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Risk Management and Contracting after Hurricane Irma: Suggestions to Avoid a Second Disaster

Peck & Abramson attorneys have assisted contractors in the immediate aftermath of several Hurricanes, including Andrew in 1992, Wilma in 2005, Ike in 2008, and Sandy in 2012. Based on this experience, we offer some post-storm strategies for contracting and risk management in three situations:

1. Ongoing projects in the area directly impacted by the storm;
2. Projects remote from the storm-impacted areas, but which may be affected by material or labor shortages; and
3. Requests for assistance in recovery/clean-up/rebuild efforts, which would be new projects.

Projects Directly Impacted By Hurricane Irma:

1. Immediately review each Owner contract to determine what notices are required for delays and/or extra costs arising from the storm. Contract notice requirements and time limits vary, whether for force majeure or other similar time and compensation rights. There is no effective one-size-fits-all solution. While the initial notice letters will likely look very similar, you should make sure that each is sent as required by the contract. Check each contract's requirements for particulars regarding content, the form of delivery, and parties and individuals designated to receive the letters as well as carbon copy recipients like the architect. Follow-up notices and time periods differ from contract to contract and should be tracked so that if, for example, a follow-up notice is required in a week per the contract terms, it is tracked to ensure compliance.
2. For each project, a notice should go out to the project's owner explaining the cause and reserving rights for time and money. Take care to advise that due to the dynamic nature of the ongoing situation no reasonable assessment of the total impacts to the project can currently be made. Assure the Owner that you will work to provide a prediction of overall impact as promptly as conditions permit. Consider the possibility that impacts may not result exclusively from the storm or the site itself, but that follow-on impacts (shortages of labor, material, equipment and/or fuel) may affect the project as well. In addition, you may want to notify the owner that insurance companies will require a reasonable time under the circumstances to investigate the conditions and damage. Also consider whether hazardous conditions may need to be evaluated by a limited number of available professionals whose services will be in extraordinary demand and then remediated to ensure that work sites are safe for workers' return; if this is a concern, include it in the

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notice. Request that the owner put all applicable insurers on notice of their claims and ask for copies of all such notices. Of course, the tone of these notice letters should be professional, sympathetic, cooperative and collaborative.

3. In some cases, contracts may require CPM support or analysis to back up a claim for additional time. Again, your review of contract provisions is critical to ensure compliance with requirements. In addition, contractors should review their CPM schedule prior to performing a time impact analysis to make sure that the baseline reflects current logic and restraints and that it will support the delay claim. Some notice provisions will require the contractor to identify affected activities and estimate the time for delay; as noted above, the submitted time impact analysis might comply by estimating the time of delay but any such estimate should be sent with a disclaimer that explains that it is provided only for convenience and that it is subject to revision as the delay continues and/or as it is easier to gauge the extent of the delay.
4. For each project, evaluate the insurance programs in effect. Is it an OCIP; CCIP; or did everyone bring their own policies? Appropriate notices must be issued by the contractor to all applicable insurers.
5. Contractors should make sure that all potentially applicable carriers are on prompt written notice of claims. Consider builders risk, general liability, professional liability, and pollution liability policies. Work with your risk managers and insurance professionals to make sure all policies are on notice for each impacted or potentially-impacted project and to understand applicable coverages.
6. Determine whether you have business interruption insurance. Some policies provide for “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 so, be prepared to document your “direct physical loss of or damage to property”, whether to the home office or to affected project sites.
7. Mitigate the loss and protect undamaged property from further loss or damage.
 - Separate damaged property from undamaged property
 - Remove all water damaged porous materials as well as any other materials that mold can grow on to prevent further damage.
 - Be careful not to discard anything unless first confirmed by an insurance adjuster or authorized representative of the applicable carriers.
8. Document your losses. Thoroughly record and document all categories of damages, physical losses, business interruption, etc., including the often-overlooked staff time dedicated to clean up or storm related efforts that would not otherwise be expended but for the storm. Memories will fade and current conditions will change following remediation and further

construction. Preserve now the evidence that you may need later to demonstrate the impact of the storm on the project and your ability or inability to work. Documentation includes the following:

