

# Contracts BULLETIN

a SMACNA publication

June 18, 2020

## COVID-19 Contract Addenda: Considerations for the Subcontractor No. 5, Part 5

Subcontractors continue to face increased construction costs and delayed schedules as a result of COVID-19. As discussed in previous [Contracts Bulletins](#), subcontractors may have clauses within their current contracts to recoup additional costs or extend time for performance due to COVID-19 such as force majeure or change-in-law provisions. However, owners, general contractors, and subcontractors may choose to amend contracts to more precisely describe COVID-19-specific construction changes through a COVID-19 addendum. Subcontractors, whether they hope to present their own COVID-19 addendum or have recently had a COVID-19 addendum thrust upon them by a general contractor or owner, should consider the following information before signing on the dotted line. A sample Addendum to Construction Agreement specific to COVID-19 will be published along with this Contracts Bulletin. As always, careful review and analysis of any COVID-19 addendum before signing is crucial.

### Increased Cost and Time

How a COVID-19 addendum addresses increased costs and time for performance under the original construction contract is likely the most important aspect of the addendum. Past Contracts Bulletins have made clear that force majeure provisions in construction contracts, whether in the AIA A201 or the ConsensusDocs 200, specifically do not allow for increased costs under the contract due to a force majeure event. The AIA and ConsensusDocs do permit extensions of the time for performance under the contract due to a force majeure event. Merely allowing a subcontractor more time for performance may not be adequate in light of the significant impact of COVID-19. A COVID-19 addendum may present the only opportunity for subcontractors to recoup additional costs following the COVID-19 outbreak.

All increased costs already incurred should be well-documented, and anticipated increased costs should be estimated with as much specificity as possible. Subcontractors should also consider increased costs and time for performance due to local rules and regulations enacted to address COVID-19. For example, COVID-19-specific safety requirements such as additional personal protective equipment and additional handwashing stations should be factored into the increased costs under the addendum. Compliance with required physical distancing between employees and others on the jobsite may also increase the time necessary to perform under a contract.

### Safety Protocols

A COVID-19 addendum should address safety measures that will be taken at the jobsite. The Construction Industry Safety Coalition (CISC) released its [Construction Industry Safety Coalition Recommendations: COVID-19 Exposure Prevention, Preparedness, and Response Plan for Construction](#) to aid the construction industry in performing its essential work as safely as possible. The CISC Recommendations rely on guidance from both the Centers for Disease Control (CDC) and Occupational Safety and Health Administration (OSHA), and include a sample safety plan, detailed information about COVID-19, temperature screening guidance, and sample letters to be used in conjunction with the safety plan. The Addendum to Construction Agreement that accompanies this Contracts Bulletin includes a safety plan based on the CISC Recommendations. Costs necessary to follow the safety plan should be included in the increased costs under the COVID-19 addendum.

## **Liability**

A COVID-19 addendum presents an opportunity for an owner or general contractor to shift COVID-19 liability to the subcontractor. More specifically, because COVID-19 presents new potential risks to those on a jobsite, such as extended hospitalization or even death, owners and general contractors may attempt to unfairly allocate these risks to the subcontractor through the addendum. Subcontractors should be on the lookout for this type of liability allocation in any COVID-19 addendum and seek to apportion any additional liability in a fair manner.

## **Bottom Line**

Practically every construction project taking place in the United States over the past several months has been affected by COVID-19. As a result, COVID-19 contract addenda have become increasingly popular. While a potential trap for the unwary subcontractor, a COVID-19 addendum can provide an opportunity to recover time, costs, and money lost as a result of the pandemic.

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*This Bulletin was written by SMACNA's General Counsel, Felhaber Larson*

## ADDENDUM TO CONSTRUCTION AGREEMENT

This **Addendum to Construction Agreement** (this “**Addendum**”) is made this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ (the “**Effective Date**”), by and between \_\_\_\_\_ (“**Subcontractor**”), and \_\_\_\_\_ (“**Contractor**”). Subcontractor and Contractor are parties to that certain Construction Agreement dated \_\_\_\_\_, 20\_\_\_\_ (the “**Agreement**”), and acknowledge that the coronavirus (“**COVID-19**”) pandemic is impacting construction activities and affecting the completion of construction projects. In light of these circumstances, Subcontractor and Contractor (collectively, the “**Parties**” and individually, a “**Party**”) agree to the following modifications to the Agreement:

1. **Recitals; Defined Terms.** The foregoing statements above are true and accurate, and incorporated by reference in this Addendum. Any capitalized term used in this Addendum but not otherwise defined has the meaning assigned to it in the Agreement.

2. **Effects on the Work.** Each Party agrees to use such Party’s reasonable efforts to implement appropriate measures to mitigate the effects of COVID-19 on the Work. The Parties agree and acknowledge that the provisions of this Section 2 are intended to supplement the terms of the Agreement relating to any extension of the Subcontract Time or increase of the Subcontract Sum, and that nothing in this Section 2 may be interpreted to supersede those terms of the Agreement.

- a. **Subcontract Time.** If the Work is delayed for any reason reasonably related to, arising from, or a result of the COVID-19 pandemic, the Parties acknowledge and agree that the Subcontract Time will be extended for such reasonable time as may be necessary to complete the Work.
- b. **Subcontract Sum.** If the Work is made more expensive for any reason reasonably related to, arising from, or a result of the COVID-19 pandemic, the Parties acknowledge and agree that the Subcontract Sum will be increased in such reasonable amount as may be necessary to complete the Work.

3. **Safety Plan.** The Parties acknowledge and understand that COVID-19 requires the modification of the Safety Precautions and Procedures as described in the Agreement. Each Party agrees to use such Party’s reasonable efforts to implement the safety measures described in the COVID-19 Safety Plan, which is attached hereto as Exhibit A and incorporated herein by reference, and distribute the COVID-19 Safety Plan to all individuals present at the job site. The Parties agree and acknowledge that nothing in this Section 3 or the COVID-19 Safety Plan may be interpreted to modify or supersede the Indemnification provisions in the Agreement.

4. **Entire Agreement.** The Agreement, as modified by this Addendum, constitutes the entire agreement between the Parties with respect to its subject matter, and may be amended or altered only by written agreement executed by both Parties.

5. **Reaffirmation; Effect of Addendum.** Except as expressly amended in this Addendum, the terms and provisions of the Agreement will remain in full force and effect. The Parties ratify and confirm all terms and provisions of the Agreement. In the event of any conflict between the terms of the Agreement and this Addendum, the terms of this Addendum will control.

6. **Counterparts and Signatures.** This Addendum may be executed in counterparts, each of which will be deemed an original and all of which together will constitute one and the same instrument. Any person may rely upon a photocopy, facsimile, or electronically transmitted signature to this Addendum. An electronic sound, symbol, or process attached to this Addendum and executed or adopted with the intent to sign will, for all purposes, be as valid as an original signature and may be relied upon by any person.

*[Signature Page Follows]*

**IN WITNESS WHEREOF**, Subcontractor and Contractor have executed this Addendum, effective as of the date and year first appearing hereinabove.

**SUBCONTRACTOR:**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

**CONTRACTOR:**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_