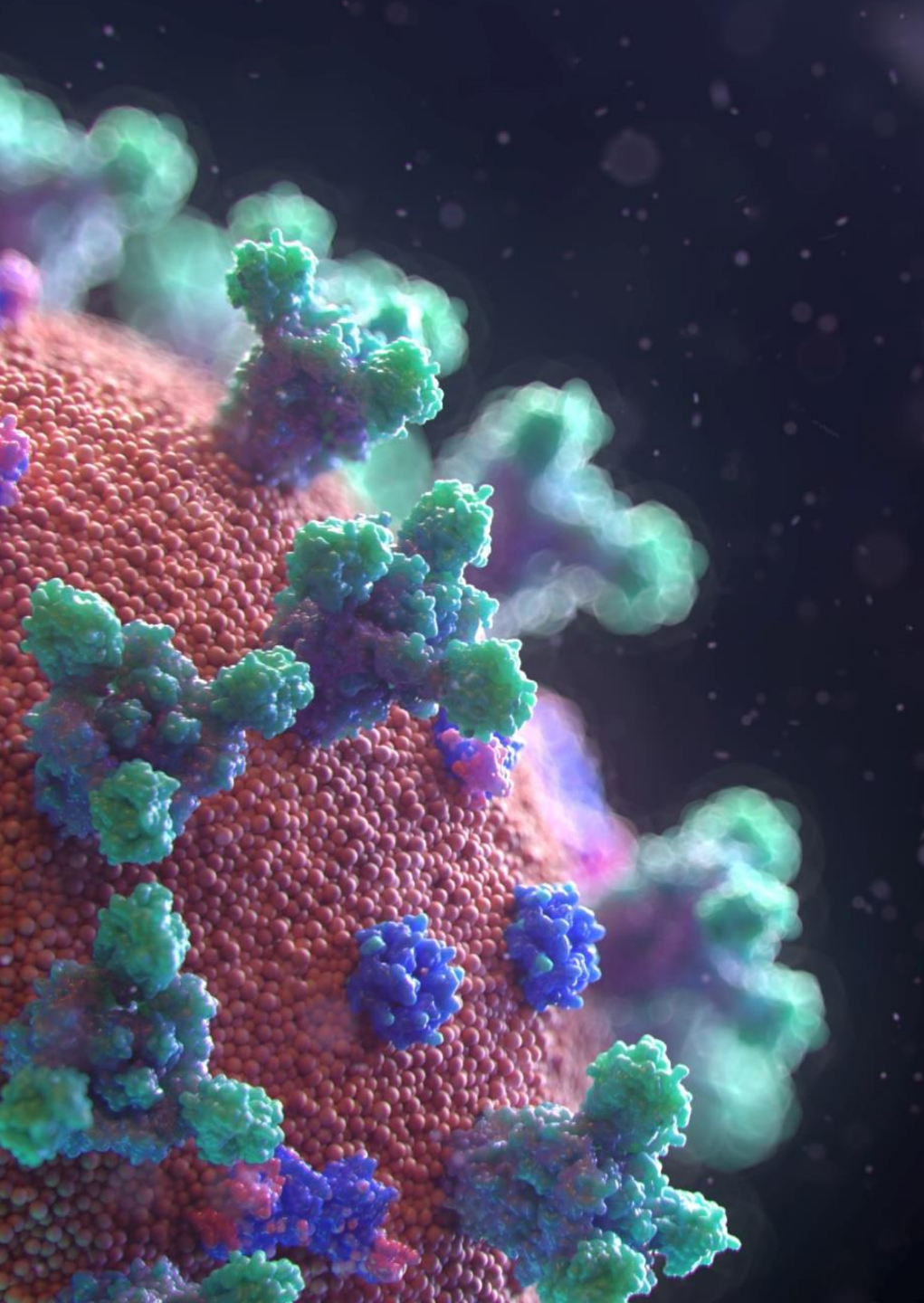
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April 1, 2020

