

# Dealing with COVID-19

## Protecting your projects and organization - Canada

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Coronavirus (COVID-19) has presented us all with unprecedented challenges. As a result, the construction industry is and will continue to experience considerable disruption and even suspension of work due to government directives and economic pressures as well as current and projected labour and material shortages. This will necessitate various contractual actions and remedies for all parties involved.

This document provides expert guidance and practical support in dealing with the issues you may be facing on your programs, projects and contracts.

### We can help



Turner & Townsend has established a COVID Response Taskforce and is currently helping many of our clients with contract and commercial matters, as they manage through these challenges. We have resources and experts available to support you in regard to issues such as:

- Contract risk and management
- Commercial impacts
- Guidance on potential project delays
- Comprehensive supply chain audits
- Detailed program and project assessments


**Contact our COVID Response Taskforce at: [TTCRT@turntown.com](mailto:TTCRT@turntown.com)**

Now is the time to be proactive in managing your projects and related contracts, especially in the following key impact areas:

- Project documentation/inventory and record keeping at the time of suspension
- Thorough understanding of key contractual provisions dealing with suspension of work, termination, cost recovery, change management and dispute resolution
- Tracking impacts and capturing costs
- Ensuring proper compliance with recovery funding requirements
- Understanding the current and future supply chain and workforce capacity
- Getting ready for the "new normal"

### Knowing your contracts

While there are bespoke contracts in use, most Canadian contracts are based on the terms and conditions noted in CCDC contract boilerplates. Practical ways of dealing with events such as COVID-19 under standardized contracts are not necessarily defined and need to be thoroughly understood by all related parties.



The COVID-19 pandemic is a significant event which may or may not be classified as an event/change under your contract. Compared to past global scale events, COVID-19's impact is unprecedented in its level of challenge and complexity. Project impacts will likely be reflected in many types of delays, such as access issues, labor availability and productivity, material and equipment availability, disruption to pacing, suspension, financial default, and termination delays to name a few. This doesn't mean that the Contractor is automatically entitled to compensation or a schedule extension. The event will still need to be assessed and its impact understood in the context of the contract terms and against the progress of the work.

### Private contracts

Although there are a number of contract models in the market place, many owners, especially those owners that have a large portfolio of work or operate as a multi-national corporation with significant capital programs, have developed their own models. These have been derived from multiple models or they have created their own unique contracts to address the specific conditions of their industry or company. Each contract has to be reviewed on its own merits to determine how impacts associated with this event may need to be treated.

In addition to the specific terms in the contract, a number of other factors will influence how change requests from contractors and vendors will need to be treated including the phase of the project, the location of the project, the level of restrictions the government in that area place on the population and businesses, project size, and other factors. Owners need to review their contracts in the context of these factors to determine the appropriate response for dealing with contractor and vendor impacts. You need to pay particular attention to any clauses addressing the following areas:

- **Changes** – You'll need to identify the process for changes and the documentation needed to substantiate the impact and support any cost and schedule adjustment requests.
- **Notice** – Verify the period the contractor or vendor has to give notice of an impact.
- **Force majeure** – If defined in the contract, is an "epidemic" or "pandemic" specifically listed as qualifying? How are such events treated

under the contract – schedule relief, cost compensation, or both?

- **3rd Party impacts** – Does the contract address impacts caused by outside parties?
- **Schedule impacts** – You'll need to review whether a contractor is required to recover schedule delays and if they have to take reasonable steps to maintain schedule.
- **Suspension** – What are the conditions for suspending work on the project? This will have an effect on what liability they may have, like how onsite materials are secured and protected, what adjustments the contractor or vendor is due, and how materials in route are dealt with.
- **Termination** – Identify the termination terms in the contract, either by the owner or by the contractor or vendor. Determine, if the owner terminates a contract due to the contractor's inability to complete the work, what adjustments is the contractor or vendor due.

### Canadian contracts

CCDC is Canada's only source for recognized Canadian standard construction documents. The main contracts in use by our clients are typically the CCDC 2, 5A, 5B and 14. The CCDC standard forms do not specifically identify epidemics within the contract, nor do they contain default provisions for force majeure events. The CCDC models have different terms, depending on the nature of the contract, some of which can be used to deal with the impact of COVID-19.

#### CCDC 2 (Stipulated Price)

1. Delays;
2. Claims for a Change in Contract Price
3. Suspension;
4. Termination

#### CCDC 5A (Construction Management for Services)

1. Changes to the Project / Changes in Services;
2. Suspension / Termination

Treatment may depend on the agreed allocation and content within Schedule A1, A2, B1 and B2 entitlement may vary from contract to contract.

## **CCDC 5B (Construction Management for Services and Construction)**

1. Delays;
2. Claims for a Change in Construction Manager's Fee for the Services, the Price of Work or the Guaranteed Maximum Price;
3. Suspension;
4. Termination

Similar to CCDC 2, substituting CM for the Contractor to a large degree. Schedule A1, A2 and B may affect entitlement.

