COVID 19 MEMORANDUM – TIME SENSITIVE

Date	March 23, 2020
From	Advocates LLP
To	Advocates' Clients
Re	**COVID-19 Managing Project Delays and Claims**

Executive Alert: Advocates argues that Notice of Delay given now and tied to Ontario's March 17 declaration of a State of Emergency and related MOH social distancing directives – may allow you access to a compensable delay, rather than merely an excusable delay.

Overview

These are indeed challenging times. What lies ahead is unknown for all of us. Things will be particularly challenging for the construction industry given the complexity of factors which must come together to ensure the successful completion of a project. The construction industry makes significant contributions to our economy; and so it is imperative that all participants in the industry work collaboratively to keep projects going, at least where it is safe to do so; and where projects are suspended, to manage any claims arising in an efficient and effective manner.

In response to the many questions we have received from our clients over the last week or so, we have developed a "roadmap" to help guide you through some potential legal impacts of COVID 19 and provide you with some recommendations to assist you as you navigate these uncertain times.

These comments are intended to help you in your consideration of the available steps to be taken in light of COVID 19 concerns. They are premised upon two common contract formats used by many of our clients in the ICI Sector. Our comments are of a general nature only and are not, and should not, be relied upon as legal advice.

Our whole team at Advocates remains "at work" though we are doing so remotely these days, to comply with both the declared state of Emergency and related Public Health orders. We are available to you to review your specific contract language and discuss your specific circumstances as together we seek to

develop an optimal strategy to keep your forces safe on site, and attempt to position your company for the challenging days ahead, to the extent that relief may be available under your own unique contract provisions.

Where Do You Start?

We are not experts in infectious diseases. However, we do know that to avoid or curtail the spread of COVID 19 limiting or preventing close contact in confined spaces is essential. And as we also know for some spaces, like restaurants and schools, the governments have mandated closures. That has not been the case in the construction industry – yet.

How and/or whether you proceed with your particular project will be influenced by a number of factors; including the environment in which the construction is taking place. For example: are you engaged in construction in an enclosed environment (ie: building construction); or, are you engaged in construction in a non-enclosed environment (ie. road building?). The risk profile will be different and unique to each project.

However, in consideration of how you move forward, we know you always recognize that the key factor in your analysis is the health and safety of your own workers, and the health and safety of all the persons on the jobsite, and the public at large. Your consideration of the health and safety of workers is both your moral obligation and also your legal right and obligation.

General Principles of Occupational Health and Safety

Occupational Health and Safety remains a foundational principle which will govern all conduct on the job site. As you well know you are obliged to take all reasonable steps to ensure your site is, and remains, safe for workers. Employees have the right to refuse to perform work where they hold a *bona fide* belief that they may not be safe.

Under the *Occupational Health and Safety Act* s.37, an Employer is obliged to disclose the presence of hazardous materials in the workplace.

If the project site is a functioning hospital facility and the Constructor cannot be satisfied that its work force is not at risk of exposure to individuals with COVID 19 this may form a basis for refusal to work. Such a contractor may have General Conditions such as those found under the CCDC2 contract which deal specifically with Hazardous Materials. Those provisions require careful consideration based on the specific facts of your job site, and we urge anyone contemplating relying upon these clauses to immediately obtain legal advice.

Specifically, under Part V of the Occupational Health and Safety Act – s. 43 (3): a worker may refuse to work, or to do particular work where they have reason to believe that the *physical condition* of the workplace is likely to endanger them. There are exceptions to this right that apply to workers whose work is inherently risky, or to those whose refusal would directly endanger the life, health or safety of others, such as police, firefighters, or hospital workers. In these challenging times, we are grateful for those who have chosen to assume these risks for the benefit of the greater good.

We have heard reports of workers in certain circumstances and on certain projects refusing to work over concerns about COVID 19 health and safety concerns at the job site. We are aware of concerns for emerging and pending labour shortages. Product supply shortages will inevitably follow, since the manufacturers and those downstream in the supply chain will face the same impacts on their own workforce, assuming they have managed to remain open and operational in this difficult time.

