



# **Force Majeure and Other Issues Related to Construction Projects During COVID-19**

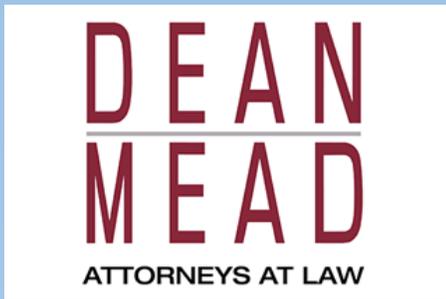
**Presented By:**

**Tom Wert**

**Board Certified Construction Attorney**

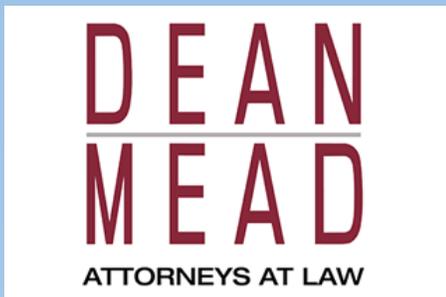
**[twert@deanmead.com](mailto:twert@deanmead.com)**

**(407) 428-5197**



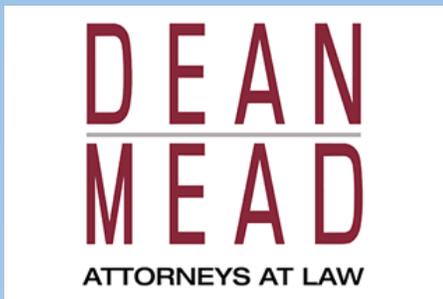
# Force Majeure

- Excuses contractual performance as a result of unforeseen circumstances outside of the parties' control
- Contained in many commercial contracts
- Traditionally an “Act of God” but today can be more
- Force majeure = superior or irresistible force
- Narrow exception to rule that parties are bound to perform their obligations under a contract



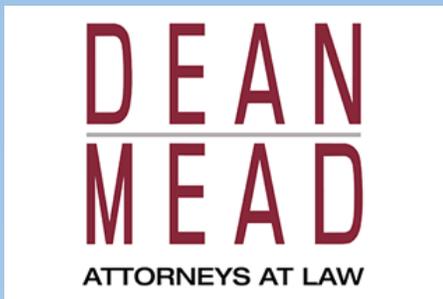
# Force Majeure

- What Constitutes a Force Majeure Event?
  - Concept has developed over time
    - Early on = “physically impossible”
    - Evolved to “Frustration of Purpose”
    - New standard of “Commercial Impracticability”
  - No uniform set of events constitute force majeure



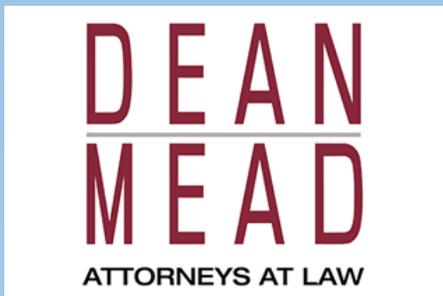
# Force Majeure

- Force Majeure in Practice
  - Start with contract between parties
  - Does a force majeure clause exist?
    - If so, courts will enforce clear and unambiguous clauses
      - Suspend performance
      - Grant extension of time to perform
      - Reduce or eliminate damages resulting from failure to perform



# Force Majeure

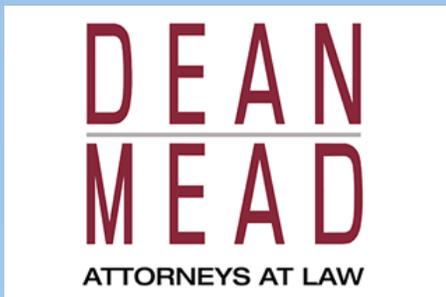
- Broad Provisions vs. Narrow Provisions
  - Broad
    - Benefit = provide flexibility
    - Negative = difficult to predict a courts interpretation
    - If too broad, it may buffer a party against the normal risks of the contract
  - Narrow
    - Provide a list of specific events
      - Contract typically state the list is not exclusive (“including without limitation”)
    - Provides clarity to parties
    - “epidemics” or “pandemics” are not commonly found
    - Courts are hesitant to apply to situations not listed



# Force Majeure

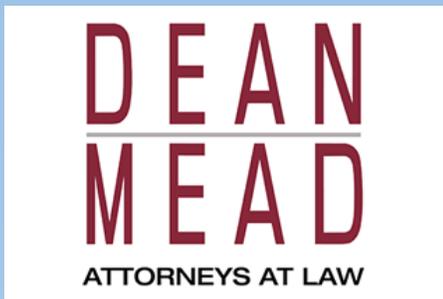
- Example of a Narrow Force Majeure Provision:

