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The Texas Storm - Guidance for Contractors

The Texas snow and ice storm of February 2021 will long be remembered. It has affected everyone across the State, and its impacts continue to be felt a week later. This Alert provides the construction industry with guidance and recommendations for navigating commercial risk resulting from the storm.

The potential impacts to your projects may be wide reaching. Consequences on a project site can include damage to the site, delays to work from the storm or from government orders, or simply the lack of help from trades who are dealing with serious personal catastrophes. Offsite impacts can cover a much broader scope of issues, including supply production issues or transportation interruptions. So, what can contractors facing such impacts do to avoid losses, mitigate the impacts, and prepare for what's to come?

1. Find the Relevant Contract Terms. Start with your contracts. Many contracts offer relief from weather impacts. Will the contract authorize a time extension? What about additional costs? And how do you provide notice and present your claim for relief? In what period of time?

Start with the provisions of your contract that allow additional time. For example, here is how the AIA A201 (2017 ed.) addresses weather:

8.3.1 If the Contractor is delayed at any time in the commencement of progress of the Work by [...] (3) labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control [...], then the Contract Time shall be extended for such reasonable time as the Architect may determine.

The AIA language goes on to require documentation that "weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction."

The AIA documents are a useful reference point, but each of your contracts may differ in their approach and their remedy. Review each carefully. Not all will grant relief for weather.

Don't stop with the delay terms. The 2021 storm was truly an extraordinary event and might be addressed by other clauses that address rights in the event of unforeseen conditions, or excusable conditions or delays. Various terms may be used; for example, your contract may or may not use the phrase "force majeure" (a French term commonly used in the U.S. contracts that refers to overwhelming forces, such as an act of god). If there is a "force majeure" clause, scrutinize it carefully to evaluate whether the current conditions fall within the terms of the clause. If there appears to be no such clause in a given contract, keep looking; many construction contracts contain a clause that affords relief in circumstances outside of the contractor's control or arising from unforeseen conditions or circumstances. Such clauses entitle the contractor to additional time and compensation and can exist in a wide range of forms.

Relief may be available even without a direct contractual clause. TxDOT, for example, has no contractual provision providing for weather-caused time extensions in its traditional highway construction contracts. Yet TxDOT has traditionally provided some relief in the event of abnormal weather. This year is no different; late last week TxDOT issued guidance to its District personnel indicating that TxDOT is “recommending that the Districts grant a time suspension on your construction projects for the time that your contractors were impacted by weather conditions.” This should provide relief on TxDOT projects and may be a useful persuasive tool for other owners whose contracts didn’t anticipate the extraordinary events of last week.

2. Provide Timely, Clear and Compliant Notice. Identify your contract’s express notice provisions for claiming delays and additional costs, including the time limits for giving proper notice, who must be provided the notice and the method of delivery. For each project, a written notice should be sent to the entity with whom you contracted (referred to as the “upstream party”) that complies with the contract requirements, explains the cause, and reserves rights for time and money. Most contracts include provisions by which the contractor may be exposed to forfeiting rights to adjustments if notice is not made timely. Do not rely on verbal communications and take particular care to be sure that the notice is provided exactly as required by the contract. Some contracts will permit a simple email, others may require hand delivery in a specific way, or certified mail, for example, with copies to certain individuals. The point is to create a written record establishing that the contractor complied with the contract, providing the upstream party with warning of the event and its impacts within the time as required by the contract, with updates as they develop. This may also help the owner make appropriate, informed business decisions.

It is a good practice to develop a carefully conceived notice form that meets the requirements of each particular contract. Using one standard form notice may be a useful starting point to streamline the process, but care should be taken to adjust the standard form to reflect the unique requirements of the applicable contract.

Take appropriate steps to warn that you may not know the full impact of the storm right now, and always reserve your rights at the end of the notice. Due to the dynamic and fluid nature of the situation, you may be unable to provide a final impact assessment. To the extent required by the contract, work to provide a reasonable prediction of overall impact promptly. Consider the possibility that economic impacts (shortages of labor, material, and/or equipment) and other such indirect impacts, including transit shutdowns, travel restrictions, or school/daycare closings, may affect the project as well. Of course, the tone of these notice letters should be professional, sympathetic, cooperative and collaborative (think of an arbitrator, judge, and/or jury looking at them a year or two later).

Additionally, be mindful that the timing of your notices upstream, and your downstream parties’ notices to you, may be different. Understand what each contract requires and do not wait to receive notices from subcontractors before you give notices to the upstream party. Once you receive notices from subcontractors, evaluate them promptly, issue a timely and appropriate written response, and promptly pass them to your upstream party to keep them informed.

3. Document Cost and Schedule Impacts. Document and segregate into separate “buckets” any impact that the storm has on your construction project. Contractors will be well advised to recognize the two key components in delay and disruption recovery – 1) establishing the right to added time and/or a price adjustment, and 2) establishing the amount or extent of the delay and added cost. The second of these two

points is often overlooked and is an area that is particularly prone to dispute. In generating your record, be specific; record impacts in daily reports, schedule updates and timesheets with an express notation, such as “due to February 2021 storm impacts.” The more clear, specific, and accurate, the better.

