

# Documenting Extra Work, Delay, and Impacts on Continuing Construction Projects



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# Rapidly Changing Environment

- Multiple Social Distancing Directives
- Executive Orders issued in at least 40 states and many political subdivisions (17 E.O.s in NY Alone as of April 14)
- Many of the orders are unclear (what is essential?) and lack an authoritative source of interpretation
- State and local regulatory guidance is changing –even as fines are threatened
- EEOC, CDC, OSHA have issued workplace/employment guidance that continues to evolve
- Emergency projects will face issues as to quantifying work for payment and will likely be subject to scrutiny and audit

# Recognize We Are Dealing With A New Reality

- Avoid knee-jerk reactions – “What we always do” might not be the optimal thing to do in these unique, changing circumstances
- Think through the situation as it is today and may be tomorrow
- Know the contract and identify all notice/documentation requirements
- There are a wide range of contract clauses that may be implicated – and, potentially, unusual applications of those clauses

# Preserve Your Options & Rights

- Give notice as required, maybe even repeatedly
- Preserve “neutral” in positions being taken
- Advise and seek direction
- Provide direction when you have clear guidance, instead of making decisions for others
- Be careful with your choice of words (“default”, “breach”, etc.)

# Prepare for the Next Phase

- Document impacts – time and dollars
- Identify and comply with provisions regarding documentation (periodic cost reports, schedule analyses, etc.)
- Document mitigation and thought process
- Document guidance received and given (Executive Orders)

# We Will Discuss

- Potential Contract Provisions that may be implicated and must be reviewed to evaluate and formulate strategies for dealing with increased costs, delays, and impacts
- The probable differences of those clauses on the legal responsibility for delays, impacts, and additional costs
- Required initial notice and continuing obligations under such clauses
- Establishing and utilizing productivity metrics
- Establishing and utilizing a schedule impact monitoring protocol
- Utilization of a cost measurement system
- Assembling documentation to evaluate or support COVID-19 impacts

# ***Force Majeure* is a Contract-Based Remedy**

**(outside of France and other Civil Law jurisdictions)**

- French for the “greater force”
- Concept can be captured in other clauses with different names (delay, extension of time)
- Effect is to excuse timely performance for unexpected events and circumstances
- Contract language can work both ways – also excusing Owner performance
- As to goods, the concept is captured in provisions related to “commercial impracticability”

# Usual Contract Requirements for *Force Majeure*

(always check *your* contract)

*Force majeure* clauses usually provide relief only if:

- the event is beyond the reasonable control of the affected party;
- the affected party's ability to perform its obligations under the contract must have been prevented, impeded or hindered by the event; and
- the affected party must have taken all reasonable steps to seek to avoid or mitigate the event or its consequences.



# Other Contract Provisions to Look For

- Emergency Clauses
- Suspension of Work Clause
- Changes and Extra Work Clauses
- Differing Site Conditions/Concealed or Unknown Conditions Clauses

# Emergency Clauses

- Standard Provision in AIA and ConsensusDoc forms
- May be present in others
- Require the contractor to take action during emergencies to protect workers and the work
- Implicitly provide for compensation
- Arguably contemplate job specific emergency but are very broadly worded

# Suspension of Work

- Applies where the owner suspends the work
- Generally provides compensation (at least for “unreasonably” long suspensions)
- To take advantage, the contractor must seek specific direction from the owner
- Some suspension clauses allow the contractor to terminate the contract if the suspension extends beyond a specific duration

# Changes and Extras

- Present in virtually all contracts
- Provide compensation and time where the contractor performs changed or extra work *directed by the owner*
- Arguably apply to additional work complying with social distancing and other additional work the contractor is performing to comply with CDC, OSHA, EEOC, etc. guidelines
- Arguably apply to the cost of disruption
- To take full advantage, request direction from the owner