“**Force Majeure**” is defined to include, but not be limited to, severe weather or storm warnings; acts of a public enemy; fires; necessity for compliance with any court order, law, regulation or ordinance of authorities having jurisdiction, either federal or state, civil or military; civil disturbances; shutdowns for purposes of necessary repairs, alterations, relocation, or construction to machinery or lines of pipe; breakage or accident to machinery or lines of pipe; freeze-offs; failure of surface equipment or pipelines; inability of either party hereto to obtain necessary material, supplies, or permits, or labor to perform or comply with any obligations or conditions of this FERC Gas Tariff or an executed Service Agreement hereunder; inability to obtain rights-of-way; or compliance with tariff provisions of upstream and downstream pipelines.



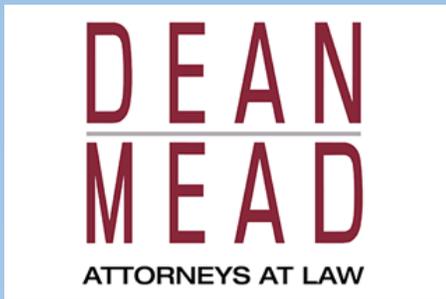
# Force Majeure

- Florida Case Law
  - Florida courts have upheld force majeure clauses
  - Contractor = excessive rain
  - Contractor = president suffered a heart attack
  - Paper Company = design error



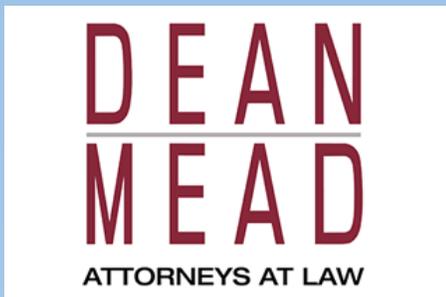
# Force Majeure

- Financial Hardship ≠ Impracticable
  - Florida Federal Court evicted nursing home over unpaid rent
    - Force Majeure clause in lease
    - Tenant argued government actions led to lost revenue
    - Court found tenant failed to prove its failure to pay rent was the result of the government funding change, as contemplated by the force majeure clause
    - Court relied upon cases which have rejected force majeure arguments when event merely created financial hardship
  - Force majeure is not intended to buffer a party against lost profits
  - Cases outside of Florida have had similar holdings



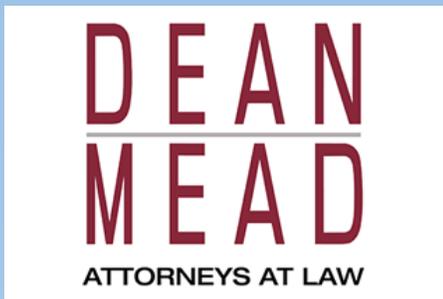
# Force Majeure

- Is COVID-19 a Force Majeure Event?
  - Start with contract, i.e., narrow or broad force majeure?
  - Act of God? reasonably unexpected events which are due directly and exclusively to natural causes, without human intervention, and which occur contemporaneously with the nonperformance of the contract
  - Includes violent hurricanes, floods, extreme tides, extraordinary snowstorms, earthquakes, and lightening
  - Not heavy rain which is merely unusual or unexpected but not unprecedented, settlement of soils, a boiler explosion, fires generally, or the sudden insanity of a railroad engineer



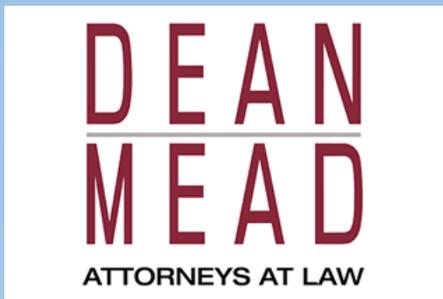
# Force Majeure

- COVID-19 Pandemic
  - reasonably unexpected
  - a naturally occurring phenomenon
  - during the Great Influenza of 1918, Western Union Tel. Co. argued that a delay in the transmission of a telegraph message “was due solely to the prevalence of an epidemic of influenza, which was an act of God”
  - Old cases have held that epidemics are an act of God because “[d]isease must, unless under very exceptional circumstances, be viewed in law as the act of God”



