

The Impact of Coronavirus on the Construction Industry

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The outbreak of COVID-19 (“coronavirus”) has impacted all industries, including construction. First and foremost, we are in the midst of a public health crisis, and the safety and well-being of all project participants should be top of mind.

We are also looking at significant economic risk and uncertainty. Our state and federal governments have issued emergency orders. The City of Boston this week announced a complete shutdown of construction projects, with other jurisdictions likely to follow suit.

The impacts to the construction industry and its participants are widespread and range from quarantines and labor shortages to disruptions in the local, national and global material supply chains. All parties, whether owners, contractors, subcontractors or suppliers, should already be in the process of creating protocols for their field and office teams, proactively establishing communications with customers and vendors, and carefully reviewing and confirming all contract and regulatory requirements, which in some cases are changing daily.

The general protocols to consider include: reinforcing good personal hygiene; encouraging employees to stay home if sick; restrictions on travel; and preparedness planning, data security and working remotely. In addition, the following concepts bear particular attention in light of these circumstances and their unique application in the practice of construction.

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Delays and Extensions of Time

Most construction contracts, including standard form documents such as AIA and ConsensusDocs, contain provisions addressing the contracting parties' rights and obligations in the event of schedule delay, including delays occasioned by "force majeure" (translated from French as "superior force"). While most of these provisions do not reference infectious disease specifically, they commonly allow for the contract time to be extended in the event of causes outside of the contractor's control, including a force majeure.

It is recommended at this juncture that project participants review these provisions carefully to determine their rights in light of the coronavirus impacts, and, importantly, to ensure compliance with notice and other procedural requirements. Many of these clauses contain strict requirements for particular notice to specified recipients, to be issued promptly upon recognizing the cause of delay, regardless of whether the impact is ultimately borne out. It is recommended here that parties create a form of notice that can be adjusted on a per-project basis, in order to establish a written record and advance notice of impacts.

Material Escalations

Contractors are beginning to receive notifications regarding delays and impacts to the supply of construction materials, and they are well-advised to review their contracts for protection against this disruption, usually in the form of material escalation clauses. These clauses will typically specify the materials subject to escalation and define the events that trigger the clause. The methodology for implementing the price increases is variable, and may utilize unit pricing, benchmark pricing or incremental increases based on other factors.

Given the fluidity of the current landscape, contractors should be careful to include language particular to the coronavirus impact, establishing procedures for documenting and proving actual cost increases. The price escalation should address not only increases in price, but also corresponding adjustments in the schedule.

Termination and Suspension

Most commercial construction contracts contain language that defines the grounds upon which the owner may terminate the contract or

suspend the work. These clauses usually describe the rights of the parties regarding procedures for demobilization, remobilization, adjustments and entitlements. It is recommended that contractors remain vigilant, be aware of these clauses, their rights in the event of an owner-directed termination or suspension, and any notice requirements to preserve adjustments that will have to be made or sought in the contract sum and/or contract time.

Insurance

For each project participant affected by coronavirus impacts, there may be unique insurance considerations depending on the nature and extent of particular losses and claims. Potential claims lie with policies that are written on an “all-risk” basis, for example, builder’s risk insurance policies, as well as business interruption insurance policies that may afford coverage, for example, for losses sustained by civil authority orders. It is recommended that participants review their policies, with their insurance professionals to the extent possible, and determine their rights and potential loss mitigation procedures that may be available.

Safety and OSHA

Obviously, worker health, safety and welfare is a priority for all employers. These are not just moral obligations, they are memorialized in several state and federal laws and regulations. For example, OSHA contains a duty for all employers to provide employees with a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” The current landscape presents unique risks and challenges, which are sometimes changing by the hour or even the minute. There are several trusted resources for employers to review recommendations for best practices, including, but not limited to, directions from OSHA, DOL, CDC and others.

Mirick O’Connell will continue to monitor the impacts of the coronavirus global pandemic on the construction industry and its participants.