

Stage 2 contractors monitoring COVID-19 impact as 'force majeure' becomes industry buzz

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Stage 2 LRT construction near Lincoln Fields station. ERROL MCGIHON / Errol McGihon

The COVID-19 pandemic could test the strength of city contracts when unfathomable obstacles threaten huge projects, such as the big Stage 2 expansion.

Major construction contracts typically have “*force majeure*” clauses that provide potential escape hatches for vendors unable work under extraordinary and unavoidable scenarios.

Since the pandemic and government-mandated restrictions have impacted almost every aspect of professional and personal lives, the *force majeure* parts of contracts are potentially in play as a

way to possibly give contractors relief from construction schedules. It's a hot topic in the procurement industry.

The two Stage 2 contracts, which authorize \$4.6 billion of work to expand the Confederation Line and Trillium Line, have clauses that define five *force majeure* scenarios. They broadly speak to war, radioactive contamination, chemical or biological contamination, pressure waves and discovery of important species-at-risk, fossils and artefacts.

The city has heard from Stage 2 contractors that they're monitoring the effects of the pandemic on construction.

Construction of the Trillium Line expansion has a contracted ending of August 2022, with the north-south railway still scheduled to be closed for about two years starting on Sunday.

The eastern leg of the Confederation Line is scheduled to be done in November 2024 and construction of the western leg is scheduled to be done in May 2025.

The most recent information from city hall is that *force majeure* clauses haven't been activated by contractors.

"We've talked to our lawyers in terms of whether someone can request or claim a *force majeure* but we have not been formally advised by any of our contractors that that, in fact, is what they're planning to notify us of," city manager Steve Kanellakos said during a press conference last Wednesday.

However, Kanellakos said the Stage 2 contractors are concerned about their timelines, especially because supply chains have been impacted by the pandemic.

With the Stage 2 construction scheduled to last several years, particularly on the LRT portion, the contractors believed they can make up any lost time along the way, Kanellakos said.

"We don't have anything from them, formal, saying that they want us to adjust the timelines or declaring anything under the contract looking for relief, but they have signalled to us that it's a watch item for them," Kanellakos said.

"Like all these things, it depends how long this goes on and how the economy starts opening up," Kanellakos said.

When the World Health Organization confirmed a global pandemic in March, talks started heating up in the procurement industry about how contracts would be impacted.

An online chat hosted by Supply Chain Canada had legal experts answer questions from industry professionals; it was so popular that experts Debby Shapero Propp and Marvin Huberman will be answering questions during another online chat this week.

Huberman, a chartered arbitrator and certified construction adjudicator based in the Toronto area, described the buzz around *force majeure* issues as “white-hot” in procurement circles.

“They’re getting a whole bunch of reasons ultimately flowing from the COVID-19 pandemic that parties, including the City of Ottawa and those involved in contracts with it, try to understand whether or not you use this situation to invoke a *force majeure* clause or excuse contractual non-performance,” Huberman said.

The answer isn’t straightforward, since it depends on language in the contracts, how the language is interpreted, the application of the law and the evidence supporting a claim of *force majeure*, Huberman said. Even if a contract doesn’t have a *force majeure* clause, a party might look at other laws to see if they provide contract relief, he noted.

Huberman predicted there will be a “tremendous number of cases being brought for arbitration and also in the courts” within a year or two related to contracts and the impact of COVID-19.

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