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Coronavirus (COVID-19) - Guidance for Contractors

The Coronavirus has been the subject of an extraordinary amount of media coverage since the start of 2020. As we approach the end of the first quarter of the year, its impact on local and global economies and our way of life cannot be ignored. This Alert will provide the construction industry with guidance and recommendations for navigating commercial risk resulting from the Coronavirus pandemic.

The potential impacts of the Coronavirus to the construction industry are wide reaching. Consequences on a project site can include quarantines or other governmental actions resulting in impacts to the project work force. Offsite impacts can cover a much broader scope of issues including labor shortages at factories of manufacturers or fabrication facilities, resulting in production delays, transportation embargoes causing project supply issues, or governmental actions which inhibit manufacturing and production causing supply chain shortages and inability to service existing demands. So, what can contractors facing such impacts do to avoid losses, mitigate the impacts, and prepare for what's to come?

1. Find the Relevant Contract Terms. Review each contract carefully for contract clauses that address rights in the event of unforeseen conditions, or excusable conditions or delays. Various terms may be used; for example, your contract may or may not use the phrase “force majeure” (a French term commonly used in U.S. contracts that refers to overwhelming forces, such as an act of god). If there is a “force majeure” clause, scrutinize it carefully to evaluate whether the current conditions fall within the terms of the clause. If there appears to be no such clause in a given contract, keep looking; many construction contracts contain a clause that affords relief in circumstances outside of the contractors control or arising from unforeseen conditions or circumstances. Such clauses entitle the contractor to additional time and compensation, and can exist in a wide range of forms. In certain contracts, for example federal government contracts, subtle but critical distinctions may be at play that must be carefully considered.

2. Provide Clear and Compliant Notice. Identify your contract’s express notice provisions for claiming delays and additional costs, including the time limits for giving proper notice, who must be copied on the notice and the method of delivery. For each project, a written notice should be sent to the project’s owner that complies with the contract requirements, explains the cause, and reserves rights for time and money. Some contracts include provisions by which the contractor may be exposed to forfeiting rights to adjustments if notice is not made timely. Do not rely on verbal communications, and take particular care to be sure that the notice is provided exactly as required by the contract. Some contracts will permit a simple email, others may require hand delivery in a specific way (certified mail, for example), with copies to certain individuals. The point is to create a written record establishing that the contractor complied with the contract, providing the owner with advanced warning of the likely impacts within the time as required by the contract, with updates as they develop. This may also enable the owner and the contractor to make appropriate, informed business decisions.

It is a good practice to develop a carefully conceived notice form that meets the requirements of each particular contract. Using one standard form notice may be a good starting point to streamline the process, but care should be taken to adjust the standard form to reflect the unique aspects of the applicable contract.

Take appropriate steps to advise that, due to the dynamic and fluid nature of the situation, you are currently unable to provide a reasonable impact assessment. To the extent required by the contract, work to provide a reasonable prediction of overall impact as promptly as circumstances permit. Consider the possibility that economic impacts (shortages of labor, material, and/or equipment) and other such indirect impacts, including transit shutdowns, travel restrictions, or school/daycare closings, may affect the project as well. Of course, the tone of these notice letters should be professional, sympathetic, cooperative, and collaborative.

Additionally, be mindful that the timing of your notices to an owner, and your subcontractors' notices to you, may be different. Understand what each contract requires and do not wait to receive notices from subcontractors before you give notices to an owner (where appropriate). Once you receive notices from subcontractors, evaluate them promptly, issue a timely and appropriate written response, and promptly pass them up to the owner to keep owner informed.

3. Pay Special Attention to Suspension and Termination Clauses. Many contracts give the owner the right to suspend a project. Those clauses typically provide rights for time extensions and additional compensation if the project is re-started. They often also give a contractor the right to terminate the agreement and to receive defined compensation if the suspension lasts for a stated duration. Be aware of those clauses, the rights they may afford you, and be on the lookout for actions by owners that could be fairly characterized as a suspension, even if they do not expressly call it one.

4. Document Cost and Schedule Impacts. Document and segregate into separate "buckets" any impact that the Coronavirus has on your construction project. Contractors will be well advised to recognize the two key components in delay and disruption recovery – 1) establishing the right to added time and a price adjustment, and 2) establishing the amount or extent of the delay and added cost. The second of these two points is often overlooked and is an area that is particularly prone to dispute. In generating your record, be specific; record impacts in daily reports, schedule updates and timesheets with an express notation, such as "due to Coronavirus impacts." The more clear, specific, and accurate, the better.

5. Ensure that Contractually Required Support is Created. In some case, contracts may require CPM support or analysis to back up a claim for additional time. Contractors should review their CPM schedule prior to performing a time impact analysis, to ensure that the baseline reflects current logic and restraints, and that it will support the delay claim. Some notice provisions may require a contractor to submit a time impact analysis in conjunction with any notice of a claim for excusable delay. If the delay cannot be quantified at the time of giving first notice of the delay, then the notice should identify that this event will result in a delay and additional costs, the extent of which is still being evaluated and will be detailed as soon as it can reasonably be determined.

