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Risk Management and Contracting After Hurricane Harvey Suggestions to Avoid a Second Disaster

Peckar & Abramson attorneys have assisted contractors in the immediate aftermath of several Hurricanes. These include Andrew in 1992, 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 area but which may be affected by material or labor shortages.
3. Requests for assistance in recovery/clean-up/rebuild efforts which would be new projects.

Projects Directly Impacted By Hurricane Harvey:

1. Review each Owner contract immediately 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 cc 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 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 everyone brings their own program? 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, GL, professional liability, and pollution liability policies. Work with your risk managers and insurance professionals to make sure all policies are on notice for each affected or potentially affected project and to understand their coverage.
6. Do 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 damages and begin to 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 to work.
8. Begin the claims process. Remember to be prepared, because adjusters will be busy and your help and cooperation will be appreciated.
9. Track each contract to ensure follow-up and pursuit of all available remedies.

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

1. Houston is a major port city and goods and materials flow through the port to destinations throughout the country. If you have projects outside of Houston or outside of Texas you should be assessing supply chains to anticipate impacts to building material deliveries for project outside of Hurricane Harvey'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 the Texas Department of State Health Services has specific Mold Assessment and Remediation Rules. These require licensed assessors who may be in short supply; plan and price accordingly. Consult with your insurance agent about how 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'll be paid. 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. Remember that under Texas Business & Commerce Code Chapter 56 you have the right to ask the owner about the sources of project financing before performing the work and the Owner is required to provide this information to you.

5. Contract forms should be considered – ideally this work should be all T&M, 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.”
8. Texas Law places requirements on Disaster Remediation Contracts. In most cases these will not affect your operations, but care should be taken to comply with Texas Business & Commerce Code Chapter 58. Here is a short summary of those provisions:
 - a. Chapter 58 applies to a contractor engaged in “disaster remediation” in a county subject to a disaster declaration. It targets traveling disaster remediation contractors; it does not apply to a contractor that is doing work in a county in which they have maintained a physical business address for at least one year preceding the date of the new contract, or in a county adjacent to that county.
 - b. Disaster Remediation Contracts subject to Chapter 58 may not require payments for work before work begins. They may not require progress or partial payments that exceed the proportion of work performed. And each contract must contain a disclaimer in boldfaced type of at least 10 points in size: **“This contract is subject to Chapter 58, Business & Commerce Code. A contractor may not require a full or partial payment before the contractor begins work and may not require partial payments in an amount that exceeds an amount reasonably proportionate to the work performed, including any materials delivered.”**
 - c. The provisions of Chapter 58 cannot be waived. Any purported waiver of Chapter 58 is void.

Based on this we suggest the following for any contract that could be construed to cover “disaster remediation” related to Hurricane Harvey:

- Where a contractor is working in a county in which it maintains a division office with a physical presence, the statute doesn’t apply. For example, a contractor whose main office is in Houston (and has been for more than a year) can work in Harris County without triggering the statute.

- Where a contractor is working in a county adjacent to one described above, the statute doesn't apply. For the Houston contractor described above, Fort Bend, Waller, Magnolia, Liberty, Chambers, Galveston or Brazoria are all adjacent counties.
- If that contractor is working outside of the counties described above, the statute may apply. It is conceivable that a contractor might avoid triggering the statute if it has maintained a jobsite office and thus a physical presence in that county for a year, but there is no case law guidance interpreting the "physical business address" language. Therefore the simplest precaution is also the safest: when working outside your home or "adjacent" counties add the contractual disclaimer above in boldface type in at least 10 point font at the beginning of each contract that might be construed as providing disaster relief.

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