



ALABAMA UTILITY CONTRACTORS ASSOCIATION

TIM AYERS, EXECUTIVE DIRECTOR
MARCH 2020

Director's Comments:

Congress Passes \$2 Trillion Coronavirus Stimulus Bill

On Friday, March 27, President Trump signed the massive \$2 Trillion Coronavirus Aid, Relief and Economic Security (CARES) Act in response to the COVID-19 pandemic. The third stimulus effort provides assistance to workplaces and employees and includes many benefits intended to deliver cash into the hands of individuals and businesses, as well as many other tax provisions.

In Alabama, all "non-essential" businesses have been ordered to close until April 18th due to the spread of Coronavirus. No matter who you are, this crisis has had an impact on our lives. We are all living in uncharted waters, and sadly don't know when we will stop "social distancing" and return to what we previously considered to be "normal."

I've seen much debate focused on who the real heroes of the crisis are: Medical Professionals, Truck Drivers, Grocery Store Workers, etc. I say they are all vitally important.

However, without the work of those that supply, install, and rehabilitate the critical infrastructure of water, sewer, gas, electricity, broadband telecommunications, and other utility systems, as well as building and maintaining roads and bridges, our world could not function.

So, while the work of our members may often go unnoticed, it should not be unappreciated, and certainly never considered by anyone to be "non-essential." Please stay safe, and let us know if AUCA can be a resource to you or your business during this time of crisis.

Tim



Inside This Issue:

Upcoming Events	2
Legislative News	3
News & Notes	4-11

Upcoming Events:

Due to the COVID-19 Coronavirus, our Mobile Industry Lunch Meeting has been postponed. As soon as a new date has been established, we will let you know.



AUCA Mobile Area Industry Lunch Meeting

*Alabama 811 will be presenting on
the new updates to the
Alabama Damage Prevention Law*

AUCA 2020 Spring General Meeting, Golf Tournament and Shrimp & Crawfish Boil

Thursday, May 7, 2020?

Arrowhead Country Club - Montgomery, AL

Also due to the COVID-19 Coronavirus, we do not know the status of our Spring General Meeting & Golf Tournament. However, with the current mandates regarding social distancing and limited public gatherings, it would seem unlikely that we will be able to have the event as scheduled on May 7th. We will continue to monitor the situation and make an announcement soon.

AUCA 2020 Fall General Meeting & Sporting Clay Shoot

Thursday, October 15, 2020

Lower Wetumpka Shotgun Sports Club - Montgomery, AL



Alabama Legislative News:

Like everything else in the world right now, the COVID-19 Coronavirus pandemic has impacted the 2020 Alabama Legislative Session. Legislators adjourned for Spring Break on March 12th. The House returned on March 26th for the 13th legislative day, but without a quorum. To date, there have been a total of 457 bills introduced in the House and 322 in the Senate.

The Alabama Senate is scheduled to meet again on Tuesday, March 31st at the State House for the 14th Legislative Day. The intent for this legislative day is to advance only essential attendance items and then to adjourn for the 15th Legislative Day.

The remainder of the session will be held possibly Tuesday, April 28th through Monday, May 18th. This timeframe includes three weeks of session plus the last day of May 18, which is when the 105 calendar days allowed by the Constitution expires. If legislators are unable to meet before May 18th, there will be a special session sometime before the end of the September 30th fiscal year.

The preliminary plan for the end of the session is to consider the following:

- Education Trust Fund Budget
- General Fund Budget
- Other bills deemed necessary



AUCA Board Members visiting Legislators at the State House on March 11th during our annual "Charge the Hill" Legislative Awareness Day

Remember to check our "Legislative Pipeline" email report for Legislative updates

News & Notes:

FORCE MAJEURE and COVID-19

The continued presence of COVID-19 is generating uncertainty as to whether necessary supplies and labor will be available for business needs and whether contracting parties are able to complete ongoing projects. This raises the question of whether a party may rely upon a force majeure clause in a contract if such shortages prevent them from meeting deadlines.

Force majeure clauses address circumstances beyond the parties' control which make contractual performance too difficult or impossible. They may allow the invoking party to suspend performance, delay, or be released from certain duties.

Many of these clauses list various unforeseeable triggering events, such as war, terrorist attacks, floods, fire, etc. Depending on the language of such a contractual provision, the inability to meet contractual requirements may be excused by COVID-19. Several form contracts, such as ConsensusDocs 200 and Federal Acquisition Regulation 52.249-14, include "epidemics" in their force majeure listings. By contrast, the standard language in the AIA construction contract's general conditions does not include epidemics. Force majeure clauses may also include acts of the government as triggering events. Given the WHO's labeling of COVID-19 as a pandemic (a global-scale epidemic) and recent limitations imposed by state and local governments limiting gatherings of specified numbers of people, these clauses may be ripe for invocation. Some clauses may even include a "catch-all," whereby a party is excused for unspecified major events outside of its control, to which COVID-19 may apply.

