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Government Action as a Force Majeure Defense in Construction Contracts

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In the event of government action due to a declared emergency such as a pandemic, performance under construction contracts may become delayed or impossible. For example, government action may directly or indirectly delay or prohibit timely access to services such as inspections, permit granting, application review, plan review, or document recording. Government action may also impact the availability of labor or materials. In such circumstances, parties may be relieved from performance by the terms of a force majeure clause, or may otherwise be able to assert force majeure as a legal defense to claims for breach or delay damages. A force majeure clause is a common contractual provision that excuses a party from performing its contractual obligations due to unforeseen events beyond its control. Those unforeseen events may include acts of government such as a mandated shutdown of private and/or public services, prohibitions against gathering, or the impediment of interstate commerce.

To preserve the protections of force majeure under a contract, the invoking party may be required to provide notice to the other party of the delaying event (e.g., a specific government action), or take other steps to mitigate the situation. Compliance with the contract's notice requirements is critical to inform the other party of the government action that is disrupting or will disrupt the contract performance, as well as to convey the message that such event qualifies as force majeure. Failure to properly and timely comply with notice requirements could result in a waiver of a force majeure contract defense.

If you need assistance with analyzing your duties and rights under a contract's force majeure clause, or with providing any notice required to preserve your force majeure protections, please contact Ted Smith, Allen Rutz, Bryan Falk, Rick Grady, or your regular Vorys attorney.

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VORYS COVID-19 TASK FORCE:

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We are taking significant steps to ensure we remain proactive during this extremely fluid environment. The business and legal challenges our clients are facing are changing each day.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.