**Seyfarth Shaw LLP**

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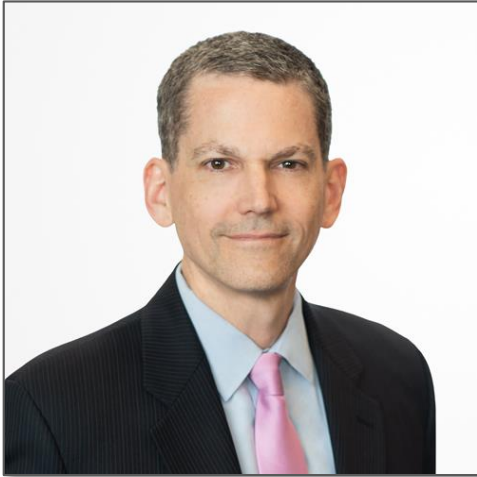
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# Speakers

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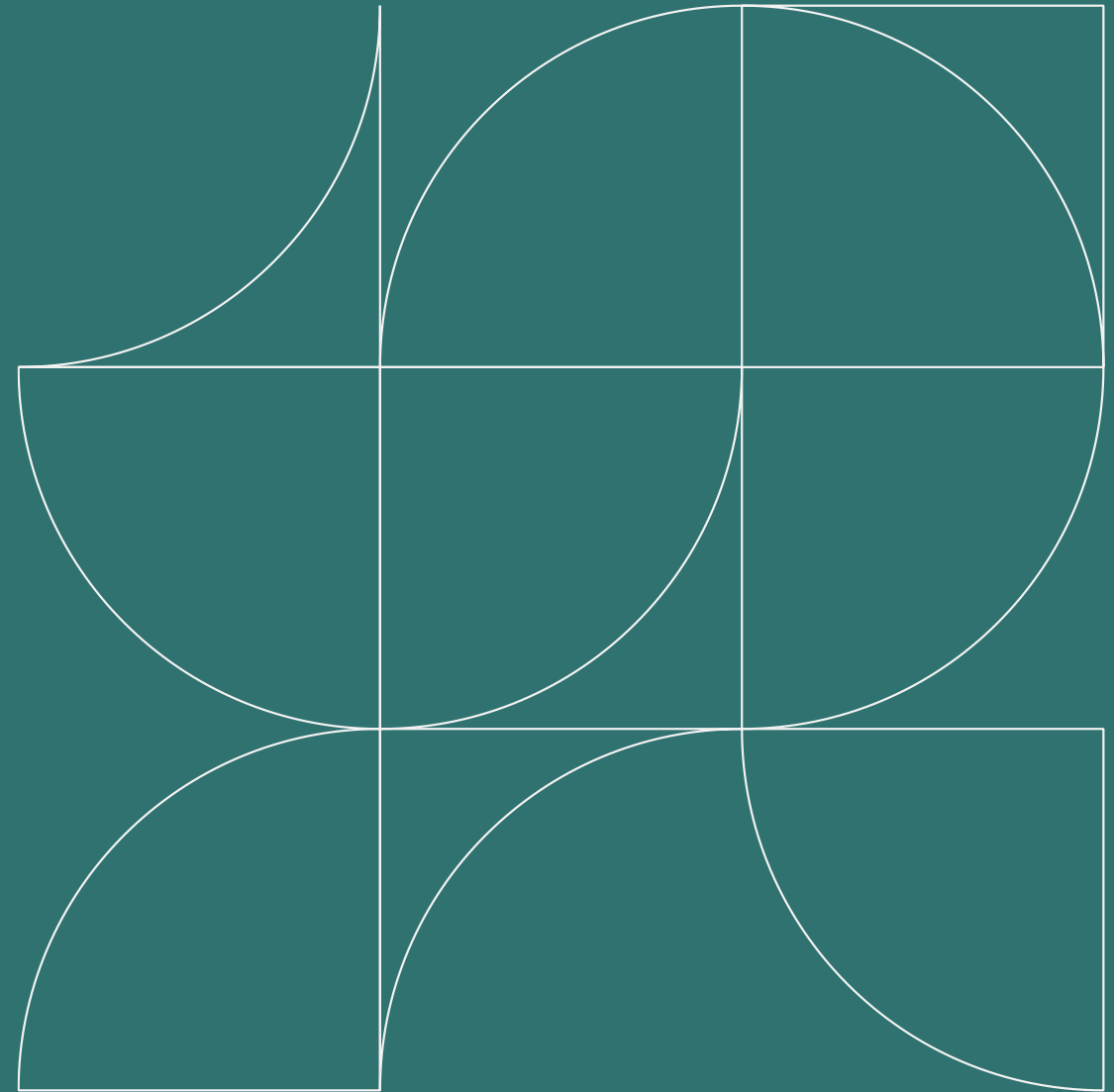
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# Topics