The Contract

Every contract is unique and the facts are often as important as the terms of the contract. Below we have highlighted common provisions contained in the CCDC - 2 Contract and in OPSS Contracts that you should be aware of; and we have noted how such provisions may be applicable to the current issues at hand. Of course, standard contracts may have been amended by supplementary conditions, as such it is important to read your contract thoroughly before you take any steps.

Giving Notice of Delay and Requesting Extensions of Time

The government of the Province of Ontario declared a State of Emergency on Tuesday March 17, 2020 closing many different businesses. It banned public events of more than 50 people in the declaration, which reinforced the Ministry of Health (“MOH”) directives to invoke social distancing measures, requiring people to remain a minimum of 2M from one another, and to self-isolate for 14 days in the event of illness or potential exposure to an ill person.

Maintaining a sustained work force, and also achieving historical productivity levels, seems to no longer be possible in the medium term. The full extent of the ongoing impacts cannot be determined, but there are and will continue to be real impacts to projects underway and those projects about to commence with the arrival of Spring conditions.

Regardless of your form of Contract, we encourage you to be familiar with the various notice provisions – including when you must provide notice for a claim and what details must be included in the claim. While these are unprecedented times, you do not want to risk being denied a claim for compensation or relief from penalty, for failure to provide notice in accordance with the contract.

CCDC 2 Contracts

These comments generally apply to clients constructing buildings where the likelihood of the work force having to operate in close quarters (<2M), or within a team in a more confined space seems generally to be greater than in the road and bridge building sectors.

The provincial government in the Province of Ontario declared its State of Emergency on Tuesday March 17, 2020 closing many different businesses and banning public events of more than 50 people and reinforcing the MOH's declaration to invoke social distancing measures. This gives us a logical reference point to establish either the commencement of the delay under the CCDC2 GC 6.5.4 or alternatively to contemplate the threshold of *"as soon as the need for an Extension of Time becomes evident"* under GC 3.06.01 of the OPSS GC's. It also anchors your notice to a series of events which we argue should be compensable.

Compensable Delay – GC 6.5.2

A number of General Conditions may be triggered by issues arising with COVID 19 concerns. Under CCDC-2 we consider that the least risky of the avenues open to the Contractor to give notice arises through GC 6.5 Delays.

GC 6.5 DELAYS

6.5.1 If the *Contractor* is delayed in the performance of the *Work* by an action or omission of the *Owner*, *Consultant* or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the *Contract Documents*, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The *Contractor* shall be reimbursed by the *Owner* for reasonable costs incurred by the *Contractor* as the result of such delay.

6.5.2 If the *Contractor* is delayed in the performance of the *Work* by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Contractor* or any person employed or engaged by the *Contractor* directly or indirectly, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The *Contractor* shall be reimbursed by the *Owner* for reasonable costs incurred by the *Contractor* as the result of such delay.

self isolate and 2M radius are impacting work force

Under GC 6.5.2 you can argue that a stop work order has been issued not by a Court but by another "*public authority*", in the form of the declaration that people must not gather in numbers larger than 50 and should not be in closer proximity than 2M from one another. If either of these limitations to the way in which work on your site can be carried out, has a practical consequence of impacting productivity or entirely precluding certain tasks, then notice of delay may be given. If the same provisions are expected to cause material shortages, notice can be given. If the 14 day self-isolation obligation (triggered under various scenarios) is expected to cause labour shortages, notice can be given.

Under this provision the Contractor **may seek reimbursement** from the Owner for the costs incurred as a result of the delay, in addition to being **granted further time** and therefore relief from liquidated damages or other delay based penalty claims by an Owner for late project completion.

You may expect from consultants or owners, an argument that the work has not been stopped by these "orders", and that the GC 6.5.2 clause applies only to a total stoppage of work, not to "mere operational constraints" such as those imposed by Ontario's declaration and MOH's directives.

Our response to that is that these operational constraints **do stop** the work in both space and in time. They stop the work within specific job site locations – specifically for the second team member who would normally and most efficiently work within the 2M radius of every other worker then on site. They also stop the work of workers who feeling briefly ill but, unable to access any definitive test, must stay off work for two weeks, along with workers who, without being ill themselves are obliged to isolate due to potential of exposure to an untested individual who themselves felt ill or was subsequently diagnosed.