## **CCDC 14 (Design-Build Stipulated Price)**

1. Delays;
2. Claims for a Change in Construction Price
3. Suspension;
4. Termination

Some similarity to CCDC 2, substituting Design-Builder (DB) for the Contractor in certain instances.

### *Delay*

Under CCDC 2, the contractor can be provided a reasonable extension of time for delays where "the Contractor is delayed in the performance of the Work by... any cause beyond the Contractor's control other than one resulting from a default or breach of Contract by the Contractor." If a court or public authority issues a stop work order for something outside contractor's control, they are also entitled to an extension to the Contract Time. This may be the clause that contractors will try to apply to the COVID-19 event if the government orders a "stay at home" work order covering that area. This clause does not state that the contractor is entitled to compensation in addition to time. This clause does require notice be provided by the Contractor within 10 days to be eligible for an extension. CCDC 14 contains similar provisions for the DB and 5B's delay clauses are similar except it does allow for the CM to receive an adjustment of its fee and Guaranteed Maximum Price (GMP) in the event of delay.

### *Cost*

The contractor or DB is entitled to make a claim for an increase in the contract price under CCDC 2 and CCDC 14 respectively, if timely notice is provided, though "timely" is not defined in the contract. The contractor or DB is required to mitigate losses being incurred and maintain contemporaneous documents to support any claim. CCDC 5B includes the same clause with

the provision for the CM fee and GMP to be adjusted as appropriate. The CCDC models do not stipulate that entitlement is limited only to instances where the owner was responsible for the change, creating ample opportunity for the relevant parties to make claims due to the impact of COVID-19.

Under CCDC 5A, the impact of COVID-19 on live projects could be considerable enough to require changes to projects which can be implemented under GC 5.1. If the Owner makes changes to the Contract which changes the Construction Manager's (CM) services and compensation, the Construction Manager will be entitled to compensation.

Furthermore, if the Contract Time is exceeded as a result of COVID-19 alone, the CM will be entitled to additional compensation (GC 5.1.5).

### *Suspension / Termination*

Under the CCDC 2 the owner can suspend work for a portion or all of the project per the contract. However, if it is suspended for the whole or substantially the whole of the remaining work for more than 20 working days, the contractor can terminate the contract with proper notice to the owner. This is true for the CM under the CCDC 5B. The CCDC 14 provides the same period for suspension of design services, which operates in the same way, unless DB and Owner agree otherwise. The CCDC 5A provisions contained at GC 6.1 and 6.2 are somewhat different, with no CM immediate entitlement to terminate in event of suspension (which is also defined differently).

The CCDC 2, 5B & 14 clauses could be applicable if the owner suspends work on the project due to COVID-19, even if it is in support of government recommendations. The relevant party would be due payment for work performed, plus reasonable profit, and damages as a result of the termination. Under all of the aforementioned contracts, and the relevant party and owner can suspend work and in some cases terminate the contract due to the default of the other party, but those terms would likely not apply to this event unless the COVID-19 event causes one of the parties to go into default for some reason.

Termination should be a last resort, suspension does not necessarily require termination thereafter. In any event you should consult legal counsel prior to considering suspension or termination of your contract(s).

## Future contracts

We already know that most of the contracts currently in place are inadequate to address the unusual circumstances and impacts associated with the COVID-19 pandemic. Pause and think before executing new contracts until the clauses required to address this type of situation are addressed. While we may not be able to predict the exact nature and impact of the next event, we now know we need to update certain elements to better address this category of events.

## Following the process

As the effects of COVID-19 are still new, everyone has been advised to look at their contracts to understand the requirements and assess the risks and associated impacts that are either happening or are about to occur.