FAR Clauses,  
AIA Clauses and  
Cases Pertinent  
to COVID-19

- 01** Delay and Suspension
- 02** Default and Termination
- 03** Forbearance, Waiver, Prevention and Economic Hardship
- 04** Illness of Key Personnel
- 05** Changes and Claims
- 06** Indemnification
- 07** Payment and Financing
- 08** Partial Occupancy and Final Completion
- 09** Questions and Follow-up

# Delay and Suspension



# Demonstrate the Delay



## For Example:

- The FAR Default clause (52.249-10) is clear in enumerating “epidemics,” “acts of the Government in its sovereign or contractual capacity,” “acts of another Contractor in the performance of a contract with the Government,” and “quarantine restrictions” as causes excusing a contractor’s late performance.

Excusable includes compensable and non-compensable delay.

The cases teach us these causes are not excusable causes *per se*.

# Contractor Demonstrates Delay



## ***Ace Electronics:***

Although listed in the Default clause as one of several causes of excusable delay, such enumeration does not make the occurrence of an epidemic an excusable cause per se. Illness occasioned by the onset of a flu epidemic is in general an excusable cause for delay provided it can be shown that performance was in fact delayed by reason of such epidemic. It is incumbent upon appellant to establish not only the existence of an excusable cause for delay but also that such cause actually contributed materially to such delay as well as the actual extent of the delay so caused.

*Appeal of Ace Electronics Associates, Inc., 67-2 BCA P 6456 (1967) ASBCA Nos. 11781 and 11496.*



# Sole or Concurrent Delay



## One Delay or Concurrent Delays

- Elements of proof of such delay are phrased in different terms, the non-construction-related BCA decisions sometimes suggest the epidemic or other excuse must be the sole cause of the delay.
- This rule may be appropriately circumscribed to non-construction contracts.
- In the context of a construction delay claim, concurrent delays (for our purposes defined as simultaneous delays, one caused by the contractor and one caused by the Government) will suffice to entitle the contractor to a non-compensable extension of the contract time and remission of the Government's liquidated damages. And that alone will be enough to overcome the termination for default due to delays in delivery.

For concurrent delay see: *Morganti National, Inc. v. U.S.*, 49 Fed. Cl. 110 (2001), *aff'd*, 36 Fed. Appx. 452 (Fed. Cir. 2002).

# Forbearance of Waiver

COVID-19 has created a period of uncertain action -- the Government may create a period of forbearance.

