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Who pays for coronavirus costs on public works projects: contractors or owners?

■ *Here's why Washington statutes should entitle public contractors to recover the costs of complying with health mandates.*

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When Washington's "Stay Home, Stay Healthy" order was issued in March, public works contractors were deemed essential businesses, and largely spared from forced closure. The cost of continuing work, however, increased. State and local governments added a range of new safety requirements, including mandatory social distancing, use of personal protective equipment, and health screenings for employees. These requirements, all aimed at curbing the spread of COVID-19, have delayed projects and, in many cases, have added hundreds of thousands of dollars to contractors' costs.

The pressing question, then, is this: who pays?

Public project owners have, for the most part, insisted that extra work or delays caused by COVID-19 restrictions are non-compensable. This position usually emanates from language contained within the owners' contract specifications, which doubtlessly failed to contemplate the magnitude and duration of the present pandemic. These contract specifications largely mirror traditional "force majeure" clauses, which tend to treat impacts from pandemics as excusable but not compensable. Thus, their answer has been mainly: contractors pay.

CONSTRUCTION INDUSTRY SPOTLIGHT

That protection is limited however, because if the owner insists on continued performance through a pandemic in compliance with government-imposed restrictions, such direction would be a form of acceleration not subject to a "force majeure" disclaimer.

Moreover, project specifications cannot rewrite the law, and Washington's statutes arguably provide contractors a pathway for recovering their costs of compliance with COVID-19 mandates, specifications notwithstanding.

Specifically, RCW 39.04.120 instructs that change orders must be issued on public projects when any new "environmental protection" statutes, ordinances, or rules are enacted which require a contractor to undertake additional work to perform a public construction project. As such, if COVID-19 restrictions can be properly characterized as being for "environmental protection," public owners must issue change orders for the cost of complying with them.

Admittedly, more people are likely to think of endangered species than the coronavirus when they hear the phrase "environmental protection." But COVID-19 is a biological contaminant, and unquestionably a threat to the health and safety of our collective environment. And while Washington courts have surprisingly never defined the scope of RCW 39.04.120, related cases on the scope of "pollution" and "pollutants" provide insight into how this law would likely be applied to cover contractors here.

In those cases, Washington's courts have made clear that a pollutant may be: (1) biological in nature; (2) limited to impacts on single individuals or small groups; and (3) need not pose any threat to wildlife or larger ecological systems.

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For instance, in 2005, the Washington Supreme Court addressed a building owner's commercial general liability policy, which included an absolute exclusion for injuries caused by pollution. In that case, *Quadrant Corp. v. Am. States Ins. Co.*, a tenant of the building was injured by toxic fumes from deck sealant, which had drifted into her apartment from the deck outside. The owner tendered the claim to its insurer, which denied the claim on the basis that deck sealant was a "pollutant" under the terms of the policy. The building owner argued that the pollution exclusion should be applied only to "traditional environmental harms" — which it claimed did not include fumes from a deck. The court disagreed, holding that the fumes fit squarely within the technical definition of a pollutant, and thus were excluded from coverage. The court also noted that the manufacturer's safety data for the sealant treated it as a pollutant, recommending "precautions such as adequate ventilation, respiratory protection, protective clothing, and eye protection."

The ruling in *Quadrant Corp.* is not an aberration. In *2017,* the court held that carbon monoxide from a negligently installed water heater was also a "pollutant." Likewise, in 2002, a federal judge in Washington ruled that odors from a compost facility fell within the scope of "pollution," noting that "Washington case law, statutes, and air pollution regulations support this conclusion."

The arguments in these cases mirror the likely outcome of litigation over whether COVID-19 restrictions constitute environmental protection rules under RCW 39.04.120. Certainly, public entities could argue that the pandemic spread of a virus is not a "traditional environmental harm" as the building owner did in *Quadrant Corp.* However, this argument would likely again fall short.

The virus itself is a physical contaminant, the presence of which adversely affects human health and welfare. Further, the goal of COVID-19 restrictions is not to simply ensure a healthy work environment, but to limit the spread of the virus in our larger community environment. And, as the court noted in *Quadrant Corp.*, the type of interventions being used to reduce COVID-19 spread are squarely in line with those for other environmental hazards: ventilation, personal protective equipment, and physical distance.

Finally, although Washington's statutes do not include a definition of "environmental protection" laws, other states' statutes do. For example, Ohio law defines "environmental protection" as any law protecting "human health or safety... by preventing or limiting the exposure of humans, animals, or plants to pollution." Under this definition, if COVID-19 restrictions are aimed at curbing the spread of a harmful biological pollutant (they are) then such restrictions should be squarely within the scope of RCW 39.04.120.

We know of no environmental events in modern construction history where construction has been disrupted more than by COVID-19. Washington's contractors have performed admirably under pressures completely unexpected in their bids or contract pricing. They have labored to keep employees safe while simultaneously keeping projects moving. There is no equitable reason why they should bear the unexpected costs of doing so. Fortunately — looking to Washington law — they likely don't have to.

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