COVID-19: CORONAVIRUS CONCERNS PROMPT TWO-WEEK HALT TO ALL CONSTRUCTION IN BOSTON

Date: 19 March 2020

U.S. Complex Commercial Litigation & Disputes, Construction & Infrastructure, Insurance Recovery & Counseling, and Real Estate Alert

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Another industry felt the impact of coronavirus (COVID-19) on Monday, March 16, when, amid growing concerns over the spread of COVID-19, Boston Mayor Martin J. Walsh announced a two-week halt to all construction projects in the City of Boston. Boston's construction ban went into effect on Tuesday, March 17, and will last at least two weeks. Although the implementation of COVID-19 prevention measures has increased across the nation in recent days, Boston's construction ban is the first of its kind in the United States. This alert discusses the impacts of the construction ban, as well as the broader implications of the ban in Boston and for the rest of the nation.

THE MAYOR'S ORDER

Mayor Walsh's order effectively halted all construction in the City of Boston at the end of Monday, putting in place a moratorium on construction that will last at least the next two weeks. Mayor Walsh announced that the city would allow work crews on sites as necessary to make construction sites safe and secure until Monday, March 23, at which time only skeleton crews will be allowed to remain. The only exception to the construction ban is for "emergency work" that can continue with approval from the City Inspectional Services, which the mayor indicated would include "emergency street repairs and utility hookup work." Mayor Walsh further stated that the city intends to monitor the situation week-to-week, and to update the policy as necessary. [1]

IMPACTS AND IMPLICATIONS

The most immediate impact of Boston's construction ban will be felt by construction companies, contractors, and developers who have been ordered to halt all work in the city. With Boston in the midst of a construction boom, the impact will likely be widespread. One potential cause for concern among general and sub-contractors is the threat of delay-related claims, including those based on liquidated damages clauses in their contracts related to delays in project completion. Although each contract needs to be examined individually, many contracts contain force majeure clauses that may excuse delays based on the city's ban on construction or delays generally caused by the outbreak. As the impact of the COVID-19 spreads, prevention measures become more strict, and with the recent World Health Organization classification of the COVID-19 as a pandemic, force majeure clauses are more likely to be implicated and may relieve some parties from substantial liability.

In the analogous situation of restrictions put in place in New York City in the aftermath of September 11, 2001, courts recognized that the circumstances could support a defense of impossibility. [2] Boston's two-week

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construction halt puts affected parties in much the same boat, with the city mandating that no construction work be done for at least two weeks. However, other impacts will likely be felt beyond those ordinarily expected. For instance, entities involved in construction may be required to modify insurance policies to cover a longer than expected period of construction, absorb higher than expected overheard costs, extend leases for laydown areas, and alter utility contract arrangements.

In addition to the disruption to the construction industry and the ripple effect in Boston, the construction ban may impact others outside of the immediately affected market. As states and municipalities increase restrictions in order to slow the spread of the COVID-19, similar construction bans may soon be implemented elsewhere in the nation. Furthermore, although Boston's construction ban is currently in place for two weeks, the city has stated that it could be extended as necessary. An increased duration or adoption of this or similar measures outside of Boston raises the prospect of even more severe economic and legal challenges for affected entities operating in Massachusetts and elsewhere.

CONCLUSION

The broader impact of the construction ban, and the long-term effects of the above-detailed disruptions, are difficult to determine at this time. K&L Gates will continue to monitor this and other COVID-19-related measures and stands ready to assist clients in navigating this and other challenges presented by the COVID-19.

A collection of K&L Gates' COVID-19-related alerts and analysis can be found in the firm's Responding to COVID-19 resource center, available at: http://www.klgateshub.com/categorylisting/?series=Responding+to+COVID-19.

NOTES

[1] The City of Boston's Temporary Guidance for Construction in the City of Boston can be found at: https://www.boston.gov/sites/default/files/file/2020/03/Temporary%20Guidance%20for%20Construction%20in%20the%20City%20of%20Boston.pdf.

[2] *Bush v. Protravel Int'l, Inc.*, 746 N.Y.S.2d 743, 794-796 (N.Y. Civ. Ct. 2002) (recognizing triable issue of impossibility based on New York City "state of virtual lockdown" following the September 11, 2001 terrorist attacks).

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