4. Ensure that Contractually Required Support is Created. In some case, contracts may require CPM support or analysis to back up a claim for additional time. Contractors should review their CPM schedule prior to performing a time impact analysis, to ensure that the baseline reflects current logic and restraints, and that it will support the delay claim. Some notice provisions may require a contractor to submit a time impact analysis in conjunction with any notice of a claim for excusable delay. If the delay cannot be quantified at the time of giving first notice of the delay, then the notice should identify that this event will result in a delay and additional costs, the extent of which are still being evaluated and will be detailed as soon as reasonably determined.

5. Contracts that Don’t Address the Issue. What about contracts that afford no relief for events like weather, or even for matters beyond the contractor’s control? Under common law, circumstances that are sufficiently disruptive to performance may excuse the contractor’s non-performance. A contractor may have rights that are not spelled out in the contract. However, when a contracting party has the benefit of knowledge or information regarding likelihood of a future occurrence, a concept known as foreseeability begins to operate. The contractor’s argument that performance is excused may be undermined where that party arguably should have foreseen the problematic circumstances. We recommend consulting with counsel, as assessing these issues tends to involve a fact-intensive inquiry.

6. Consider Insurance. Contractors should evaluate whether existing insurance policies potentially provide coverage for storm-related losses. It is important to review all insurance policies and request that the project owner provide copies of all applicable insurance policies including Builder’s Risk, business interruption, and any other policies. Insurance policies may also include notice obligations and there may be adverse consequences if notice is not provided timely. Many of these policies require demonstration of “actual loss of Business Income you sustain due to the necessary suspension of your operations . . . caused by direct physical loss of or damage to property.” If appropriate, be prepared to document your “direct physical loss of or damage to property,” whether to the home office or to affected project sites. Although the wording of each policy must be individually scrutinized, certain specialized insurance products such as trade disruption or supply chain risk insurance, may provide coverage for businesses impacted by the abnormal weather. These types of insurance products afford coverage for losses associated with delays or disruptions in trade or supply chains arising out of specified events such as emergencies resulting in closure of ports and transportation hubs, quarantines, seizures during transit, embargoes, and other related risks.

7. Assess Both Prime and Subcontracts. Along with your careful analysis of the prime contract, revisit the term of your subcontracts as well – one approach likely does not fit all, as agreements (particularly, negotiated agreements) often address relevant matters differently. Some subcontract agreements may flow-down terms and conditions in the prime contract, while other agreements have different terms and conditions that would operate in the same situation. Contractors should recognize that the approach may differ from project-to-project and contract-to-contract. Care should also be exercised when phrasing communications to ensure that the way an issue is addressed in the prime/owner context is consistent with how that issue should be addressed in the prime/subcontractor context.

8. Attempt to Identify Challenges Early. Generally speaking, a contractor may have the responsibility to mitigate the consequences of a delay or disruption. Contractors will be well served by taking diligent action designed to reduce the impact and by maintaining a clear record of those efforts. Reach out to subcontractors and vendors to identify and assess potential issues impacting labor and the supply-chain. Discuss and develop contingency plans and protocols with subcontractors and vendors. If supply chain issues are likely, consider exploring alternative sourcing options and the pricing for such alternatives or consider substitution options. Most construction contracts afford a right to notify the project owner in the event a contractor desires to propose substitutions, but be prepared to demonstrate the comparison for the substituted products and/or materials. If shortages to project labor are expected, consider alternatives such as the retention of temporary labor companies. Having a strong sense of the actual market conditions and potential impacts may be critical for loss mitigation. Make sure that you communicate your mitigation efforts to the Owner, with particular attention to any successes you achieve.

9. Carefully Consider Language in Contracts that are About to be Executed. Contracts that may be signed now after the storm present new challenges. If we have another severe winter storm in 2021-2022, someone might argue that those impacts – though just as severe – are not recoverable because they were not “unforeseen” at the time the contract was signed. Contractors should carefully consider the risks of delay and disruption and add language that clearly provides for adjustments consistent with how those risks are being allocated. In the interest of mitigating the risk of ending up in court or arbitration, parties would be well advised to meet in advance and attempt to reach a consensus on what project-related occurrences and impacts are foreseeable in light of increasingly unusual weather, and then memorializing that understanding in the contract language.

Conclusion: We hope that you and your teams will recover quickly from this storm and can use this guidance to work out fair and reasonable time extensions and compensation for storm-related damages. We also hope that this event will serve as a reminder to you to assess and evaluate your risks on an ongoing basis. During ongoing and new negotiations, consider drafting force majeure and escalation provisions that potentially provide entitlement to excused performance and recovery of additional time and compensation. For existing contracts, parties should consider and look to those contracts for avenues for avoidance and mitigation of losses or for evaluation of options for recovery. Lastly, parties should assess insurance product options and review existing insurance policies for potential coverage. When both precautionary and proactive measures are implemented, project participants stand a better chance of mitigating their risks.

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