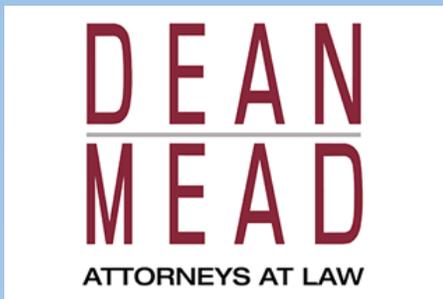
# Force Majeure

- COVID-19 Pandemic
  - COVID pandemic should constitute an act of God or a cause beyond the control of the parties.
  - But, to excuse or extend performance, nonperformance must be due directly and exclusively to pandemic.
  - Must occur contemporaneously.
  - Outcome is a fact-intensive analysis of the parties' contractual expectations and reason for nonperformance.
  - Focus is on whether event was foreseeable at inception.



# Force Majeure

- COVID-19 Pandemic
  - Party only excused if the language clearly & unambiguously relieves the party of performance
  - Parties may argue Governor's Exec. Orders closed businesses rendering impracticable to perform projects
  - But Construction projects are deemed "essential" under Governor's Order
  - Not so "excessively or unreasonably difficult or expensive" as to be deemed impracticable
  - economic hardship from event is not enough



# Force Majeure

- Typical Construction Contract Force Majeure Provisions
  - Parties' rights begin and end with their contract.
  - It is essential that parties review their contracts to determine their rights and obligations.
  - Most construction contracts provide for an extension of time to complete a project if conditions cause a delay in performance.
  - Less frequently they provide for additional compensation for delays.

# Force Majeure

- AIA A201- § 8.3 Delays & Extensions of Time:

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### Delays and extensions of time

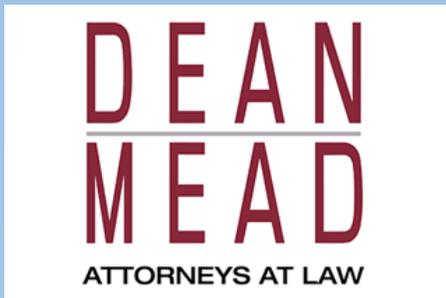
#### § 8.3 Delays and Extensions of Time

§ 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.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 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.

- This is a force majeure clause
- Florida courts have upheld such broad force majeure clauses



# Force Majeure

- Must Provide Timely Written Notice of Claim

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## Claims for additional time

### § 15.1.6 Claims for Additional Time

§ 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section 15.1.3 shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

- Estimate of Cost and probable effect on progress of work

- AIA Notice Requirements:

## A201<sup>®</sup>-2017 Notice of claims

### § 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. 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.

§ 1.6.2 Notice of Claims as provided in Section 15.1.3 shall be provided in writing and shall be deemed to have been duly served only if delivered to the designated representative of the party to whom the notice is addressed by certified or registered mail, or by courier providing proof of delivery.

# Impossibility, Frustration of Purpose, & Commercial Impracticability

- What if your Contract Does Not Contain Force Majeure?
  - Defenses
    - Impossibility of Performance
    - Frustration of Purpose
    - Commercial Impracticability
  - Florida Court interpretations – not merely inconvenient, profitless, or expensive
  - Must be so “excessively or unreasonably difficult or expensive” as to be deemed impracticable
  - Fact specific inquiry

# Suspensions

- Very Broad Right for Owners Under AIA

## Owner's suspension for convenience

### § 14.3 Suspension by the Owner for Convenience

§ 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.

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- As long as Contractor is notified in writing, Owner can suspend work

# Termination

- Owner's Right to Terminate for Convenience is Also Very Broad

## Owner's termination for convenience

### § 14.4 Termination by the Owner for Convenience

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 14.4.2 Upon receipt of notice from the Owner of such termination for the Owner's convenience, the Contractor shall

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

- If Owner provides notice, Contractor must cease operations as directed, take all actions necessary to protect the work, secure the job site, materials, etc. and make sure Owner doesn't incur any losses

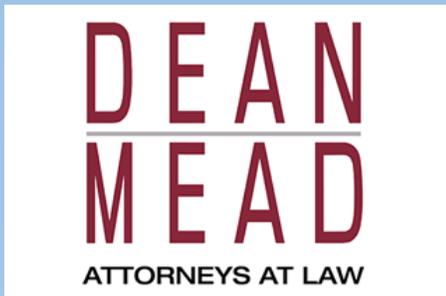
# Termination

- Contractor is Paid for Work Properly Executed, Costs and a Fee, if negotiated

## Owner's termination for convenience

### § 14.4 Termination by the Owner for Convenience

§ 14.4.3 In case of such termination for the Owner's convenience, the Owner shall pay the Contractor for Work properly executed; costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.