If you think that your contract may provide an excuse of performance based on a force majeure clause, important steps to take include:

- Analyze the clause – Is an epidemic or pandemic included? Government action? Is there a catch-all provision?
 - Review the contract for additional provisions which may allow for extra time or recovery of costs.
- Gather supporting documentation
 - The US declared a national emergency March 13, 2020 and many states followed suit.
 - The WHO declared a "public health emergency of international concern" January 31, 2020 and a "pandemic" as of March 11, 2020.
 - If supplies from China are involved in your operations, China's Council for the Promotion of International Trade can issue "force majeure" certificates.
 - Information and correspondence regarding supply shortages and laborers/employees impacted by the virus would be relevant.
- Provide written notice to the other party in accordance with the contract (and potentially find mutually beneficial solutions)
 - Respond timely if you are the party being provided notice.



News & Notes:

(Continued from page 4)

- Consider alternative means of performance and mitigation strategies

Should there be disagreement regarding whether a force majeure provision applies, most courts construe such clauses in accordance with their plain language. *See Holder Constr. Grp. v. Ga. Tech Facilities, Inc.*, 640 S.E.2d 296, 298 (Ga. Ct. App. 2006) (“Accordingly, under the contract, Holder bore the risk of the late delivery of the steel because it was not due to any of the reasons set out in the ‘Force Majeure’ clause.”). *Compare St. Joe Paper Co. v. State Dep’t of Env’tl. Regulation*, 371 So. 2d 178 (Fla. Dist. Ct. App. 1979) (enforcing unambiguous force majeure clause including catch-all provision), *with Cartan Tours, Inc. v. ESA Servs., Inc.*, 833 So. 2d 873, 875 (Fla. Dist. Ct. App. 2003) (finding ambiguity in a force majeure provision, requiring further contractual interpretation by the court). *See also* <https://www.bakermckenzie.com/en/insight/publications/2020/03/when-is-force-majeure-really-force-majeure> (discussing construction of force majeure clauses in New York, California, and Texas).

Force majeure is an affirmative defense, which the party invoking would likely bear the burden of proving. *See, e.g., Pro-Logistics Forwarding (Pty) Ltd. v. Robison Tire Co.*, No. 2:13CV83-KS-MTP, 2013 WL 6507347, at *4 (S.D. Miss. Dec. 12, 2013) (noting in the context of Mississippi’s UCC force majeure statute that the invoking party bears the burden of proof at trial); *see also Falanga v. Kirschner & Venker, P.C.*, 680 S.E.2d 419, 423 (Ga. Ct. App. 2009) (party relying on affirmative defense bore the burden of proving it); *African Methodist Episcopal Church, Inc. v. Smith*, 217 So. 3d 816, 823 (Ala. 2016) (same); *SA-PG Sun City Ctr., LLC v. Kennedy*, 79 So. 3d 916, 920 (Fla. Dist. Ct. App. 2012) (same).

Merely being unable to perform a contract as a result of financial hardships is not sufficient. *See, e.g., Elavon, Inc. v. Wachovia Bank, Nat. Ass’n*, 841 F. Supp. 2d 1298, 1306 (N.D. Ga. 2011) (“The economic downturn of 2008 was not an ‘act of God.’ Further, financial inability does not excuse contract performance as impossible.”); *Marshall Const., Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So. 2d 845, 848 (Fla. Dist. Ct. App. 1990) (“It is a well-settled contract principle that unexpected difficulty, expense, or hardship does not excuse a party from performance of its obligations under a contract.”). Thus, it is important to consider whether COVID-19 truly prevents timely performance, or whether it is being used as an excuse to avoid compliance.

A force majeure defense may be available in some jurisdictions without a contractual provision, but that argument will receive resistance. *See Alpine Constr. Co. v. Water Works Bd. of City of Birmingham*, 377 So. 2d 954, 956 (Ala. 1979) (“Where one by his contract undertakes an obligation which is absolute, he is bound to perform within the terms of the contract or answer in damages, despite an act of God, unexpected difficulty, or hardship, because these contingencies could have been provided against by his contract.”) (emphasis added). Other states may permit impossibility or frustration defenses in certain cases. *See Mailloux v. Briella Townhomes, LLC*, 3 So. 3d 394, 396 (Fla. Dist. Ct. App. 2009) (“In Florida, acts of God, impossibility of per-



News & Notes:

(Continued from page 5)

formance, and frustration of purpose are well-recognized defenses to nonperformance of a contract.”); *Watkins Dev., LLC v. Jackson Redevelopment Auth.*, 283 So. 3d 170, 179 (Miss. 2019) (noting Mississippi’s recognition of an impossibility defense in certain instances).