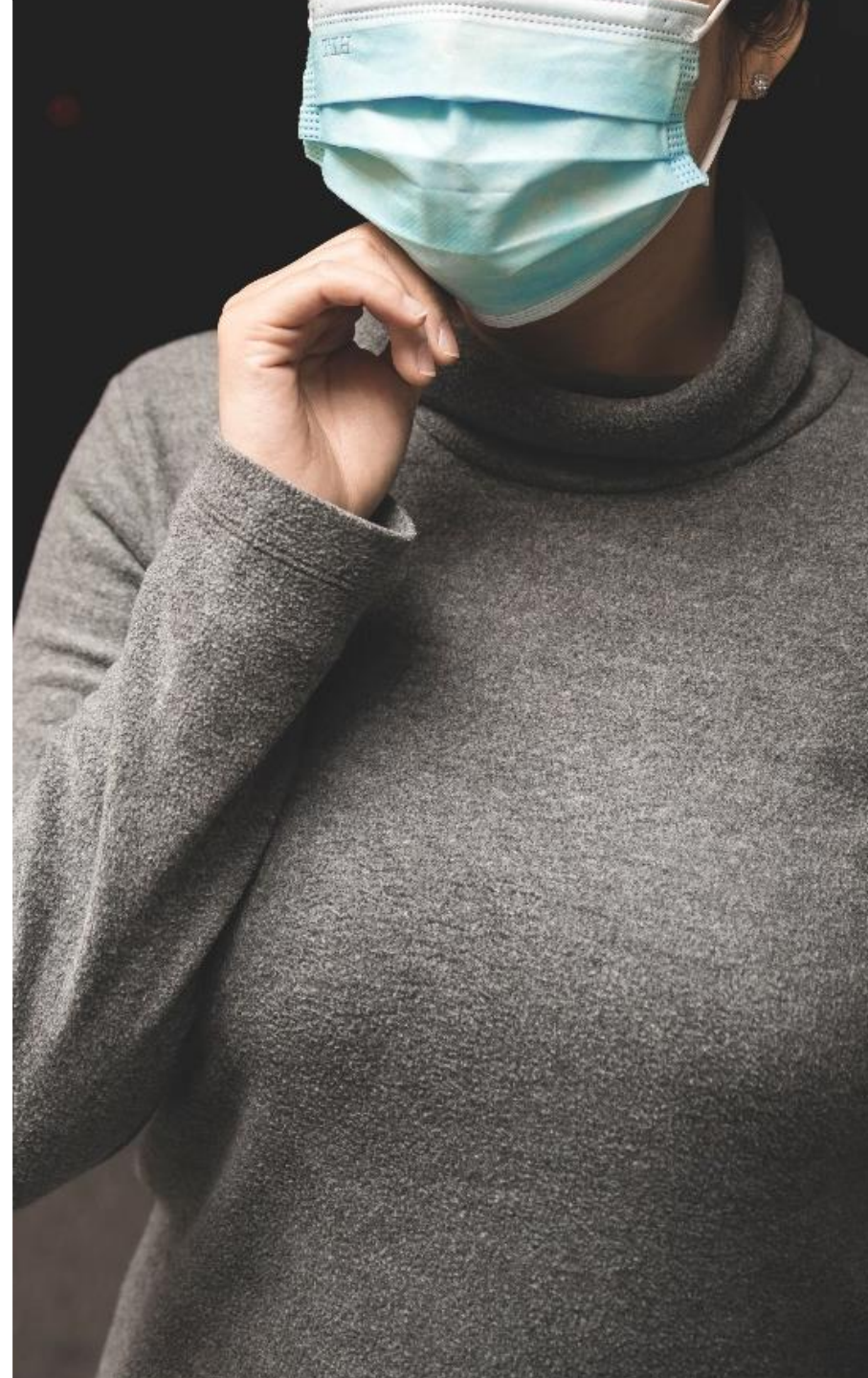
- In Ace Electronics, the ASBCA noted, it “appears well settled” that a contract remains in force after the default (breach) until the Government elects to terminate it.
- The analysis depends largely on the contractor’s conduct in “vigorously and actively proceeding with efforts to perform” and when the Government’s “conduct and actions of its agents, encourages and induces the contractor to continue with performance and to incur further expense in connection with such performance.”
- In Ace Electronics, the Board determined the Government’s actions “induced appellant to continue with its preproduction testing program, thus manifested a willingness to permit continued performance, and thereby waived the requirement for their delivery in accordance with the original contract schedule.” The Board converted a termination for default into a termination for the convenience of the Government.



# Illness of Key Personnel

COVID-19 may infect key personnel resulting in the loss of their specific services.

- Merely pointing to the illness of a key employee may not suffice. Link the key personnel to actual duties others in the organization could not perform – particularly if the contractor is a corporation and not a small business.
- Demonstrate facts indicating the ill or quarantined personnel were key to performance, including any contract language identifying those personnel as “Key Personnel.”
- Explain the key employee’s role in performing the contract; why others could not immediately step-in to fulfill the open role; and should link the period of absence to actual delays of performance.
- Even if there are others in the organization that can fulfill the role of the ill key-person, consider a claim for the replacement’s reasonable ramp-up or learning curve period which may serve to excuse a portion of the delay or result in reimbursable costs if the contractor seeks the adjustment under the Changes clause.