- Take ample time-stamped photographs and videos to memorialize all damage before mitigation efforts have begun.
 - Show the full loss in its initial state.
 - Photograph and video water levels indicating how far it rose, if applicable.
 - Take 360° video of each area around the perimeter of the site.
 - Establish a separate cost accounting system or code under which all Irma loss-related costs will be captured. These may include the following:
 - expediting expenses to speed up damage or repair to property (overtime wages and express transportation charges),
 - increased costs caused by ingress / egress delays,
 - expenses associated with the enforcement of laws or ordinances regulating repair,
 - costs to demolish and rebuild damaged buildings.
 - debris removal expenses ,
 - costs for pollutant cleanup and removal, and
 - costs to preserve property, including trees, shrubs and plants.
 - Create a list and track any changes in subcontractor staffing levels.
 - Account for and separately track all Irma-related temporary and permanent work invoices, change orders, work tickets, proposals, quotes, etc., with detailed descriptions of the repair/replacement work to be performed.
9. Begin the claims process. Remember to be prepared, because adjusters will be busy and your help and cooperation will be appreciated.
10. Track each contract to ensure follow-up and pursuit of all available remedies.

Ongoing Projects Outside of Irma's Path But Which May Be Affected:

1. Florida and other cities in the South East directly impacted by Irma have large ports with goods and materials flowing to destinations throughout the country. If you have projects outside of the areas directly impacted by Irma, you should be assessing supply chains to

anticipate impacts to building material deliveries for projects outside of Hurricane Irma's path. If so, an appropriate notice should be issued per the terms of the contract with the owner advising of this possibility and reserving rights accordingly.

2. Shortages may also occur from increased demand as rebuilding efforts begin. We are already seeing news reports suggesting that fuel supplies and/or prices will be affected. Encourage subcontractors to assure that they have adequate supplies of materials to avoid shortages and/or price increases.

Requests for Assistance In Recovery/Clean Up/Rebuild Efforts:

1. Each new engagement should be scrutinized carefully. These are not normal construction projects and the risks should be evaluated as such, with contracts tailored appropriately.
2. If you do proceed, the preferred course would be for the Owner to engage appropriate industrial hygienists (or other professionals) to evaluate site conditions and to ensure they are safe for workers (and to document that clearly) before your forces begin site work. Remember that some states (including Florida) have specific licensing requirements for those performing mold-related services. These licensed professionals may be in short supply so plan and price accordingly. Consult with your insurance agent about how and what insurance should be in place for these high-risk endeavors. The contractor should expect significant push back on this approach as many owners may not have the wherewithal to manage this process and will look to you to do so.
3. Corporate decisions need to be made as to whether you are willing to engage in managing hazardous material/conditions assessments by appropriately engaged industrial hygienists and remediation efforts. If you are willing to undertake such responsibilities, risk management protocols should be discussed and developed. Consider contract language that will limit your exposure for this work.
4. Consider how you will be paid for these additional and risky services. The contractor should not enter into any contract where payment is contingent on the Owner receiving funding from third parties, such as insurance or FEMA. Such payments could be delayed or even illusory. Assess whether a given client/potential client has the ability to fund the work through normal cash flow.
5. Contract forms should be considered – ideally this work should be all on a time and material basis, or perhaps based on stated unit rates that are not subject to audit. Be careful to define costs and how the contractor's staff and burden will be computed.
6. Thought should be given up front as to how the scope of work will be defined. Again, this is not typical construction work and much may have to be designated on the fly in the field. This should be anticipated in the contracts with compensation based on work actually performed.

7. Evaluate potential shortages of workers, materials, equipment, and specialized participants such as mold assessors, structural engineers, etc. Be careful about commitments regarding schedule or levels of staffing of trade forces. Consider limiting your commitment to “reasonable efforts under the extraordinary circumstances.”

As always, feel free to reach out to us if there is anything that we can do to assist through this process. While our Miami office is not yet fully staffed due to the impacts from Hurricane Irma, we are available on our mobile phones or can be reached via e-mail.

We hope that you, your families and your colleagues stayed safe through the storm.

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.