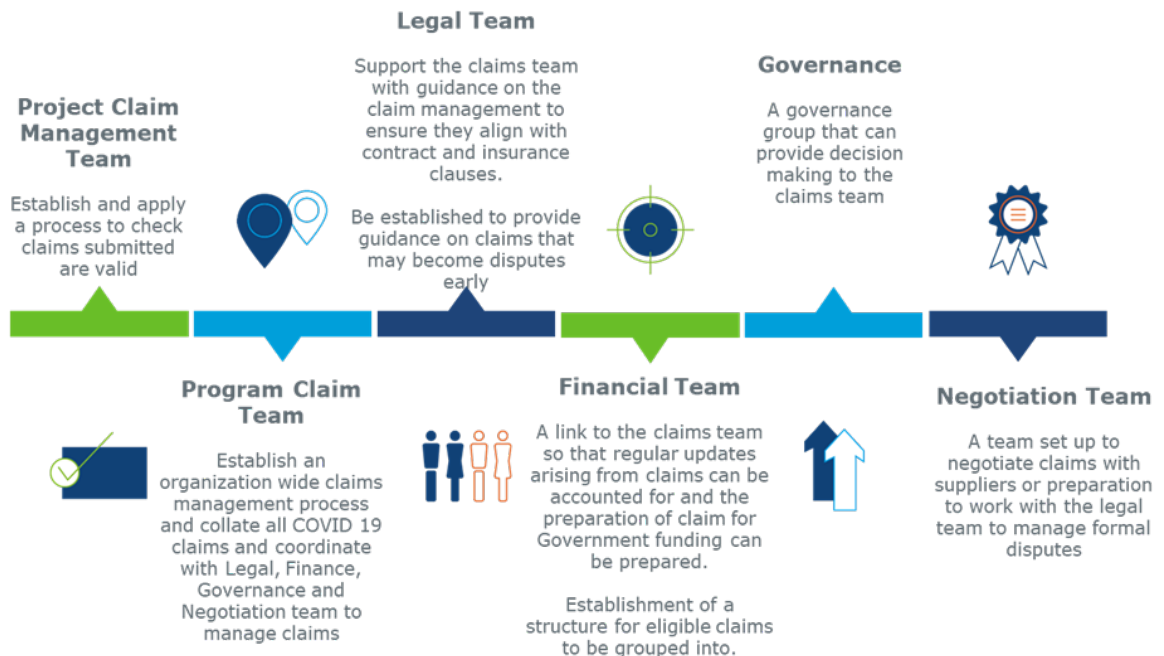
It's important to have three key commercial processes in place to ensure you are ready and set-up to manage these events: project change control processes, program/portfolio change control processes, and insurance processes.

**Project change control process** - Contracts allow for changes to occur, but not many set out a process to manage them between the parties. Typically contracts do not define rules for what needs to be submitted with a change request, how the costs and schedule requests will be developed or assessed, and how any disagreements will be resolved. Applying a "reasonable" test is vague, as what is reasonable to the owner, may not be seen as reasonable by the contractor and thus cause a dispute.

**Program and portfolio change control process** - Create a systematic process in your organization to co-ordinate, prioritize, assess, negotiate and reject/accept claims associated with those projects. For relief from the government under a stimulus program or other emergency funds, understand the process required by those organizations to prepare and support such a claim.

**Insurance and government stimulus process** – Determine what direct costs or contractor claims could be claimed and identify the processes necessary for reimbursement from your insurance company under the policy for a project or program. Government stimulus and emergency funding programs may require you to have demonstrated you have checked your insurance first.

## Proposed process chain for the management of claims at an organizational level:



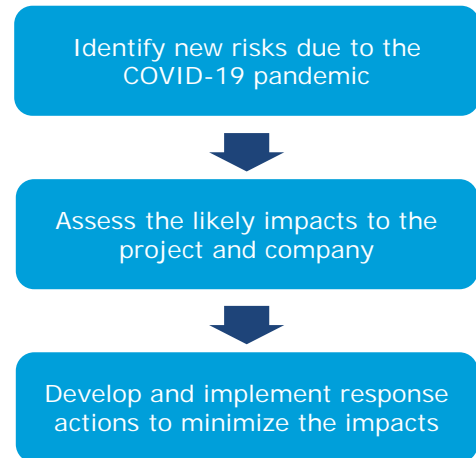
## Managing your risks

For owners, managing the risks associated with the COVID-19 pandemic will be critical to minimizing impacts to ongoing projects and the company as a whole. The risks are largely twofold: direct impacts to a project's performance, and the likely disputes with contractors and vendors also impacted by the pandemic. Managing these risks will largely rely on the primary steps of common risk management: *identifying* the new risks that this situation has created, *assessing* the likely impacts to the project and company, and *responding* effectively to avoid the risk or minimize it.

In dealing with direct impacts to the project, owner's project teams need to realistically assess their execution plans, all contractors, consultants, and vendors to understand what material and equipment deliveries are likely to be delayed; which contractors and consultants will have performance issues due to work restrictions or lack of workers; and what plans will no longer be viable due to the impacts.

Owners need to start having conversations with all parties now to understand how the supply chain is being affected and any anticipated impacts to the project. They need to work together to develop response plans that will minimize the impacts, which may include significant changes in how the project is executed.

Additionally, look beyond just the project. This pandemic may be significantly impacting the market such that there is no longer a need for the project, or at least, the project in its current form. In which case, owners may need to suspend work until they can further assess whether the project should continue, be reworked, or terminated.



## Conclusion

To minimize the risk of disputes with contractors and vendors, owners need to review their contracts to understand how this type of event is addressed, if at all, determine the remedies provided under the contract and what the process is for dealing with these issues. In these times, teams also need to make the extra effort to document activities, discussions and decisions. This documentation will be extremely helpful in the future to help resolve any areas of dispute.

However, what is most essential, is to start having conversations with the contractors and vendors now to work together to minimize the impact to the contractor and the project. Good faith efforts by both parties to resolve requests for equitable adjustments will go a long way to minimize impacts to the project and company as a whole.

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