

THE PANDEMIC'S IMPACT ON CONSTRUCTION

New Norms and a Slower Pace of Work

This article examines some coronavirus related project management issues emerging in industry publications that may need close attention by owners and contractors of ongoing construction operations and identifies several contractual and construction law issues that can arise on existing and future projects.

Engineering News Record's 2Q/2020 Construction Industry Confidence Index survey has resulted in the lowest rating since the third quarter of 2010 when the industry was still recovering from the 2008 financial meltdown. Industry executives surveyed believe that recovery from the impact of the novel coronavirus COVID-19 pandemic will be at least a year away. Only six percent of survey respondents had not seen any of their projects delayed or suspended.

In June, ENR reported challenging new budget impacting practices to prevent disease spread as projects restart and contractors are seeing a slower pace of work as a new normal. Remobilization of craft workers back to work at a reasonable rate is expected to take time. U.S. contractors are struggling to get adequate personal protective equipment and must recover labor from a stimulus assisted unemployment compensation program. Some states are requiring additional safety officers dedicated to control of social distancing and other pandemic safety rules. Projects are being forced to limit crew size, increase shiftwork, and develop more complex craft stacking approaches. The industry, like others, is also experiencing great hesitation to bring workers back into offices. Such measures can potentially bankrupt many construction firms with contractual obligations to maintain schedule or risk financial penalties.

The pandemic, currently into its eighth month, triggers numerous execution and contract administration issues important to owners and contractors managing large construction projects. The May/June issue of ASCE's Civil Engineering magazine reported pandemic-related construction delays are inevitable and questioned if they will be compensable. Suddenly, a booming U.S. construction industry underway with deep backlogs, available project funding and the only major concerns being labor shortages and aging trades and infrastructure was hit hard by a pandemic of unprecedented reach. This surprise, considered a "black swan" by some, has exceeded expectations of project risk management planners and authors of carefully crafted force majeure clauses among ongoing projects worldwide. Almost overnight a severe negative impact on the outcome of many U.S. projects has become a major concern.

Supply chain interruption is an immediate worry. Its full impact has yet to be experienced. Sellers of building materials and fabricated equipment originating in pandemic effected countries, a major percentage of U.S. construction consumption, are sure to be unable to sustain both manufacturing and delivery commitments. Price escalation, delay and disruption will need to be in the forefront of owner/contractor discussions and in negotiations with vendors and suppliers.

Project delays can also arise due to owner and/or contractor self-initiated shutdowns, suspensions, and inefficiencies of work-at home directives. Fewer new project startups are likely due to a declined economy.

Legal implications are numerous. The fine print in contracts and agreements should be under heightened review by both owners and contractors. Increased focus will be necessary on force majeure

and change clauses, plus provisions for suspension of work, material escalation, protection of work, safety and health requirements, notice requirements and even changes in law. The means for contractor relief of both schedule and cost, which can vary significantly among federal and private sector contracts, is worth special attention, possibly involving construction attorneys and project control professionals.

Successful resolution of COVID-19 delay claims is a huge gamble. ASCE's May/June issue of Civil Engineering magazine included an article indicating possible evolving epidemic-related case law that casts doubt on favorable results for government sector contractors. Briefly, a U.S. based contractor was forced to suspend work for a period of eight months in 2014 on a foreign project for the State Department due to the Ebola virus. Its firm-fixed-price contract contained an excusable delays clause following Federal Acquisition Regulations, wherein force majeure scenarios entitle the contractor to a time extension but no money. The State Department granted a requested 195 additional days, but a resolution issued in a summary judgement by the Civilian Board of Contract Appeals regarding a \$1.25 million claim for life-safety measures and disruption and demobilization costs ruled that the contractor bears the risk of additional cost. The ruling affirmed that the government had no duty whatsoever to provide the contractor with direction on how to proceed in light of the epidemic. The contractor's legal theories, including the cardinal change doctrine, the constructive change approach, and suspension of work theories asserted a shift of increased cost risk to the government. All were rejected. The board stated that the firm-fixed-price contractor should have accounted for the possibility of an epidemic in its bid.

In the foregoing example the contractor's notice of delay was deemed by the State Department to be a unilateral action based on circumstances beyond the control of either party. For that reason, the government saw no basis upon which additional costs could be claimed for curtailing the work.

In April the Civil Engineering magazine discussed private sector contracting force majeure provisions in industry boilerplate such as ConsensusDOCS 200 noting they also include extension of time provisions for an epidemic related delay but not for cost. AIA A201 General Conditions has a provision for acts beyond the contractor's control as determined by the architect. In both private and public sectors contractors must generally prove actual delays were caused by an epidemic, and additional provisions commonly address recovery of cost only if specific notification provisions are closely followed.

The severity and duration of the crisis remains uncertain. New norms for EPC execution will have learning curves. Estimates, budgets, schedules, and risk registers will likely need to be upgraded to reflect changed conditions. As a minimum, both owners and contractors need to address current operations and commercial aspects of ongoing projects. Contracts may need review for possible modification to integrate new work methods, added staff and personnel protective equipment and increased hygiene unique to virus safeguarding. Careful evaluation and possible modification of force majeure and change provisions in industrial and international sector construction contracts is particularly important.

For project operations already under way as well as new work, good legal advice and project management advisory services are available in the industry.

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