

Practice Update

Tips for Responding to a Notice of Construction Delay Arising From a Hurricane

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Hurricane Ian's unprecedented size and strength is taking a major toll on the state of Florida and other areas in the southeast United States, which is likely to cause impacts to the construction industry. Akerman attorneys offer guidance on how to respond to notices of construction schedule delays and other requests for relief from contractors and suppliers.

Hurricane Ian has negatively impacted countless industries in the state of Florida and other areas in the southeast United States, and construction is no exception. When hurricanes strike, they have immediate detrimental effects on construction projects, including project shutdowns and delays, damage to existing work and materials, and destruction of the construction sites themselves. However, those impacts continue for longer than the initial storm and flood events. The hurricane recovery period can last long after the initial catastrophe and cause lingering problems for construction projects, such as worker shortages and absenteeism, supply chain impacts, and inability to even access a project site.

Owners and contractors at all tiers should be prepared to receive notices of schedule delays and other requests for relief from contractors and

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suppliers, and project participants may consider the following when responding to those notices.

Understand the Notice of Delay

Carefully assess the notice of delay or other impact, and understand what it is that the contractor or supplier is asserting and requesting.

For instance, is the contractor claiming that the project will be delayed by a few days or for many months, and how detrimental is that to your project? Is the contractor requesting a relatively small equitable adjustment, or a large change order that could impact the financial viability of the project? The answers to these questions will help determine what type of actions you need to take and how you respond.

Some contractors may simply put owners on notice of potential delays or other impacts without any current evidence of such impacts, simply to reserve rights under the contract. Others will immediately request significant relief under the contract, asserting extensive delays and additional costs. In either event, you must understand what the contractor or supplier is requesting before responding.

Understand Your Contract

Before responding, you need to understand the parties' rights and responsibilities under your contract, especially pertaining to weather delays, force majeure, emergencies, change orders, equitable adjustments, contingency funds, labor or material supply chain disruptions, acceleration, insurance, suspension, termination, and notice provisions.

These responsibilities may seem evident from your contract forms, but sometimes these legal terms may be more difficult to locate and understand. For instance, the AIA A201-2017 General Conditions of Contract states that a contractor is entitled to an

extension of the contract time for “adverse weather conditions,” but only if the weather conditions “were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction.”

While an adverse effect may be evident, it is not as straightforward to determine whether a particular hurricane was abnormal or could not have been anticipated. With respect to these types of delay provisions and other contractual language, you should have your construction counsel review your contract and assist with any response.

Determine Whether the Notice Complies With Contract Notice Provisions

Construction contracts frequently contain specific and strict notice provisions outlining the proper procedure for the contractor to request relief under the contract. Some (but not all) courts and arbitrators will strictly construe these notice provisions, and deny relief if the notice requirements are not followed. Check to see if the contractor provided notice within the required time frame, with the proper documentation, and to the correct person.

Speak with your construction counsel about any potential notice issues, as she or he can best advise as to the potential effect of any improper notice under the contract in the jurisdiction where your project is located.

Also review the contract to see if you have any corresponding obligations with respect to any notice received from your contractors or suppliers, and ensure you follow those procedures. Some courts and arbitrators may similarly find that an owner’s failure to properly respond in accordance with the contract’s requirements means that the owner has waived its right to dispute the requested relief.

Review the Backup Documentation Provided

As noted above, many contracts describe what type of documentation is required with any notice of delay or other impact. Review the contractor's or supplier's backup documentation and determine if any records or information are inadequate or missing. You may need to request this information in your response.

Specifically with respect to notices of delay, confirm that the contractor has included a critical path method (CPM) schedule analysis showing the impacts to the project's critical path. Engage your project scheduler or schedule expert to analyze the alleged delay and determine whether any relief is warranted.

Determine if Relief Is Warranted and Issue a Written Response

Once you understand the contractor's request, the parties' rights and responsibilities under your contract, and any backup documentation, issue a concise and comprehensive **written** response. The response should state what relief, if any, you will provide under the contract, and request any additional documentation not already provided.

Consider whether you should include an analysis of your decision in the response and a reservation of rights in the event there are concurrent delays and/or liquidated damages that may be applicable.

Request Frequent Schedule Updates

Once a project falls behind schedule, request frequent schedule updates showing the steps the contractor is taking to bring the project back on schedule. Preferably, these updates will be CPM schedules showing the critical path and any adjusted sequences.

Ideally, the contractor will be required by your contract to provide such schedule updates. Again, check your contract to see if the contractor could

consider a request for schedule updates additional work for which a change order could be requested.

Consider Requiring Acceleration

If it is imperative to get the project back on schedule, or you believe a time extension is not permitted by the contract, consider requiring the contractor to accelerate its work. You should first review any contract provisions concerning your right to require acceleration, and the parties' rights and remedies when acceleration is required.

Encourage the Contractor to Purchase Materials In Advance

During a hurricane recovery, materials and supplies are likely to become scarce as thousands of owners race to repair or replace their damaged properties. Moreover, damaged or destroyed roads, ports, vehicles, ships, and factories can cause supply chain issues. Consider requesting or requiring that your contractor or supplier order materials, equipment, and supplies early. Evaluate methods to store these items in the event they arrive earlier than needed, including storing the materials, equipment, and supplies on-site if possible. As always, consult your contract to understand your rights and obligations if you request these things.

Plan Ahead and Hire a Private Provider When Possible

Some sources claim that when Hurricane Ian hit Florida, over 2 million homes and businesses lost power. For the foreseeable future, Florida's power provider will be busy restoring power to those properties. That means that in the near-term, it might be difficult or impossible to reliably schedule a power provider to provide services such as connection of permanent power to your project.

By understanding these types of impacts, you can proactively plan ahead, schedule these providers well in advance, adjust the critical path of your

schedule to avoid these logjams, and consider hiring a private provider where possible. Appreciating these risks and taking proactive steps can mean the difference between maintaining the schedule and falling weeks or months behind.

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