# Prevention Doctrine



- “A party may not use the non-performance of a condition precedent when that party, is responsible for the non-performance of the condition.”
- Contractors should be proactive in mitigating delays and implementing mitigation measures such as insisting that subcontractors protect sources of supply or arrange for alternative sources of supply not subject to shipping or manufacturing problems arising from quarantine restrictions or acts of the Government precluding delivery.
- Finally, consider the situation where a contractor or subcontractor delayed purchasing materials (and now they are unavailable); contractors or subcontractors who waited too long to apply for trade permits (if applicable to the government contract); or delayed in preparing RFIs or submittals for review and submission before the workplace was shutdown (precluding or delaying review).
- These potential sequential or concurrent causes of delay should be vetted, analyzed and assigned appropriately.

# Economic Hardship



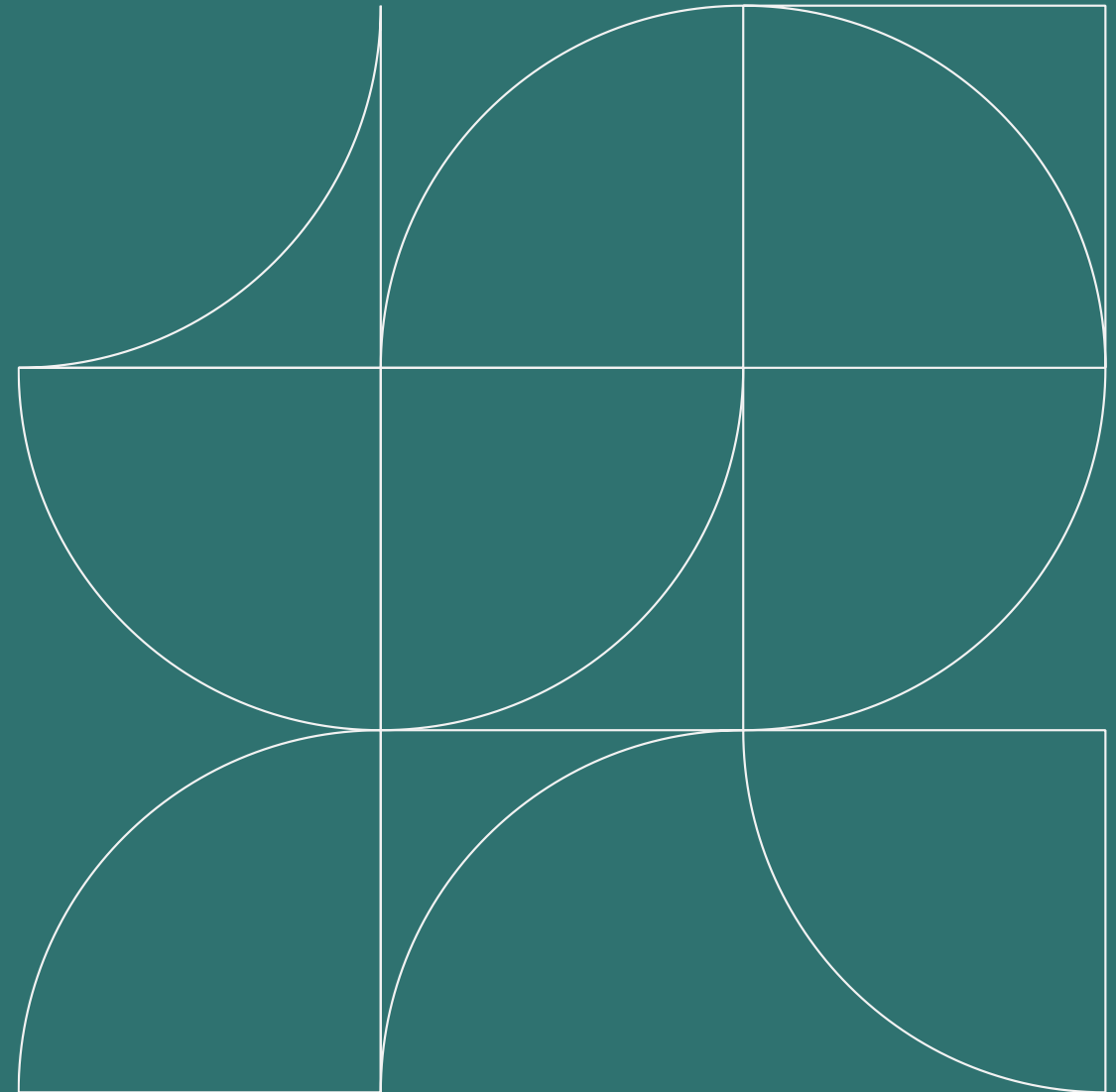
## Economic Hardship may not always Translate to Commercial Impracticability or an Excuse

