

Do You Have a Force Majeure Clause in Your Engineering Services Contract?

By Bruce Burt, P.E.

It has been a turbulent and unpredictable past twelve months. Still, it appears engineering firms were in a better position to respond to the interruptions resulting from COVID-19 than many other companies. With the necessary network infrastructure in place, many engineering firms effectively performed design/analysis and small team collaboration in a remote environment. At least early in response to the pandemic, many surveys showed utilization rates actually increasing within engineering firms. While many firms dodged a disruption bullet, not all managed to do so. Valuable lessons were learned about a firm's resilience, lack thereof, and preparedness for disruptive events.

One lesson to be learned is the importance of having protective language in a firm's contracts for events that are beyond a firm's control. Though many companies weathered the effects of the coronavirus reasonably well, other potential events are lurking that could result in costly project delays – delays that a firm may be held liable for despite its lack of control over them.

A force majeure clause is intended to limit a firm's liability if it cannot fulfill its contractual obligations due to events prescribed in the clause. The events in a force majeure clause would be considered outside a firm's reasonable control and usually include "Acts of God" (fires, floods, hurricanes, earthquakes, etc.), governmental or other regulatory action or inaction, and other listed events such as war, terrorist acts, strikes, and labor disputes. A pandemic would certainly be considered an "Act of God" force majeure event.

Two other conditions usually need to be met to trigger a force majeure clause. First, the event must negatively affect a firm's ability to perform its contractual obligations. Second, the firm must demonstrate that good-faith

efforts were made to limit the effects of the triggering event.

Take the example of a data loss due to server malfunction. This could certainly cripple a

may result from a pandemic or other event should also be considered since many parts of the country suffered significant disruption due to government-mandated closures.

An example "Delays" clause might be written as follows:

The Structural Engineer (SE) shall not be responsible for delays caused by factors beyond SE's reasonable control, including but not limited to delays because of strikes, lockouts, work slowdowns or stoppages, government-ordered industry shutdowns, power or server outages, acts of nature, widespread infectious disease outbreaks (including, but not limited to epidemics

and pandemics), failure of any governmental or other regulatory authority to act in a timely manner, failure of the Client to furnish timely information or approve or disapprove of SE's services or work product, or delays caused by faulty performance by the Client or by contractors of any level. When such delays beyond SE's reasonable control occur, the Client agrees that SE shall not be responsible for damages, nor shall SE be deemed in default of this Agreement.

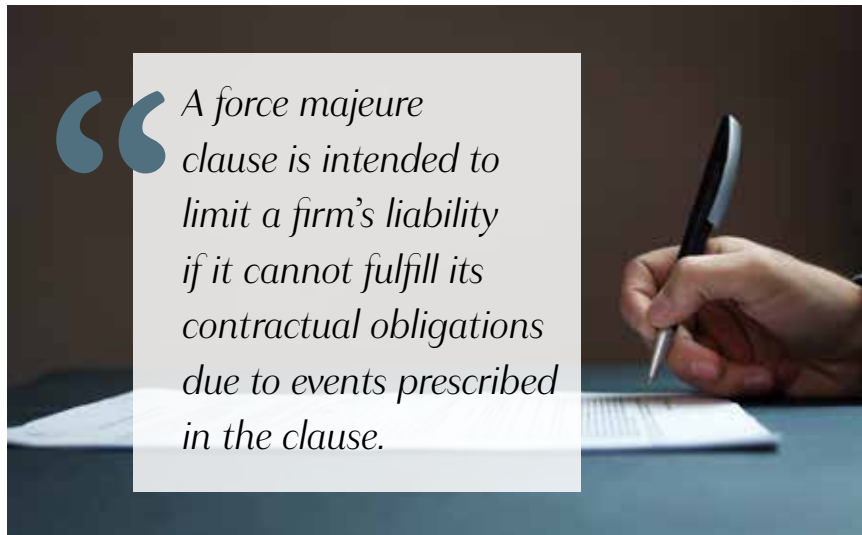
As always, when adding or modifying contract terms, seek the advice of legal counsel.

For firms who purchased contracts published by ACEC's Council of American Structural Engineers (CASE), a force majeure clause template is available for free download at www.acec.org/case/news/publications.

Future versions of all twelve CASE contracts will include a "Delays" clause. ■



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firm for an extended period. However, there is a question as to whether a data loss would qualify if it can be argued that most comparably sized firms have backup systems. Another example is a data breach. Even firms with suitable security systems in place could fall victim to ransomware. The specific conditions of a data loss or breach could determine whether the force majeure clause is applied.

Most engineering firms' force majeure clauses address delays. Although not usual in professional service firms, companies in other industries have included non- or under-performance in their force majeure clause. Firms should exercise caution in expanding a force majeure clause. An overly broad clause or the inclusion of additional provisions may negate more common and generally accepted force majeure contract language. Also, firms must use care in identifying the kinds of occurrences that are included in a clause. Having too many specific events may cause a force majeure clause to be strictly interpreted to only the events listed. Using less specific language, such as "epidemics and pandemics," is more likely to be enforceable than including reference to a specific condition like COVID-19. And including "government action" that