

Practice Update

Managing Construction During Coronavirus

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Throughout 2019 and into early 2020, the construction industry was booming and operating smoothly. Project participants relied on construction contracts, developed over years or even decades, that contained provisions for nearly every type of contingency imaginable. The coronavirus pandemic has thrown a massive wrench into that, even causing New York State, as well as Boston and Cambridge, Massachusetts, to shut down all non-essential construction. Owners' tried-and-true contract forms and project control mechanisms are no longer sufficient. In the age of coronavirus, project owners should consider taking specific and proactive steps to manage their projects, and draft contracts for future projects in a way that addresses unique risks and impacts caused by coronavirus and other infectious diseases.

Managing an Ongoing Project

The first step an owner can take in proactively managing project risks caused by coronavirus is reviewing its construction contracts, and especially those provisions relating to force majeure, emergencies, delay, cost increases, labor or material supply chain disruptions, insurance, suspension, and termination. While it is unlikely that the contract will specifically reference a pandemic, most are probably vague enough to cover a labor or supply disruption due to an unforeseen act, and many

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contract forms provide relief to the contractor in the event the project is shut down or otherwise impacted by a government entity. Contracts may also address escalation in material costs and the party responsible for the increase.

Constant contact with other project participants is another key step owners can take. Owners should keep in touch with their contractors and request that they provide the owner with notice of any anticipated project disruptions due to the coronavirus, including supply chain delays or a mandatory quarantine affecting workers. Owners should also request immediate notice of potential schedule and cost impacts, even if the impact is not yet determinable. This would include productivity decreases due to workforce absenteeism related to the virus.

While an owner should always be aware of available insurance, owners should take the time to review all policies that may cover impacts caused by coronavirus. This would most likely be found in a builder's risk policy or an owner's loss of use/business interruption policy. Keep in mind that after the 2003 SARS epidemic, many insurance carriers introduced epidemic related exclusions.

Owners should also put a plan in place for dealing with any disruptions to the project, including creating a demobilization plan and remobilization plan in the event of a suspension or a government ordered shutdown. This plan should be detailed and include a description of duties and roles. It would be wise to have contractors and subcontractors do the same, and to include these parties in your planning process. Review any recorded Notice of Commencement to determine if it needs to be extended, and proactively extend it now if necessary.

Owners should always – but especially now – ensure that all onsite workers are aware of and are following all available health and safety guidance available from sources such as the CDC, OSHA, and

construction trade groups. This includes encouraging workers to stay home when they are sick, to wash their hands or use hand sanitizer frequently, and to clean equipment, tools, and the worksite regularly. The contractor should provide a written plan of action that details the measures it is taking to prevent the spread of the virus. Owners may also consider more extreme measures, including actively screening workers at the jobsite for signs of illness, and limiting the number of workers onsite at any given time to only those necessary to maintain the project schedule.

Owners may also want to prepare in advance notices informing all parties of a shutdown (including a suspension or termination, if necessary), notifying workers that they may have been exposed to the virus, and notifying an insurer, lender, or investor of a potential claim or impact.

Drafting Contracts to Address Coronavirus

Knowing what we know now, owners should not gloss over the force majeure and emergency clauses in their construction contracts. Instead, owners should make a calculated decision as to which party should bear the burden of any impacts or risks caused by coronavirus or any future outbreak of infectious disease. From the owner's perspective, it obviously would be best to place this risk on contractors, but there are additional ways to address the issue. Owners could draft these clauses to ensure that performance may be excused only when the party claiming the excuse can prove that an expressly named event – a pandemic as defined by the WHO, for instance – has made performance impossible or impracticable. Also condition any excuse from performance on a demonstrable and measurable impact on the contractor's performance.

Owners should also re-address their existing contractual requirements that allow a contractor to receive an adjustment of the contract time or price. Similar to force majeure and emergency clauses, any

right to an adjustment in price or time based on infectious disease should be conditioned on the contractor showing a demonstrable and measurable impact to the project. Contracts could also specifically state whether any impacts caused by coronavirus or infectious disease will entitle the contractor to an adjustment of the contract time or price.

To the extent a contract does not already do so, owners should ensure their contracts address impacts to labor and material supply chains. Projects rely upon labor, goods, and materials that are delivered from other states and countries, and contracts must address which party bears the risk that necessary supply chains may be interrupted or halted by coronavirus and other infectious diseases. These provisions should specifically state whether a supply chain impact will entitle the contractor to an increase in the contract time or price. Additional options available to owners include requiring contractors to have two or more potential sources for critical goods and materials, so that there is already a backup plan in place.

Owners may also want to consider procuring or requiring the contractor to procure a loss of use/business interruption insurance policy that covers impacts caused by coronavirus and infectious disease. Many standard policies may not cover impacts caused by infectious disease, so owners should confirm with their insurance brokers. Another option is to see if any builder's risk policies would cover impacts or costs caused by infectious disease.

Owners must unfortunately prepare for the worst on their projects. For each project, owners should have in place a disaster preparedness and pandemic plan and clear delineation of responsibilities. Owners should also modify existing safety requirements to require contractors, subcontractors, and consultants to institute best practices for reducing the spread of coronavirus or any other infectious disease.

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