

Navigating Business Through a Global Pandemic – More Advice for Contractors

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In our [last article](#) we provided advice for contractors in order to minimize the impact of the pandemic on existing projects. In this article, we will provide advice to contractors who are intending to bid new work and/or enter into new contracts for construction or service projects.

FORCE MAJEURE IS NOT THE ANSWER

While contractors are certainly getting legal advice about force majeure clauses and how they may assist with ongoing projects, these clauses are not going to be very useful for new projects. The main concept that guides force majeure clauses is that the circumstance that triggers the clause is "unforeseen". Considering the worldwide prevalence of COVID-19 and the many steps governments have taken to combat the spread of the virus, no one will be able to argue that potential future impacts to a construction project are unforeseen or unanticipated. Therefore, contractors must take different steps to protect themselves.

NO "GET OUT OF JAIL FREE" CARD

While open and honest negotiation will result in fair contractual language, contractors should not expect that impacts of the pandemic will allow the contractor to be relieved of their obligations. As stated above, arguments relating to force majeure or related concepts such as contract frustration are highly unlikely to be successful for new contracts, based on standard contract language.

There is no one perfect clause that could be inserted into a contract (or into a surety bond) that will discharge the contractor or negate any potential default allegation. Contractors should not expect their lawyers, advisors, brokers, lenders or surety companies to have a simple paragraph that will solve all their potential problems. It is also doubtful an Owner would accept just a one-sided amendment. Only by taking a proactive and comprehensive approach to new contracts can a contractor best protect itself. To avoid potential disputes the parties should prepare a project risk matrix, so the parties understand the risks and responsibilities.

ANTICIPATION OF IMPACTS

While some potential impacts of the pandemic are far-reaching and across the board (such as the Quebec government's three-week shutdown of most non essential construction projects) many others will be specific to the region the project is located, the type of work to be performed, the labour, material and subcontractors required to complete the work, the cashflow required to finance the work and the anticipated duration of the work. Contractors

must review all the potential impacts when determining their price and proposed schedule for the work and especially if they will be providing a fixed price (for the entire project or for unit prices) with set completion dates. Contractors must review the proposed contract form from the owner and analyze how such impacts are dealt with in the language of the contract. Before a tender closing, it is critical for contractors to ask an owner or its representative the right questions in order to have clarity on how the owner and contractor will move forward depending on the impact. Some of these questions might be:

- What happens to the project schedule if a government body mandates the site's closure? Does the contractor receive any compensation for this delay and to protect the project site?
- What happens if required materials are delayed due to manufacturers and/or distributors being unable to produce or deliver?
- What happens if construction work is allowed to proceed but only when workers are a certain distance apart, but the work required for the project necessitates working in proximity?
- What happens if too many people become ill such that required labour is impossible to procure?
- How can a contractor provide updated schedules if subcontractors and suppliers are unable to provide the necessary information given the current circumstances?
- Will owners and owners' representatives be attending on site as required by the contractor; and if not, how will that be addressed?
- Will the contractor be compensated for the additional project management time to continually re-assess and reschedule the project more than normal?
- What if proper safety supplies are not available to allow contractors to meet the guidelines established by the local Public Health Units and the applicable Ministry of Labour?
- What if workers fail to show up to work due to fear of the virus spreading or notice of confirmed case on the project site?
- What if testing and inspection agencies do not issue proper permits nor come do the required inspections.
- What if equipment or repairs and parts from dealers or manufacturers are unavailable?
- What if critical services to the site are interrupted such as cleaning crews and sanitation and waste services?
- And in the worst-case scenario, what happens if the event of sickness or death of a key project member for any party (owner, contractor or designers).

The best place for a contractor to protect itself is in the contract form. A modification to a surety bond alone will not resolve contractual issues and guarantee payment etc. Most contracts have provisions to deal with change that can lead to delays.

PRICING THE WORK

Even if a contractor gets answers to all the questions above, it should not assume that cost increases due to the impacts of the pandemic will be provided by others. Therefore, contractors should be considering:

- Cashflow needs of the project considering that certain receivables (e.g. holdback receivables in Ontario) may be delayed for payment
- Extended duration of projects will lead to increased overhead including construction loan financing, insurance and surety bond premiums, and other general project costs, including potential climactic condition work that the original construction schedule (including sequencing and delays) did not anticipate
- Site security and project protection costs if site shutdown
- Labour costs may increase due to scarcity of qualified people

- Material costs may increase due to increased shipping costs, manufacturing reductions/backlogs and raw material unavailability
- Subcontractors and key suppliers might be more likely to default so consider the performance security measures
- Health and safety costs will surely be elevated

DURING THE WORK

As mentioned in our last article, good communication between all parties is essential to minimize impacts, which is always true but especially relevant now. Other items to think about are:

- Organizing and documenting such communication as well as the status of the project constantly including project schedule updates will be extremely important
- Any verbal discussions should be confirmed contemporaneously in e-mails. Contractors should consider adding an additional project-specific e-mail address (with access by key employees) to copy correspondence sent by individuals in order to document chronologically and manage the challenge of people working remotely
- Photographs and videos of site conditions should be produced regularly and especially as issues arise (including potential lack of productivity due to the limits of social distancing). Ensure they are dated, include proper description for future reference and saved to company server that is backed regularly
- Remote project surveillance is something becoming more available for live feeds of the site and to document the status of work over its duration
- Site personnel must be diligent at maintaining a project site diary daily given the circumstances. Entries should be made multiple times during the day so the multitude of issues arising daily do not get missed
- Project schedules should be updated more regularly and even informally (such as using two-week look-ahead by work area) but should still tie back to the overall master schedule to support future impact claims. If necessary, engage the services of external consultant to aid with the additional workload and anticipation of future claim preparation
- Contractors must also consider heightened health and safety protocols as recommended by the relevant authorities (which will likely include additional cleaning staff and supplies)
- Back up of project records and ensure not stored on stand alone company computers or home computers
- Consider using document sharing services to collaborate on issues

There is a lot of essential work to be done and all the parties to a construction project must work together to meet the challenges that COVID-19 might add to the already challenging construction environment. The parties that recognize this and openly discuss the existing and potential future challenges and reasonably deal with the potential impact costs fairly amongst each other will likely forge relationships that will last a lifetime.

Please continue to reach out to your Trisura contacts for any further questions or concerns.

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