6. For Contracts that Don't Address the Issue. What about contracts that afford no relief for events like pandemics or epidemics or even for matters beyond the contractor's control? Under common law, circumstances that are sufficiently disruptive to performance may excuse the contractor's non-performance. A contractor may have rights that are not spelled out in the contract. However, when a contracting party has the benefit of knowledge or information regarding likelihood of a future occurrence, a concept known as

foreseeability begins to operate. The contractor's argument that performance is excused may be undermined where that party arguably should have foreseen the problematic circumstances. We recommend consulting with counsel as assessing these issues tend to involve a fact-intensive inquiry.

7. Consider Insurance. Contractors should evaluate whether existing insurance policies potentially provide coverage for Coronavirus-related losses. It is important to review all insurance policies and request that the project owner provide copies of all applicable insurance policies including Builder's Risk, business interruption, and any other policies. Insurance policies may also include notice obligations and there may be adverse consequences if notice is not provided timely. Many of these policies require demonstration of "actual loss of Business Income you sustain due to the necessary suspension of your operations . . . caused by direct physical loss of or damage to property." If appropriate, be prepared to document your "direct physical loss of or damage to property," whether to the home office or to affected project sites. Although the wording of each policy must be individually scrutinized, certain specialized insurance products such as trade disruption or supply chain risk insurance may provide coverage for businesses impacted by the Coronavirus. These types of insurance products afford coverage for losses associated with delays or disruptions in trade or supply chains arising out of specified events such as emergencies resulting in closure of ports and transportation hubs, quarantines, seizures during transit, embargoes, and other related risks.

8. Assess Both Prime and Subcontracts. A careful analysis of prime and subcontracts should be conducted as well – one approach likely does not fit all, as agreements (particularly, negotiated agreements) often address relevant matters differently. Some subcontract agreements may have flow down of identical terms and conditions as exist in the prime contract, while other agreements have different terms and conditions that would operate in the same situation. Contractors should recognize that the approach may differ from project-to-project, contract-to-contract. Care should also be exercised when phrasing communications to ensure that the way an issue is addressed in the prime/owner context is consistent with how that issue should be addressed in the prime/subcontractor context.

9. Attempt to Identify Challenges Early. Generally speaking, a contractor may have the responsibility to mitigate the consequences of a delay or disruption. Contractors will be well served by taking diligent action designed to reduce the impact and by maintaining a clear record of those efforts. Reach out to subcontractors and vendors to identify and assess potential issues impacting labor and the supply-chain. Discuss and develop contingency plans and protocols with subcontractors and vendors. If supply chain issues are likely, consider exploring alternative sourcing options and the pricing for such alternatives or consider substitution options. Most construction contracts afford a right to notify the project owner in the event a contractor desires to propose substitutions, but be prepared to demonstrate the comparison for the substituted products and/or materials. If shortages to project labor are expected, consider alternatives such as the retention of temporary labor companies. Having a strong sense of the actual market conditions and potential impacts may be critical for loss mitigation.

10. Consider Unique Safety Issues Pertinent to the Pandemic. Revisit office and job site safety protocols to address disease spreading and to implement healthy procedures. Many employers are already providing guidance to employees regarding hygiene, travel, etc. Such measures may become a factor with regard to the continued performance or the shutting down of a project. As an example, although virtually all project sites contain temporary toilet facilities, some do not include handwashing stations that may help support worker health and control the spread of infection. Another consideration is the implementation of infection

control measures, such as screening to test for fevers or other symptoms of illness. Exactly what measures should be adopted are unclear at this stage, and protocols and policies with regard to the treatment of infected and potentially infected persons will likely evolve; “Monday morning quarterbacking” is likely. While guidance regarding specific and appropriate safety measures are outside of our purview, it is suggested that contractors/employers seek guidance from professionals, as well as monitor and follow the standards and recommendations offered by organizations such as the Occupational Safety and Health Administration (OSHA), Centers for Disease Control (CDC), and the World Health Organization (WHO).

11. Carefully Consider Language in Contracts that are About to be Executed. Contracts that may be signed now that the pandemic is underway present unique challenges as one may argue that the conditions were not “unforeseen” at the time the contract was signed. Contractors should carefully consider the risks of delay and disruption, and add language that clearly provides for adjustments consistent with how those risks are being allocated. In the interest of mitigating the risk of ending up in court or arbitration, parties would be well advised to meet in advance and attempt to reach a consensus on what project-related occurrences and impacts are foreseeable in light of the Coronavirus, and then memorializing that understanding in the contract language.

Conclusion: Regardless of whether project participants have operations in areas directly affected by the Coronavirus, the resulting impacts may be felt across the construction industry. And with the outbreak of the Coronavirus still growing, the ultimate impacts remain uncertain. During this time of uncertainty, construction project participants need to assess and evaluate their respective risks on an ongoing basis. During ongoing and new negotiations, consideration should be given to drafting force majeure and escalation provisions that potentially provide entitlement to excused performance and recovery of additional time and compensation. For existing contracts, parties should consider and look to those contracts for avenues for avoidance and mitigation of losses or for evaluation of options for recovery. Lastly, parties should assess insurance product options and review existing insurance policies for potential coverage. When both precautionary and proactive measures are implemented, project participants stand a better chance of mitigating their risks.

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.

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