

Construction Contracts and COVID-19

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Following up on our March 2020 Update, COVID-19 continues to impact basically every segment of the construction industry in British Columbia. What has changed since March is that parties now tendering and bidding on construction projects and entering into contracts are aware of COVID-19 and its impacts on projects, including new laws and guidelines dealing specifically with COVID-19 and construction projects. Accordingly, COVID-19, its potential impacts and the relevant laws and guidelines should be front-and-centre in the parties' minds when putting projects out for tender, bidding those projects and entering contracts.

Generally speaking, parties are bound by the terms of their contract, which is the law of the parties.² The courts have routinely held, albeit in different contexts, that the parties to a construction contract are free to distribute risk and responsibility as they see fit and, while the ultimate agreed distribution of risk may appear unfair, that is a matter for the marketplace, not for the courts.³ Accordingly, it is incumbent upon those involved in procurement processes prior to bid closing and those negotiating contracts to identify and allocate the risks related to COVID-19 (i.e. increased cost and increased time) whenever possible.

Each project and contract must be reviewed individually to determine what COVID-19 risk allocation makes sense in the circumstances. There is no boilerplate answer or one-size-fits-all solution to this issue. However, wherever possible the identification and allocation of risks should be addressed in the procurement process (if there is one) so that those bidding work know in advance what the expectations of the tendering authority are. If that risk allocation is not addressed in the procurement documents it is recommended that bidders seek written clarification from the tendering authority during the procurement process on that issue. This accords with the process being fair, open and transparent and, based on the tendering authority's response, at least then bidders will know the risk profile of the work being bid.

If there is no procurement process (e.g. direct award) or if the procurement process did not clarify risk allocation but the procurement documents permit negotiation (e.g. over-budget negotiations, preferred proponent negotiations, etc.) it is recommended that COVID-19 risk identification and allocation be discussed and agreed through negotiation. In these circumstances, the parties will be much better served by a full and frank discussion of the identified risks and agreement on allocation of those risks prior to contract award. Otherwise, the parties will be left trying to deal with the impacts of COVID-19 through provisions and processes not designed to adequately cover the risks or respond in the circumstances.

As set out in our previous Update, COVID-19 presents an unprecedented challenge for the construction industry, and society in general. We are all partners in this industry and, where possible, we should seek to work together in order to find reasonable solutions to project related issues caused by COVID-19. Part of that process is identifying and allocating COVID-19 risks in the procurement or negotiation processes whenever possible. Agreement up front on risk identification and allocation, and related processes and procedures to deal with the COVID-19 impacts, can only benefit the parties and construction projects.

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² *R. v. Paradis & Fairley Inc.*, [1942] S.C.R. 10 at p. 18

³ *Greater Vancouver Water District v. North American Pipe & Steel Ltd.*, 2012 BCCA 337 at paras. 28 and 32-34; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para. 141; *Trizec Equities Limited v. Ellis-Don Management Services Ltd.*, 1999 ABCA 306 at para. 5