This is not a criticism of these measures, but a reflection that this new reality will produce labour shortages in a number of different ways which were not previously foreseeable. Tying your notice to the provincial declaration and MOH directives assists that argument.

GC 6.5.2 places this risk on the Owner. Since COVID 19 was not a risk contemplated by the parties, we believe it can reasonably be argued that it could not have been transferred to bidders at time of contract formation. We see this GC as the preferred approach to dealing with these consequences and any resulting delays. Timely notice then, may be critical.

Force Majeure – GC 6.5.3.4

The alternative ground for delay would be GC 6.5.3.4 for delays suffered due to *any cause beyond the Contractor's control*, other than one resulting from a default or breach of the Contract by the Contractor. In that alternative scenario,

the only relief is additional time with no compensation. It becomes an excusable but not compensable delay, which is not a contractor's preferred course.

6.5.3 If the *Contractor* is delayed in the performance of the *Work* by:
.1 labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the *Contractor* is a member or to which the *Contractor* is otherwise bound),
.2 fire, unusual delay by common carriers or unavoidable casualties,
.3 abnormally adverse weather conditions, or
.4 any cause beyond the *Contractor*'s control other than one resulting from a default or breach of *Contract* by the *Contractor*,
then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the *Contractor* agrees to a shorter extension. The *Contractor* shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the *Owner*, *Consultant* or anyone employed or engaged by them directly or indirectly.

Critically – and in either case, Notice of the Delay must be given within 10 working days of commencement **of the delay** pursuant to GC 6.5.4.

The take-away here is that under CCDC-2 you must give Notice of Delay within 10 working days of commencement of the delay, and we recommend anchoring that Notice to Ontario's March 17 Emergency Declaration and the related MOH directives on social distancing.

6.5.4 No extension shall be made for delay unless *Notice in Writing* of the cause of delay is given to the *Consultant* not later than 10 *Working Days* after the commencement of the delay. In the case of a continuing cause of delay only one *Notice in Writing* shall be necessary.

Concealed or Unknown Conditions – GC 6.4

There is a third avenue under CCDC 2 which invokes the provisions of the Hazardous substances General Conditions. We consider it to be a high risk strategy for a contractor to rely on this provision because the party responsible for the presence of the Hazardous substance on site is at risk of having to indemnify the other for the consequential cost impacts of managing that exposure. For that reason, we could only see it be given serious consideration by those contractors working at an active hospital site where patients with COVID 19 are passing close to the location of construction activities. Those circumstances arguably give rise to an identifiable and enhanced risk ***caused*** by the activities of the Owner at the site.

The argument to be followed in such a case would arise with a Notice under GC 6.4 of a Concealed or Unknown Condition at the place of work. It would be a GC 6.1.4.2 unanticipated "*physical condition… of a nature which differ materially from those generally recognized as inherent in construction activities…"*

To initiate this process the Contractor must give Notice within 5 days of the observance of the conditions. Hence an immediate decision to give that Notice must be made if this were to form the basis of the effort to seek time and compensation due to impacts. It should also be expected to lead to a process of engaging the Occupational Health and Safety Committee and Hospital Risk Management staff. It would be a protracted process, during which there would likely be at least a temporary suspension of work while the Owner attempted to put in place further strategies to properly deal with the hazardous conditions.

GC 6.4 CONCEALED OR UNKNOWN CONDITIONS

6.4.1 If the *Owner* or the *Contractor* discover conditions at the *Place of the Work* which are:

.1 subsurface or otherwise concealed physical conditions which existed before the commencement of the *Work* which differ materially from those indicated in the *Contract Documents*; or

.2 physical conditions, other than conditions due to weather, that are of a nature which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the *Contract Documents*,

then the observing party shall give *Notice in Writing* to the other party of such conditions before they are disturbed and in no event later than 5 *Working Days* after first observance of the conditions.

Under GC 6.4.4 it is contemplated that the unknown condition may relate to toxic substances, and if so, reference is then made to the operative provisions of GC 9.2 Toxic and Hazardous Substances

6.4.4 If such concealed or unknown conditions relate to toxic and hazardous substances and materials, artifacts and fossils, or mould, the parties will be governed by the provisions of GC 9.2 - TOXIC AND HAZARDOUS SUBSTANCES, GC 9.3 - ARTIFACTS AND FOSSILS and GC 9.5 – MOULD.