For future reference, parties should carefully consider whether to include epidemics or pandemics in contracts. Arguably, COVID-19 could impact whether epidemics or pandemics are seen as “unforeseeable” in future settings.

Our firm is committed to helping our clients thoughtfully navigate the issues COVID-19 presents for their businesses. We will continue to monitor developments in this and other areas. Please feel free to contact us with any questions or concerns.

Alabama Rules of Professional Conduct require that the following language accompany any communication concerning a lawyer’s services: “No representation is made that the quality of the legal services to be performed is greater than the quality of legal services to be performed by other lawyers.”

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AUCA Scholarship Program:

- AUCA will be awarding two (2) Scholarships worth \$1,500 each.
- Money will be paid directly to the College or Trade School of the applicant’s choice.
- The Scholarship Committee will select the two winners from AUCA member company employees, or immediate family members that apply before the April 30th deadline.
- Applications are available on the AUCA website:



<http://www.aluca.org/scholarship-program.html>



News & Notes:

March 31 Runoff Election Postponed Until July 14 Because of the COVID-19 Coronavirus Pandemic

Following a joint press conference featuring Governor Kay Ivey, Secretary of State John H. Merrill, and Attorney General Steve Marshall, the March 31 Runoff Election will be postponed until July 14, 2020.

The following statement is from Secretary of State John H. Merrill:

When I took office as Alabama's 53rd Secretary of State, I set out to ensure a free and fair elections process for the people of Alabama.

First and foremost, however, the safety and well-being of every single Alabamian is my top priority.

The guidelines prescribed by the Centers for Disease Control & Prevention and the Alabama Department of Public Health have made it clear that it is no longer advisable for the people of Alabama to go to the polls to vote on March 31.

The opportunity to participate in the electoral process and have one's voice heard at the polls is one that we will continue to protect and advocate for.

In postponing the March 31 Runoff Election to July 14, we are continuing Alabama's practice of providing free and fair elections that do not compromise the safety and health of our voters, poll workers, and anyone else who may be involved with the elections process.

This new date will allow for the electoral process to continue in a normal manner. This delay will allow all local election officials the time to assess and evaluate the changes that must be made to ensure the Runoff Election is administered according to plan.

Eligible Alabamians may continue to register to vote in the Runoff Election until Monday, June 29.

Absentee ballot applications that have already been successfully submitted will be valid for the July 14, 2020 Runoff Election. To check on the status of your application, please contact your local Absentee Election Manager.

All absentee ballot applications must be received by the close of business on Thursday, July 9. If delivered by hand, absentee ballots must be received by the Absentee Election Manager by the close of business Monday, July 13. If returning by mail, the last day to postmark an absentee ballot is Monday, July 13.



News & Notes:

ALDOT Keeps Essential Services Going for Alabama

The Alabama Department of Transportation (ALDOT) is maintaining essential services, such as road and bridge maintenance and construction, during the continuation of a national effort to prevent the spread of COVID-19. Work to repair slides and other roadway failures resulting from the recent record rainfall is also ongoing.

“ALDOT’s mission is to move people and goods, and that includes things such as products to keep stores stocked and supplies for healthcare providers and manufacturers of the equipment needed for community safety and sanitation,” said George Conner, Deputy Director of Operations, ALDOT. “Many of our employees and contractors continue to work while taking extra precautions to protect their health. At a time where trucking and the shipment of essential goods is vital, ALDOT is working hard to advance the maintenance and construction that’s required for our interstates and state highways.”

Most ALDOT functions, including maintenance work, such as repairing flood-damaged roadways, and construction projects, are considered essential functions. Other than temporary lane closures to facilitate construction or repairs or to respond to a traffic incident, no interstate or other state-maintained roads are closed, and none are expected to close.

“We are committed to safety in all aspects of our operations, which includes our work zones,” Conner said. “We’re doing all we can to keep our projects moving. As always, we ask that motorists drive alertly around the many work zones that remain active at this time.”

Rest Areas

Restrooms remain open at ALDOT rest areas and welcome centers across the state. Throughout the day, the staff cleans and sanitizes the areas used most frequently by travelers, including door handles, counters, faucets and toilets. In addition, deep cleanings are performed on the restrooms each week. While rest area employees are focused on cleaning at this time, a phone number is posted at each rest area and welcome center for travelers to call if they need information or assistance.

