

Practice Update

Responding to Contractors' Notice of Delay Caused by COVID-19

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With coronavirus interrupting the construction industry, Akerman attorneys offer guidance on how to respond to notices of construction schedule delays and supply chain impacts from contractors and suppliers.

The coronavirus pandemic has wreaked havoc on countless industries, and construction is no exception. Governmental orders shutting down non-essential businesses and requiring individuals to remain in their homes have largely permitted construction projects to continue, but the industry has nevertheless been impacted by issues like supply chain impacts, worker absenteeism, and productivity decreases.

Some states such as New York and New Jersey have shut down all non-essential construction altogether. These shutdowns and other impacts are almost certain to cause schedule issues on construction projects nationwide.

Owners and contractors at all tiers should be prepared to receive notices of schedule delays and supply chain impacts from contractors and suppliers, and project participants may consider the following when responding to those notices.

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Understand the Notice of Delay, or Other Impact

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

Is the contractor claiming that the project will be delayed by a week or for many months? Is the contractor requesting a relatively small equitable adjustment, or a large sum that could impact your ability to continue the project? The answers to these questions will help determine what type of actions you need to take and how you respond.

Many contractors are simply putting owners on notice of potential delays or other impacts, without any current evidence of such impacts, simply to reserve rights under the contract. Others have already suffered extensive delays and additional costs and are requesting significant relief under the contract. Understand what the contractor or supplier is telling you before responding.

Understand Your Contract

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

These responsibilities may seem evident in your contract forms, but you should nonetheless 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. 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.

Review the Backup Documentation Provided With the Notice

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 will 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 what the contractor or supplier has requested, the parties' rights and responsibilities under your contract, and any backup documentation, issue a concise and comprehensive **written** response. This 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. Ideally, these updates will be CPM schedules showing the critical path and any adjusted sequences.

Again, check your contract to see if the contractor could consider such a request additional work under the contract for which a change order could be requested.

Consider Requiring the Contractor to Accelerate Work

If you have no other choice but to get the project back on schedule or you believe the delay to be caused by the contractor—as opposed to Covid-19—consider requiring the contractor to accelerate its work. You should first consult any contract provisions concerning your right to require acceleration, and the parties' rights and remedies when acceleration is required.

Encourage the Contractor or Supplier to Order Materials Early

Consider requesting or requiring that your contractor or supplier order materials, equipment, and supplies—especially long lead time items—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.

Hire a Permit Expediter

In many locations, the permitting process is typically a glacial process, and the Covid-19 pandemic is not helping that. Many public offices are shut down entirely or have transitioned to work-at-home operations. Consider hiring a permit expeditor that can help you avoid lengthy delays in permitting and other governmental approvals. These professionals likely have a wealth of knowledge about the local permitting and approval processes and the individuals who work in those permitting agencies.

Expediting this process can mean the difference between keeping a schedule and falling weeks or months behind.

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