The challenge and risk arising once the Contractor directs the Owner into GC 9.2 is that the pendulum can swing both ways. The concept established by GC 9.2 is to compel the party which is found to have introduced the toxic substance to the site, to bear all the consequences of steps necessary to address the impacts from the substance. The language is broad. It could be argued to apply to both direct clean-up costs, and consequential delay costs. Caution is therefore urged, before initiating such a process. The circumstances where it might succeed are likely restricted to those where the facility is a known treatment center for COVID 19 patients supporting the inference that an elevated toxic risk, was being brought to bear on the project due to the Owner's operations.

As you can see in the snip below, the GC 9.2 Toxic and Hazardous Substances sections also creates trailing obligations for indemnity, which should be a concern to any General Contractor.

9.2.5 If the *Contractor*
.1 encounters toxic or hazardous substances at the *Place of the Work*, or
.2 has reasonable grounds to believe that toxic or hazardous substances are present at the *Place of the Work*,
which were not brought to the *Place of the Work* by the *Contractor* or anyone for whom the *Contractor* is responsible and which were not disclosed by the *Owner* or which were disclosed but have not been dealt with as required under paragraph 9.2.4, the *Contractor* shall
.3 take all reasonable steps, including stopping the *Work*, to ensure that no person's exposure to any toxic or hazardous substances exceeds any applicable time weighted levels prescribed by applicable legislation at the *Place of the Work*, and
.4 immediately report the circumstances to the *Consultant* and the *Owner* in writing.

9.2.6 If the *Owner* and *Contractor* do not agree on the existence, significance of, or whether the toxic or hazardous substances were brought onto the *Place of the Work* by the *Contractor* or anyone for whom the *Contractor* is responsible, the *Owner* shall retain and pay for an independent qualified expert to investigate and determine such matters. The expert's report shall be delivered to the *Owner* and the *Contractor*.

9.2.7 If the *Owner* and *Contractor* agree or if the expert referred to in paragraph 9.2.6 determines that the toxic or hazardous substances were not brought onto the place of the *Work* by the *Contractor* or anyone for whom the *Contractor* is responsible, the *Owner* shall promptly at the *Owner's* own expense:
.1 take all steps as required under paragraph 9.2.4;
.2 reimburse the *Contractor* for the costs of all steps taken pursuant to paragraph 9.2.5;
.3 extend the *Contract* time for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor* and the expert referred to in 9.2.6 and reimburse the *Contractor* for reasonable costs incurred as a result of the delay; and
.4 indemnify the *Contractor* as required by GC 12.1 - INDEMNIFICATION.

9.2.8 If the *Owner* and *Contractor* agree or if the expert referred to in paragraph 9.2.6 determines that the toxic or hazardous substances were brought onto the place of the *Work* by the *Contractor* or anyone for whom the *Contractor* is responsible, the *Contractor* shall promptly at the *Contractor's* own expense:
.1 take all necessary steps, in accordance with applicable legislation in force at the *Place of the Work*, to safely remove and dispose the toxic or hazardous substances;
.2 make good any damage to the *Work*, the *Owner*'s property or property adjacent to the place of the *Work* as provided in paragraph 9.1.3 of GC 9.1 – PROTECTION OF WORK AND PROPERTY;
.3 reimburse the *Owner* for reasonable costs incurred under paragraph 9.2.6; and
.4 indemnify the Owner as required by GC 12.1 - INDEMNIFICATION.

OPSS GENERAL CONDITION CONTRACTS

We recognize different factors will generally be at play for our general contractors in the road and bridge building sector. Many projects are just about to begin work following winter shut down. They are mostly being constructed in open outside environments, and not enclosed quarters.

Regardless of these differences, our clients tell us they have the same reasonable fears about labour shortages, productivity impacts on labour when it is available, and pending material shortages or supply chain disruption. These realities are becoming apparent, and might be said by MTO or others, with hindsight, to have been evident from the date of the province's Declaration of Emergency on March 17th.