- In order to rely on this excuse, the contractor may have to demonstrate that it exhausted all alternative sources of supply. This is not a light undertaking.
- Mitchell Canneries describes a practical approach:

Thus, when a contractor complains that it is unable to obtain an adequate supply of a particular contractual commodity, it must show that the product was unavailable within the boundaries of a reasonable area in order to have a creditable excuse.
- Costs “so great that buyers could not be found who would be willing to pay a price consisting of such costs plus a reasonable profit.”

# Key Clauses Affecting Performance

*Clauses that may come into play  
with COVID-19*



# Federal Government Construction Projects



Changes: 52.243-4

Stop-Work Order: 52.242-15

Suspension of Work: 52.242-14

Termination for Convenience of the Government: 52.249-2

Default: 52.249-10

Consider:

Use and Possession Prior to Completion: 52.236-11

# Non-Federal Government Construction Projects (AIA)



Evidence of the Owner's Financial Arrangements:  
A201 § 2.2

Indemnification: A201 § 3.18.1

Changes In the Work: A201 Article 7  
(Change Orders, CCD)

Delays and Extensions of Time: A201 § 8.3

Failure of Payment: A201 § 9.7

Partial Occupancy or Use: A201 § 9.9

Delay post Substantial Completion – Pre Final:  
A201 § 9.10.3

Contractor Termination or Suspension: A201 § 14.1

Termination by the Owner for Cause: A201 § 14.2

Suspension by the Owner for Convenience: A201 § 14.3



# Government Contract Changes

## The changes clause:

### – FAR 52.243-4 CHANGES (JUNE 2007)

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes --

- (1) In the specifications (including drawings and designs);
- (2) In the method or manner of performance of the work;
- (3) In the Government-furnished property or services; or
- (4) Directing acceleration in the performance of the work.

(b) Any other **written or oral order** (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; *provided*, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order. \* \* \*

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, **whether or not changed by any such order**, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, **except for an adjustment based on defective specifications**, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. \* \* \*

(e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of proposal, unless this period is extended by the Government.



# AIA Changes Clauses



- § 7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor, and Architect.
- § 7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.
- § 7.3.4 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Architect shall determine the adjustment on the basis of reasonable expenditures . . .
- § 15.1.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract. \* \* \* The responsibility to substantiate Claims shall rest with the party making the Claim. This Section 15.1.1 does not require the Owner to file a Claim in order to impose liquidated damages in accordance with the Contract Documents.
- § 15.1.3.1 . . . Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

# AIA Proof of Financing Clauses



- § 2.2.1 Prior to commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. The Contractor shall have no obligation to commence the Work until the Owner provides such evidence. If commencement of the Work is delayed under this Section 2.2.1, the Contract Time shall be extended appropriately.
- § 2.2.2 Following commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract only if . . . (2) the Contractor identifies in writing a **reasonable concern** regarding the Owner's ability to make payment when due . . . If the Owner fails to provide such evidence, as required, within fourteen days of the Contractor's request, the Contractor may immediately stop the Work . . . the Contract Time shall be extended appropriately and the Contract Sum shall be increased . . .

# AIA Indemnification Clause



- § 3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, **sickness, disease or death**, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the **negligent acts or omissions** of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder.