# Differing Site Conditions

- Provides compensation and time when conditions differ from:
  - 1) conditions represented in the contract documents, or
  - 2) conditions that reasonably could have been anticipated
- Until recently, no one could have anticipated the presence of COVID-19 at the job site or its effects
- Long shot argument – clause has been interpreted to deal with the condition of the site *at the time of contracting*

# COVID-19 Pandemic Types of Impacts

- **Termination or Suspension of Work**
  - Demobilization - Remobilization
  - Standby Mode Costs
  - Price Escalation Upon Restart of Project
- **Material and Equipment Supply Disruption**
  - Late, Partial or Cancelled Delivery of Materials and/or Equipment
  - Supplier Default/Bankruptcy
- **Project Delays, Acceleration, Constructive Acceleration**
  - Lack of Timely Site Inspections by Governmental Agencies
- **Labor Impacts**

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# COVID-19 Pandemic Types of Impacts

- **Labor Impacts**

- Lack of Workforce - Increased Absenteeism
- Labor Productivity Impacts
  - Incomplete Crews
    - Governmental Guidelines for Safety Practices
    - Social Distancing
    - Governmental Restrictions
    - Owner Restrictions
    - Illness
    - Quarantine
  - Medical Testing Requirements
  - Lack of Inspections

# Establish Productivity Metrics

## Loss of Productivity Resulting from COVID-19 Must be Linked to Project Records Such as Production Records or Earned Values

- Determine Actual Production Prior to Onset of COVID-19 Impacts
- Compare to Actual COVID-19 Impacted Production\*
- Differences are Quantified and Monetized and Should be Correlated with Schedule Delays.
- Develop a Supplemental CPM Schedule Performance Rate that Compares Planned Crew Day Performance\*\* with Actual Impacted Crew Day Performance on critical or near critical paths.

(\* - adjusted for any non COVID-19 issues)

(\*\* - based on non impacted experience)



# Establish Schedule Impact Monitoring Protocol

## COVID-19 Delays Must Be Linked to the Schedule

- Establish a Record Baseline
- Update The Baseline Bi-weekly or Monthly Including All Known Impacts

# Establish Schedule Impact Monitoring Protocol

## Establish a Record Baseline

- **Status Project Immediately Prior to First Known Impacts**
  - Update Project Schedule -
    - Thorough Review of All Activities - Confirm No Incorrect or Unstated Float Paths Near Critical Path
    - Review Near Critical Float Paths for Perceived Concurrency. Identify Any Concurrency and Consider Mitigation Options.
  - Submit Schedule to Project Stakeholders to Establish a Record Baseline

# Establish Schedule Impact Monitoring Protocol

## Update the Baseline on a Bi-weekly or Monthly Basis

- Update on a “Progress Only” Basis
  - No Revision to Duration or Logic
  - Insert All Known COVID-19 Impacts or Other Impacts
- Review the Critical and Near Critical Paths and Document any Slippages
- Measure Slippages from Baseline (previous update) to Current Update
- Correlate Slippages with Known Events or Impacts
  - 15% LOP correlates to a 15% increase in schedule activity duration
  - Develop TIA utilizing the LOP equivalent days to support the COVID-19 impact
- Include In Schedule Narrative

# Cost Measurement System

## Additional Costs Supported by Actual Project and Accounting Records

- Establish Costs at Time of First Known COVID-19 Impacts
- Establish New Codes for Separate and Identifiable Costs
  - Employee Testing
  - On-Boarding Costs for Additional or Replacement Employees
  - Premium or Escalation Costs Associated with Alternate Supplies, Subcontractors
  - Additional Personnel to Track COVID-19 Costs
  - Management Time to Address COVID-19 Issues

# Documentation to Support COVID-19 Impacts

## Project Records are Critical to Support the Impact of COVID-19

- Correspondence / Notices
- Daily Reports - Detail Description of Impacts Each Shift, Each Day
- Foreman Crew Journals
- Subcontractor Daily Reports
- Delivery and Procurement Issue Logs
- Phone Logs
- Email
- Worker Log - Absenteeism - Medical Testing

# Questions?

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