We raise this concern now with you as our partner Jim LeBer argued a case in Court on February 5th 2020, over the proper interpretation and application of the MTO's contract language over EOT's and Liquidated Damages. The Judge's

decision in that case has not yet been released. However, one of the elements in dispute arose from the internal contradiction in the MTO EOT process in GC3.06.01 which requires on one hand that a request be made *"as soon as the need for such extension becomes evident"* while mandating the use of the prescribed form indicating the precise amount of time extension required. Arguably, until the impact has been nearly fully sustained, you can't know the precise duration of the impact and therefore declare *"the length of extension required."* Which demand trumps: as soon as evident – or – when the length of extension required is known?

During argument in that Court process MTO's lawyers declared that if "*the length of extension required"* cannot be determined then the Construction Industry should be submitting multiple EOT's along the way, for a single delay cause, updating your anticipated length of extension required whenever it begins to appear likely your estimate will have been exceeded. MTO's lawyers argued that is not contrary to the provision and is the practice that should be followed, rather than await greater certainty on the probable duration of the impact before submitting the EOT, assuming the need for an extension is becoming evident.

Whether the Judge accepts this position as a reasonable interpretation of what the contractor should do, our message to the Industry is clear:

MTO has argued you have failed to give timely notice and your EOT should be rejected when notwithstanding uncertainty about duration, a Contractor did not submit the EOT as soon as it can be said that the need became evident. We strongly recommend submitting an EOT now based on the March 17 Declaration of Emergency and related MOH directives on social distancing, and the resulting and known impacts of those constraints.

MTO says you must do so even without a reliable prediction of the length of extension required. This is not a practice we at Advocates have typically seen adopted by our clients, and so we bring it to your attention. The response of MTO to such notices, remains to be seen. We will be keen to observe how they will be managed by CA's and MTO staff as well.

GC 3.06 Extension of Contract Time or Interim Completion Dates

.01 An application for an extension of Contract Time or interim completion dates shall be made in writing by the Contractor on the Owner standard form PH-CC-775, Extension of Time Request and Approval Form, to the Contract Administrator, as soon as the need for such extension becomes evident. The application for an extension of Contract Time shall enumerate the reasons and impact on the critical path schedule, and state the length of extension required.

.02 Circumstances suitable for consideration include the following:

a) Delays: See subsection GC 3.07, Delays.

b) Changes in the Work: See clause GC 3.10.01, Changes in the Work.

c) Additional Work: See clause GC 3.10.02, Additional Work.

.03 The Contract Time shall be extended for such additional time as approved by the Contract Administrator.

.04 The terms and conditions of the Contract shall continue for such extension of Contract Time.

GC 3.07 Delays

.01 If the Contractor is delayed in the performance of the Work by:

a) War, blockades, or civil commotions; or

b) Errors in the Contract Documents; or

c) An act or omission of the Owner, Contract Administrator, other contractors, or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the Contract Documents; or

d) A stop work order issued by a court or public authority, provided that such order was not issued as the result of an act or omission of the Contractor or anyone employed or engaged by the Contractor directly or indirectly; or

then, the Contractor shall be granted an extension of Contract Time according to subsection GC 3.06, Extension of Contract Time or Interim Completion Dates, and shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as the result of such delay.

The language of GC 3.07.01 (d) has similarities to those discussed above in the context of CCDC2 language about public authorities – AND – is also a compensable delay

> *"A stop work order issued by a court or public authority, provided that such order was not issued as the result of an act or omission of the Contractor…"*