# AIA Delay Clause



- § 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, **unusual delay in deliveries**, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or **other causes beyond the Contractor's control**; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the **Contract Time shall be extended** for such reasonable time as the Architect may determine.
- § 8.3.3 This Section 8.3 **does not preclude recovery of damages for delay** by either party under other provisions of the Contract Documents.

# AIA Suspension Clause



- § 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work, in whole or in part for such period of time as the Owner may determine.
- § 14.3.2 **The Contract Sum** and Contract Time **shall be adjusted** for increases in the cost and time caused by suspension, delay, or interruption under Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent
  - .1 that performance is, was, or would have been, so suspended, delayed, or interrupted, by another cause for which the Contractor is responsible; or
  - .2 that an equitable adjustment is made or denied under another provision of the Contract.

# AIA GC Termination Clause



- § 14.1.2 The Contractor may terminate the Contract if, **through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor**, their agents or employees, or any other persons or entities performing portions of the Work, repeated suspensions, delays, or interruptions of the entire Work by the Owner as described in Section 14.3, constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

# AIA Owner Termination Clause



§ 14.2.1 The Owner may terminate the Contract if the Contractor

- .1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2 fails to make payment to Subcontractors or suppliers in accordance with the respective agreements between the Contractor and the Subcontractors or suppliers;
- .3 **repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority;** or
- .4 otherwise is guilty of substantial breach of a provision of the Contract Documents.



# AIA Partial Occupancy Clause



§ 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer and authorized by public authorities having jurisdiction over the Project. . . **Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld.**

# AIA Non Payment Clause



## § 9.7 Failure of Payment

If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or **if the Owner does not pay the Contractor** within seven days after the date established in the Contract Documents, the amount certified by the Architect or awarded by binding dispute resolution, then the Contractor may, upon seven additional days' notice to the Owner and Architect, **stop the Work** until payment of the amount owing has been received. **The Contract Time shall be extended appropriately and the Contract Sum shall be increased** by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided for in the Contract Documents.

## AIA Final Completion Clause



§ 9.10.3 If, after Substantial Completion of the Work, **final completion thereof is materially delayed through no fault of the Contractor** or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, **make payment of the balance due for that portion of the Work fully completed**, corrected, and accepted.

# Suspension of Work

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## **52.242-14 -- Suspension of Work. Suspension of Work (Apr 1984)**

(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted

(1) by an act of the Contracting Officer in the administration of this contract, or

(2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

(c) A claim under this clause shall not be allowed --

(1) For any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order); and

(2) Unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

# Termination of Convenience

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## Termination for Convenience of the Government (Fixed-Price) (Apr 2012)

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.

(b) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

(e) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. **The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension.** If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(l) **If the termination is partial, the Contractor may file a proposal with the Contracting Officer for an equitable adjustment of the price(s) of the continued portion of the contract.** The Contracting Officer shall make any equitable adjustment agreed upon. **Any proposal by the Contractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination unless extended in writing by the Contracting Officer.**

# Termination of Default

## 52.249-10 Default (Fixed-Price Construction)

- (a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. \* \* \*
- (b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if—
  - (1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include . . . (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, . . . (vi) epidemics, [and] (vii) quarantine restrictions, \* \* \*
  - (2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

# Form of Notice

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- How should notice be given?
- Federal Acquisition Regulation - paper copies or electronically transmitted and stored information suffices but be mindful of situations where a signature is required such as in the certification of claims.
- AIA Regime 2017 - agreement should specify that email suffices for notices. A201 and A101 (2017) require email to be specified to be recognized, E203, if used, provides for email. But, claims are to be served in paper form unless the parties specify otherwise.

