

OSU General FAQ

Managing Force Majeure in Contracts in Which OSU has contracted with a third party for goods or services

What is a Force Majeure Clause?

Updated March 31, 2020

It is a contract clause that relieves one or both parties of the burden of performing under the terms of the contract if that party is unable to perform because of a supervening event.

Does COVID-19 Qualify as a Supervening Event?

Updated March 31, 2020

COVID-19 does constitute a supervening event in the force majeure provisions that appear in Procurement's OSU standard contra for goods and services. The following are examples of typical lists of supervening events found in Procurement OSU force majeure provisions:

- a. Fire, riot, act of nature, terrorist acts, or other acts of political sabotage, or war (goods and services contract)
- b. Fire, riot, acts of God, or war (personal services contract)

If the contract was not formed using PCMM OSU standard templates for goods and services, or the force majeure provision in PCMM's OSU standard templates for goods and services was revised during negotiation, please reach out to pacs@oregonstate.edu for assistance in determining whether COVID-19 qualifies as a supervening event under the terms of the contract.

If COVID-19 Qualifies as a Supervening Event, Does that Mean the Contractor is Excused from Performing under the Contract for Goods or Services?

Updated March 31, 2020

It depends on the particular facts and circumstances of each contract. COVID-19 will excuse performance under the force majeure provision only if the contractor is unable to perform as a result of COVID-19 caused barrier and the contractor has made all reasonable efforts to remove or eliminate the barrier to performance that are caused by COVID-19.

Example 1: Performance Excused: University has contracted with Company A to purchase 500 face masks. Company A purchases all of the face masks it sells from Company B. Government issues Executive Order requiring that all face masks manufactured by Company B be provided to Hospitals. Company A tries diligently to find another supplier for face masks to sell to University, but is unable to. Company A's default under contract with University is excused by the force majeure clause.

Example 2: Performance Not Excused: University has contracted with Company A to provide landscaping maintenance services. 5% of Company A's workforce is unavailable due to personal illness or caring for family members that are ill. Despite the personnel shortage, Company A still has sufficient resources and personnel to meet its obligations under the contract. If Company A were to fail to perform its obligations, this default would not be excused by the force majeure clause.

Example 3: Performance Not Excused: University has contracted with Company A to provide enhanced teleconferencing services for use during an active pandemic. Company A has agreed to provide services specifically in response to a supervening event, and the force majeure clause would not excuse performance.

Can a Contractor Require OSU to accept Goods or Services other than those Agreed to under the Contract?

Updated March 31, 2020

No. OSU is **not required** to accept alternates to the goods and services that were agreed to. Alternates include things like partial fulfillment of an order for goods, a substitution of one product with a similar product, or any changes to the nature of the delivery of services (i.e. a different consultant or a reduction to the scope of services).

OSU may **voluntarily agree** to change through written amendment the type or quantity or timing of delivery of goods, or the scope of services at its discretion.

If a Force Majeure Clause is Invoked and Performance is Delayed is OSU Obligated to Continue Making Payment During the Time of Delay?

Updated March 31, 2020

No. OSU is not required to make payments for any goods or services that have not been received by OSU.

Are Termination Provisions Suspended During the Time Period of the Supervening Event?

Updated March 31, 2020

No. Termination of the contract continues to be an option under the specific terms of the contract.

What is OSU's Position on Paying Cancellation Fees when it Terminates a Contract?

Updated March 31, 2020

When OSU terminates a contract for convenience, **even if tied to changed circumstances caused by COVID-19**, OSU is obligated to follow the terms of the contract, including the payment of cancellation fees. Consideration should be given to vendors, particularly those involved in providing services related to events, by making timely payment of any owed cancellation fees.

If you need to terminate a contract because meeting performance or payment obligations is impossible, please reach out to pacs@oregonstate.edu to discuss obligations related to the payment of cancellation and other fees.

PRACTICE TIP: Any application of the force majeure clause should be done in writing, whether it entails a delay of performance, a change to the scope of contract (through written amendment) or a termination of the contract.

Managing Force Majeure in Contracts in Which Another Party has Contracted with OSU to Provide Services

Updated March 31, 2020

What is a Force Majeure Clause?

Updated March 31, 2020

It is a contract clause that relieves one or both parties of the burden of performing under the terms of the contract if that party is unable to perform because of a supervening event.

Does COVID-19 Qualify as a Supervening Event?

Updated March 31, 2020

COVID-19 does constitute a supervening event in the force majeure provisions that appear in Contract Services OSU standard contracts for providing services. The following is an example of typical lists of supervening events found in OSU force majeure provisions:

Fire, riot, acts of God, terrorist acts, or other acts of political sabotage, or war.

If the contract at issue was not formed using Contract Services' OSU standard templates, or the force majeure provision in the standard templates was revised during negotiation, please reach out to contract.services@oregonstate.edu for assistance in determining whether COVID-19 qualifies as a supervening event under the terms of the contract.

If COVID-19 Qualifies as a Supervening Event, Does that Mean the OSU is Excused from Performing under a Contract for Services?

Updated March 31, 2020

It depends on the particular facts and circumstances of each contract. COVID-19 will excuse performance under the force majeure provision only if OSU is unable to perform as a result of a COVID-19 caused barrier and OSU has made all reasonable efforts to remove or eliminate the barriers to performance that are caused by COVID-19.

Example 1: Performance Excused: University has conference facilities that are available for rent by outside parties. Company A and University have entered into a contract for Company A's use of the facilities for an event. Government has issued an Executive Order closing all public facilities, which includes University facilities. University's default under contract with Company A is excused by the force majeure clause.

Example 2: Performance Not Excused: University Department provides data analysis services to Company A. Pursuant to an Executive Order issued by Government, all University employees are required to work remotely. University has the ability to provide employee performing the services with all equipment needed to perform the work remotely. If University fails to provide the services, the default would not be excused by the force majeure clause.

Can OSU Require the other party to accept Services other than those Agreed to under the Contract?

Updated March 31, 2020

No. The other party is **not required** to accept revisions to the scope of services that were previously agreed to.

OSU may request and the other party may **voluntarily agree** to change the scope of services through a written amendment.

If a Force Majeure Clause is Invoked and Performance is Delayed is the Other Party Obligated to Continue Making Payment During the Time of Delay?

Updated March 31, 2020

No. The other party is not required to make payments for any services that have not been received by that party.

Are Termination Provisions Suspended During the Time Period of the Supervening Event?

Updated March 31, 2020

No. Termination of the contract continues to be an option under the specific terms of the contract.

What is OSU's Position on Requiring Payment of Cancellation Fees when the Other Party Terminates a Contract?

Updated March 31, 2020

When the other party terminates a contract for convenience, **even if tied to changed circumstances caused by COVID-19**, the other party is obligated to follow the terms of the contract, including the payment of cancellation fees.

If the other party terminates under a force majeure provision, it is likely that cancellation fees are not required. In this case, please reach out to contract.services@oregonstate.edu to discuss obligations related to the payment of cancellation and other fees.

PRACTICE TIP: Any application of the force majeure clause should be done in writing, whether it entails a delay of performance, a change to the scope of contract (through written amendment) or a termination of the contract.