# Termination

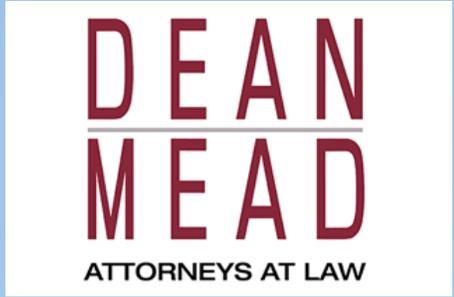
- Termination Fee Needs to be Negotiated Pre-Contract

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## Termination fee

§ 7.1.1 If the Contract is terminated for the Owner's convenience in accordance with Article 14 of AIA Document A201-2017, then the Owner shall pay the Contractor a **termination fee** as follows:  
*(Insert the amount of, or method for determining, the fee, if any, payable to the Contractor following a termination for the Owner's convenience.)*

« »



# Termination

- Contractor's Rights are Work-Stoppage Related

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## Contractor's termination

§ 14.1 Termination by the Contractor

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days 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, for any of the following reasons:

- .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2 An act of government, such as a declaration of national emergency, that requires all Work to be stopped;

- 30 consecutive days
- Order of court/public authority
- Probably not an issue with COVID-19 because most contractors want to keep working or get back to work, not terminate

# Termination

- If Work-Stoppage Too Long

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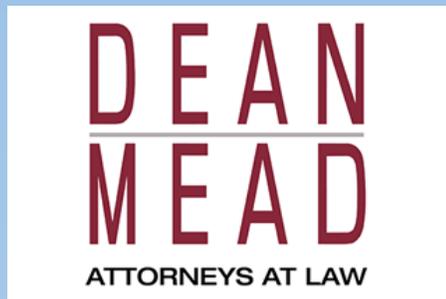
### Contractor's termination

Owner's suspension for  
convenience

§ 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.

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, as well as reasonable overhead and profit on Work not executed, and costs incurred by reason of such termination.

- Contractor may terminate with notice and recover payment for work completed plus overhead and profit on work not completed and costs incurred due to termination.



# Subcontractors

- Everything that Applies to Contractor in Prime Agreement, Probably also Applies to Subcontractors

## A401™-2017

### Subcontractor agreement

#### ARTICLE 2 - MUTUAL RIGHTS AND RESPONSIBILITIES

The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201–2017 apply to this Agreement pursuant to Section 1.3 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities that the Contractor, under such documents, assumes toward the Owner and the Architect. **The Contractor shall have the benefit of all rights, remedies, and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies, and redress against the Contractor that the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract.** Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.

# Continuing Performance

- Parties Should Not Stop Performing if Ongoing Dispute

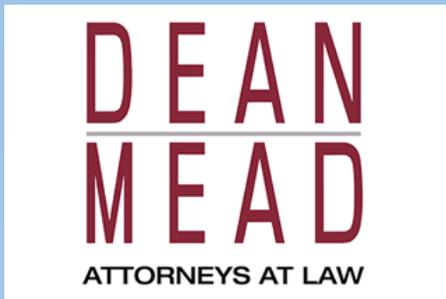
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## Continuing contract performance

### **Section 15.1.4**

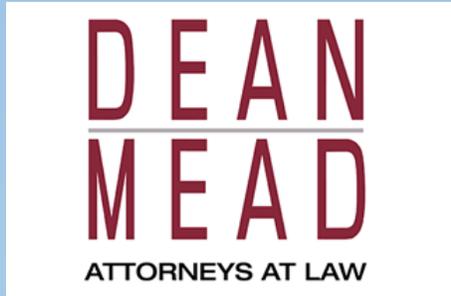
Pending final resolution of claims... the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

The Contract Sum and Contract Time shall be adjusted in accordance with the Initial Decision Maker's decision, subject to the right of either party to proceed in accordance with this Article 15. The Architect will issue Certificates for Payment in accordance with the decision of the Initial Decision Maker.



# Conclusion

- When Issues Arises Resort to the 3 Cs:
  - Consult your contract
  - Consult with your attorney
  - Communicate with the project parties
- And document all costs associated with delays, you will need that information to prove or defend any legal action, and it will make the other party deal with you more amicably.



# Questions? Send us an Email

**Thomas P. Wert, Esq.**

Board Certified Construction Attorney

Dean Mead

[twert@deanmead.com](mailto:twert@deanmead.com)

(407) 428-5197