General Operations

ALDOT personnel will continue to monitor and respond to traffic incidents and roadway issues. ALDOT traffic operations and Alabama Service & Assistance Patrol (ASAP) responders will continue serving in areas where they currently operate.



(Continued on page 9)

News & Notes:

(Continued from page 8)

Public Involvement Meetings

All ALDOT public involvement meetings are postponed until further notice.

Permit Operations

Local ALDOT offices will continue to receive and process [permits for work on ALDOT right of way](#). [The ALDOT Oversize/Overweight Permit Office](#) will continue to accept and process applications for oversize/overweight vehicles on Alabama highways.

About the Alabama Department of Transportation

ALDOT's mission is to provide a safe, efficient, environmentally and economically sound transportation network across Alabama. For further information, visit www.dot.state.al.us. For traffic and road condition information, go to www.ALGOtraffic.com.



ALABAMA
COUNTS!

2020 CENSUS



News & Notes:

Alabama State Licensing Board for General Contractors March 31, 2020 License Renewal Deadline is Automatically Extended as Follows:

Pursuant to Board action summarized below, effective March 25, 2020, an automatic extension up to and including June 30, 2020 is granted to either licensees holding a current unexpired Alabama license or to those licenses holding a current Alabama license extension that expires on March 31, 2020.

Failure of those whose licensing renewal deadline of March 31, 2020 has been automatically extended, to file the required licensing renewal documentation by June 30, 2020, will result in their license lapsing on July 1, 2020.

Summary of Board Action Taken on March 25, 2020:

On March 25, 2020, and pursuant to Governor Ivey's March 2020 proclamations, the State of Alabama Licensing Board for General Contractors held a specially called meeting needed to respond to COVID-19 by adopting the following emergency rule deemed necessary for the public's health, safety and welfare, which provides the Board the authority to extend the Board's licensing renewal procedures deadlines set forth at Administrative Code Section 230-X-1-.01 during a Governor declared state of emergency. This emergency rule was adopted at this March 25, 2020 specially called Board meeting that convened at 10:04am and adjourned at 10:18am and is available for review below:

EMERGENCY RULE:

230-X-1-.01ER Authority for Extending License Renewal Filing Deadlines During a Declared State of Emergency

Where a state of emergency has been declared by the Governor of the State of Alabama, the Alabama Licensing Board for General Contractors has the authority to modify its licensing renewal filing deadline procedures set forth under its Administrative Code Section 230-X-1-.01 for those holding a current unexpired Alabama license or for those holding a current Alabama license extension when said emergency declaration impedes a prime contractor and/or subcontractor's good faith ability to timely comply with the Board's licensing renewal deadline procedures for his or her current Alabama license as set forth under the Board's Administrative Code Section 230-X-1-.01. Moreover, when the declared state of emergency adversely impacts the ability to meet the Board's aforesaid licensing renewal filing deadlines as stated, the Chairman of the Board may authorize the Board's Executive Director to modify the Board's aforementioned licensing renewal filing deadlines for those holding a



(Continued on page 11)

News & Notes:

(Continued from page 10)

current unexpired Alabama license or those holding a current Alabama license extension, subject to the Board Chairman's final approval before said limited modifications go into effect. This rule does not expand or modify the license in issue and the adoption of this rule is deemed necessary for the public's health, safety or welfare.

Author: Alabama Licensing Board for General Contractors

Statutory Authority: Code of Ala. 1975, §34-8-22

History: Emergency Rule: Filed March 25, 2020.

Upon the Board's adoption of the above referenced Emergency Rule 230-X-1-.01.01ER, the Board took the following action during this specially called meeting: A motion to automatically extend the March 31, 2020 licensing renewal deadline was made and passed by the Board as set forth below:

MOTION:

A motion was made that for the public health, safety or welfare the March 31, 2020 licensing renewal deadline be automatically extended for 90 days and up through June 30, 2020 for those prime contractors and subcontractors holding a current unexpired Alabama license or those holding a current Alabama license extension to allow them up through June 30, 2020 to file the required license renewal documentation with the Board's office. Failure of those whose renewal deadline of March 31, 2020 has been automatically extended to file the required renewal documentation by June 30, 2020, will result in their license lapsing on July 1, 2020.

General Information:

Any future notices relating to the above referenced Emergency Rule 230-X-1-.01.01ER will appear on the Alabama Licensing Board for General Contractors website (www.genconbd.alabama.gov).

For further information or if there are any questions, please contact the Board's office at (334) 272-5030.



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**AUCA IS A MEMBER-DRIVEN, NEEDS
FOCUSED TRADE ASSOCIATION CREATED
SOLELY TO PROMOTE AND ADVANCE THE
UTILITY INDUSTRY IN THE STATE OF
ALABAMA.**

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