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Planning Now to Prove Your COVID-19 Damages and Delays Later

Right now, your construction projects may be in a state of uncertainty and flux as a result of the COVID-19 outbreak, but in the future, you may need to be specific about added costs and time lost to secure time extensions and recoveries. Action now may be enormously helpful in the future.

Many contractors are working hard managing new and unanticipated burdens - trying to keep your people and projects safe; keeping projects moving forward to the extent possible; issuing notices to preserve rights; reviewing contracts for applicable relief provisions (time and hopefully money); reviewing insurance policies to see how they may respond; and calming your employees; among many other challenges coming at you rapidly.

In the throes of this flurry of activity, it is easy to overlook the task that you will likely face months, if not years from now, when you may be asked to demonstrate the costs and delays that you incurred as a result of COVID-19 related events to whomever may be responsible to extend your completion date or reimburse the added cost. Cost tracking can be a daunting undertaking, but one that is significantly more manageable and effective if you formulate and follow through on a plan of action now, in real time.

It's "All About" Real-Time Documentation

Contractors are well advised to prepare now for what they may need to demonstrate later: (1) what costs and schedule impacts your project incurred because of the COVID-19 crisis; (2) how those costs and delays were incurred because of the COVID-19 impacts and not for other reasons; and (3) that those costs and schedule impacts were reasonably incurred and reasonably mitigated. Beginning the process of documenting added costs and schedule impacts now, while they are being incurred, will both expedite the process later and reduce the opportunity for others to challenge your claims.

Regardless of who you are going to seek recovery from (insurers, owners, subcontractors, etc.), they, their counsel, and their auditors and consultants will likely look to challenge your claims to mitigate their exposure, exploiting every weakness they can identify in your ability to prove your damages.

The Bucket Challenge – Segregate and Document

How best to meet the challenge? Two key themes serve as a good rule of thumb – segregate and document. Separate out costs that result from the COVID-19 project impacts from other job costs and then track them in as many distinct categories as possible. Depending on the case, different categories of costs will face different entitlement challenges, so dividing them into discrete categories will allow greater flexibility in presenting and defending them.

For example, different insurance policies may pay for some types of costs, but not others. Some may pay for disinfection costs, but not costs related to delay. Contract clauses addressing owner-directed project suspension may entitle a contractor to make-safe, demobilization and remobilization costs, but not



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for staff costs during a suspension. What may be recoverable from different sources will depend on unique policy and contract terms and the unique factual circumstances that drove the basis for the costs having been incurred on each project. Tracking the costs in discrete categories will permit correlation of the costs with their potential entitlements. If they are all lumped together as one “COVID-19 Cost Code,” the ability to compile costs expeditiously may be lost or may take considerable time and effort to apportion later.

Assembling detailed documentation, along with short narratives that explain each category of cost and schedule impact and how it ties back to the COVID-19 events, *while these costs and impacts are being accrued*, is an undeniably burdensome process. It may, however, greatly enhance your best shot to maximize your recovery and be less onerous, less expensive and more reliable than trying to recreate the details later.

Be Reasonable and Prove it

The circumstances presented by the COVID-19 crisis are unprecedented, but in most cases those making a damages or a scheduled-related claim have at least some obligation to reasonably mitigate their damages and delays. That obligation does not require perfection and is viewed in the context of the events giving rise to the damages and impacts – but you may still be expected to demonstrate that what you did was reasonable under the circumstances as they existed at the time.

No doubt you are working hard to be prudent in the costs being incurred to secure sites, to keep the work progressing as best as possible, to source required supplies that may be becoming scarce, to increase worker safety protocols, and to blunt the inefficiency effects of social-distancing efforts, among many other similar efforts. But will the efforts you are making now be apparent to those looking at your effort months from now?

The 20/20 hindsight view that those evaluating your submissions later on may look to impose, removed from the challenges of the real-time value judgments you must make now, can be effectively rebutted by recording now the logic underlying your often-difficult choices in short statements or narratives. A contemporaneous record of showing that you evaluated your cost containment and schedule mitigation options and why you chose the course you did, even if not perfect in retrospect, is very difficult to challenge as unreasonable.

Schedule and Inefficiency Related Costs and Claims Require Special Attention

Schedule impacts can be difficult to track and apportion under normal circumstances without deliberate attention. With all of the factors that may come into play that can impact project plans and efficiency in these highly unusual circumstances, this effort may become especially challenging. Delays and diminished productivity will likely come from many sources as the COVID-19 stresses mount and you may later need to apportion the various delays and inefficiencies to their causes as you pursue different sources of relief and recovery. Some impacts may be owner-directed; others may stem from government action; still others from work force diminution; material supplies may be impacted; projects may require temporary shut down and disinfecting; among many other factors which may come into play on the same project.

Contractors often record the *facts and effects* of delays on the schedule as part of their schedule updating process; but may overlook to contemporaneously record *why and what caused* a given impact and the efforts made to *mitigate* its effects. Often a few-word explanatory note on a schedule update and/or a sentence or two as part of the update narrative can provide the context needed to demonstrate the cause and effect and the judgments made to try to mitigate. For example, without a contemporaneous note making clear that pacing was intentional, deliberate slowing down of a follow-on trade impacted by a preceding delay can look like that trade, too, was a cause of delay, making a confused record appear like an effect was a cause. A simple note clarifying that pacing was intentional can dispel all the confusion. Ensuring that the schedule’s logic is sound and regularly updating the project schedule with as-built information to show how these events impacted the project can be critical to proving these claims.



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Damages from schedule impacts can be difficult to track and, thus, subject to attack. Establishing delay costs is therefore a dual exercise: 1) establishing the delay and its correlation to the right to extended time; and 2) correlating cost with the identified delay period. Schedules may also be valuable in justifying cost entitlement for efforts that mitigated delay – for example, if the decision was made to work dual shifts at an added cost, but delay was avoided, a schedule analysis showing the delay avoided and the savings, may be valuable.

Delay costs, including extended general conditions and staff costs, and acceleration costs paid to mitigate or make up for delays warrant special planning and attention.

It would be exhaustive and beyond the scope of this alert to address all areas of schedule analysis and support that may be involved in proving delay and mitigation in the future. Nevertheless, careful attention to supporting delay related expenses and mitigation efforts through well developed schedule analyses will likely be valuable down the line. And just as it makes sense to be preparing cost related documentation now, developing schedule related support now may be just as important.

The Wrap Up

Every project's circumstances are going to be different. It is impossible to provide one foolproof checklist of how to marshal the evidence necessary to prove damages and delays in every case. Each case, with its unique issues, requires individual consideration and planning. But with planning right from the start you will have a better chance to maximize your cost recovery and secure appropriate time extensions.

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