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Hunker Down and Don't Get Burned

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This year has been one for the record books, to say the least. Not only has the pandemic disrupted businesses around the globe and certain construction projects, but we have seen a record-breaking year for wildfires throughout the United States and the hurricanes in the Atlantic and Gulf of Mexico, leading to severe weather-related project interruptions. The resulting delays to projects throughout 2020 have culminated in added costs to a number of notable projects, and pause – and in some cases – full termination, of others. This article will focus on those projects that have continued, despite these challenges.

A wildfire or hurricane can constitute a classic “force majeure” event. Force majeure is a French term meaning “superior force” and it denotes an event typically caused by forces beyond the contractor’s control which could not have been anticipated. While “force majeure” events do not automatically entitle contractors to relief in some jurisdictions, the ConsensusDocs contain a provision that may grant contractors relief in such events.¹ Under §6.3,

the contractor is entitled to an extension of time in the event of delays caused by fire, unavoidable circumstances, adverse weather conditions, or other causes beyond the Contractor’s control. Other contracts may also allow for an increase in the contract sum in these situations.

Notice

For a contractor to be entitled to relief, if any, it must typically satisfy contractual notice requirements. It is crucial to review your contracts and comply with these notice requirements. There is almost always a deadline to submit notice. Pursuant to the ConsensusDocs, the contractor must give initial written notice within 14 days after occurrence of the event giving rise to a claim. On other contracts, it is not uncommon to find shorter notice periods. If a contractor is seeking additional costs, notice must be submitted prior to proceeding with the work that is subject of the claim, unless it is an emergency. Preparing the jobsite for the storm and/or fire and demobilization efforts could possibly fall under the emergency provision and one could possibly argue that prior notice is not required. Note that many contracts do not allow recovery of costs due to force majeure events. Nevertheless, the safest course is to always give notice. Relatedly, contractors should also check and comply with the contractual notice requirements to ensure they are sending the notice to the right recipients and in the right delivery method.

Contractors should also consider including time beyond the actual period of the storm or fire. There can be additional delays due to lack of access to the project site and/or changes in the site conditions (e.g. surrounding fires, debris or muddy conditions). Also, it is vital to communicate with subcontractors and suppliers to understand possible delays with labor, materials and/or equipment. If a contractor cannot fully quantify the time and/or costs needed when the notice is due, it should be stated that the contractor will supplement the notice once the time and costs impacts are known.

The increase in contract time and/or the contract sum will result in a change order, which means documentation will be required.



Documentation

The ConsensusDocs require supporting documentation but does not state specifics on the type of documentation or what the contractor must show. §8.4. Other contracts may contain more specific requirements. For example, under the AIA Document A201 – 2017™ General Conditions (“A201”), a notice for an increase in the contract time must include “an estimate of cost and of probable effect of delay on the progress of the Work”. §15.1.6.1. This means the contractor must show a delay to the project’s critical path. If resulting from a weather event, a claim under the A201 must be “documented by data substantiating 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.” §15.1.6.2. Examples of backup for weather events would include NOAA reports and other data showing the actual rainfall at the project site and flooding in the area. A revised schedule must also always be submitted along with the documentation. These supporting documents are helpful regardless of the contract being utilized.

To receive costs for the delays, contracts usually require submission of a complete itemization of costs, labor and materials. A contractor should submit time sheets, payroll records, source documents for costs, and have their subcontractors submit the same itemized documentation. The more documentation a contractor can include, the better chance they have of getting additional time and money. Typically there is also a deadline to submit the documentation for a change order. It is crucial for contractors to comply with the time limits to submit the documentation.

Insurance

Another form of relief may be provided by builder’s risk insurance. Indeed, a hurricane or wildfire may trigger a claim for property damage to work in place, and materials and equipment stored on the jobsite. It is customary for the owner to obtain this type of insurance, but a contractor may be required to obtain it under the contract. A contractor should contact its insurance carrier immediately if it holds the policy and work with the owner of the project on these types of claims. Again, documentation of the loss will be key to recovery. It is critical to keep accurate and detailed project records of the labor, materials and equipment incorporated and/or stored on site. The deductible for an insurance claim should also be considered. Depending on who is responsible for the deductible, the amount of the deductible and extent of the damage, an insurance claim might not be the best option.

Hopefully we will never see a year like 2020 again, but contractors will not be able to completely avoid future force majeure events. Knowing your contracts and proper documentation will help avoid your profits from getting blown away or burned.

¹ ConsensusDocs® 200 – Standard Agreement and General Conditions Between Owner and Construction – ©2011, Revised June 2019 (“ConsensusDocs”).