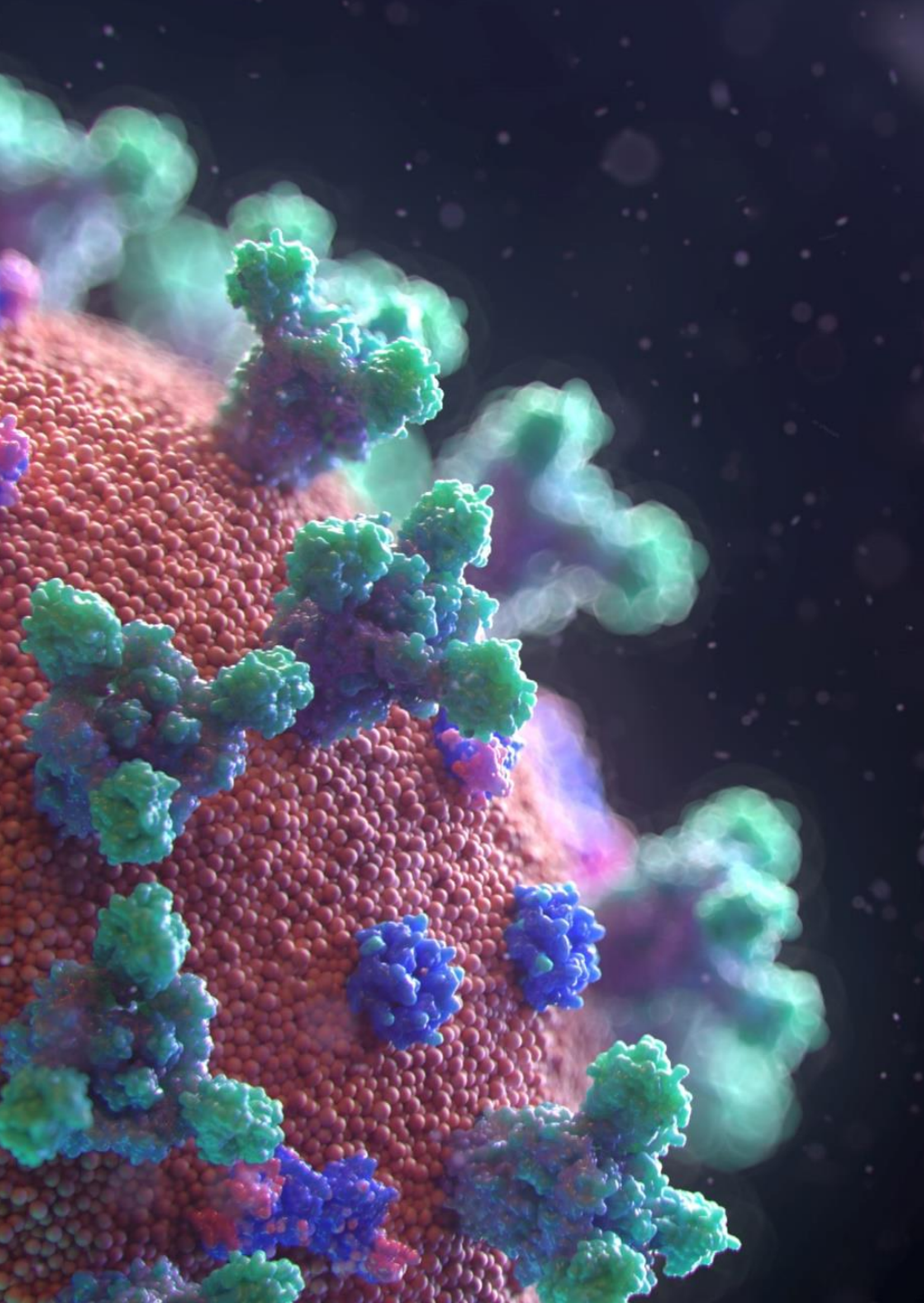
## Notice under the FAR

- FAR 2.101 Definitions -
  - “In writing,” “writing,” or “written” means any worded or numbered expression that can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.
  - But if signature is required - “Signature” or “signed” means the discrete, verifiable symbol of an individual that, when affixed to a writing with the knowledge and consent of the individual, indicates a present intention to authenticate the writing. This includes electronic symbols.

An abstract graphic composed of white lines on a dark blue background. It features a vertical line on the left, a horizontal line in the middle, and two curved lines that intersect at the center, creating a stylized, symmetrical shape. The overall effect is clean and modern.

**thank you**





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