

Practice Update

Can Florida's Construction Sites be Hurricane-Proofed?

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One of the biggest threats during a hurricane is windborne debris, and its potential to cause severe property damage and personal injury. Trees, fences, patio furniture, roof tiles, and the like can all become deadly projectiles in a hurricane. Construction sites, which are typically laden with loose materials and equipment, are especially at risk for providing windborne debris to a hurricane. After Hurricane Andrew hit in 1992, Miami-Dade County enacted legislation punishing builders who failed to secure their site – in the wake of growing hurricane concerns, other counties and cities have also considered taking similar action. Some Florida cities, such as Bradenton, Venice, and West Palm Beach, have actually enacted local ordinances which require contractors to properly secure their construction sites during the threat of a hurricane.

The City of Bradenton's Ordinance Number 2784 is a prime example of municipal crackdown on unprotected construction sites. The ordinance makes it illegal for any person to allow construction related materials to remain loose or unsecured at a construction site from 24 hours after a hurricane watch has been issued, until the hurricane watch or warning has been lifted. Violating this ordinance is classified as a second-degree misdemeanor, subjecting the violator to a fine of up to \$500 or imprisonment of up to 60 days. On its face, the new

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Bradenton law seems to cover both project owners and construction contractors equally.

With cities quickly moving to criminalize the failure of owners and contractors to properly shore up construction sites, owners are left with the responsibility of including within their contracts requirements designed to ensure lower-tier compliance with the new laws. At a time when owners may be predominantly concerned with a hurricane's impact to both the financial cost and the schedule delays that may be incurred on the project, these new laws force owners to focus equally as much on what happens if their construction sites are left unprotected in the event of a hurricane. With this in mind, owners and contractors alike should be reviewing their contracts and making sure that they contain provisions designed to meet these new requirements.

Owners should require their contractors to make themselves familiar with the national, state, and local rules, regulations, codes, and laws applicable to their specific project, and to fully comply with all such requirements. Further, even in the absence of a legal requirement, owners should ensure that their contracts contain provisions requiring that contractors fully secure the project site during a hurricane threat, which may or may not include moving materials and equipment completely off the site. Naturally, this implicates demobilization, mobilization, and overhead costs that the contractor will ultimately try to seek from the owner. Anti-escalation clauses that specifically reference the potential threats a hurricane might pose should further be incorporated into these "hurricane proof" contracts to address this issue. Contractors, as a result, will be more cognizant of the risks inherent in hurricane-region construction and will, hopefully, hold their subcontractors to higher standards.

Contractors, similarly, should lean on their subcontractors and material suppliers to adequately assess and respond to hurricane threats. For

example, in addition to traditional “responsive and responsible” considerations, contractors should look to their subcontractors to create and enforce written hurricane protocols, and should make those policies express parts of their subcontracts. Subcontractors should be asked what preparations they can provide in the time immediately preceding a hurricane, such as assisting with the shoring of their work, and the removal of materials incidental to their specific trade.

Finally, for both owners and contractors alike, enacting and enforcing a comprehensive written hurricane protocol can prove invaluable when a hurricane threatens. Hurricane preparedness protocols, written into or made express parts of the contract for construction, should cover all aspects of a hurricane threat or strike, such as communication and coordination of the hurricane plan among lower tiers, protection of the site, securing and removal equipment and materials, emergency contacts for before, during, and after a hurricane, and restoration of work and cleanup after a hurricane strikes. Although every construction project is different, a properly implemented hurricane preparedness protocols is likely to improve responsiveness to the uncertainty of hurricane threats on almost any size and type of project.

This update has been revised and was originally published in the *Daily Business Review* in 2007.

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