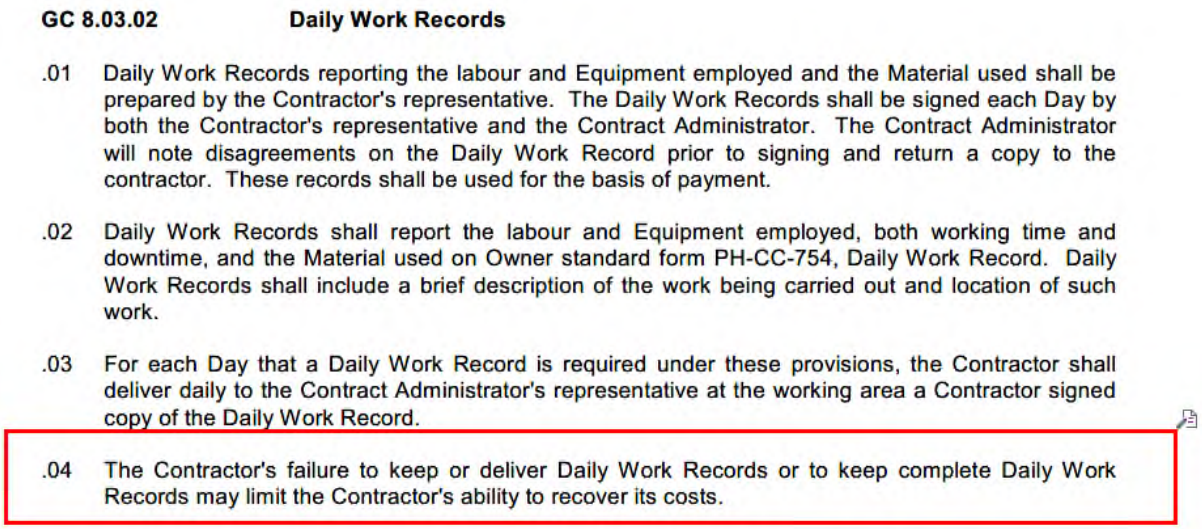
We believe that the same consequences of Ontario's March 17, 2020 State of Emergency declaration and related MOH directives can be said to flow from those orders issued which stop work both within the available space at the

project site, and across time for workers trying to responsibly comply with the self-isolation directive. We repeat those comments again below.

Advocates argue that a stop work order has been issued by another "*public authority*", in the form of the mandate that people must not gather in numbers larger than 50 and should not be in closer proximity than 2M from one another. If either of these limitations to the way in which work on your site can be carried out, has a practical consequence of impacting productivity or entirely precluding certain tasks, then notice of delay can be given. If the same provisions are expected to cause material shortages, notice can be given. If the 14 day self-isolation obligation is expected to cause labour shortages, notice can be given.

We recommend submitting a Request for Extension of Time caused by the constraints imposed by the Declaration of Emergency of March 17th and related MOH directives, with a best "guestimate" of the length of extension and an affirmative statement that the estimate of the length of time required will be revised and updated as further certainty is gained in the passage of time.

The consequence of submitting an EOT request is that the obligation to keep DWR's is triggered immediately for all work potentially impacted by the delay.



GC 8.03.02 Daily Work Records

.01 Daily Work Records reporting the labour and Equipment employed and the Material used shall be prepared by the Contractor's representative. The Daily Work Records shall be signed each Day by both the Contractor's representative and the Contract Administrator. The Contract Administrator will note disagreements on the Daily Work Record prior to signing and return a copy to the contractor. These records shall be used for the basis of payment.

.02 Daily Work Records shall report the labour and Equipment employed, both working time and downtime, and the Material used on Owner standard form PH-CC-754, Daily Work Record. Daily Work Records shall include a brief description of the work being carried out and location of such work.

.03 For each Day that a Daily Work Record is required under these provisions, the Contractor shall deliver daily to the Contract Administrator's representative at the working area a Contractor signed copy of the Daily Work Record.

.04 The Contractor's failure to keep or deliver Daily Work Records or to keep complete Daily Work Records may limit the Contractor's ability to recover its costs.

We frequently see claims rejected by MTO for a failure to prepare, submit and reconcile DWR's weekly on any project where a delay is believed to be ongoing,

and where notice of an EOT has been given, (or is subsequently given at some later date).

Our recommendation is to submit your EOT now and begin immediately keeping DWR's for all tasks which have the *potential* of being impacted by the impending delay. Given the wide ranging nature of the delays which could arise to both labour and material across multiple subcontractor groups, it looks like all tasks could be tracked in the DWR's you are going to be submitting.

Conclusion

The team at Advocates remain available while working from our various remote locations. We are just a video call away. We'd be glad to hear from you!

Let us know if these comments have raised specific questions or concerns for you. We are ready to review your own contract's specific language, to consider its supplementary general conditions, and the unique facts you are facing on your job site, if you need legal advice about alternatives you may want to implement now, to preserve your options going forward.

Check our website for our contact information: AdvocatesLLP.com