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Mitigate project impacts due to coronavirus (COVID-19) - by Peter Martin

May 15, 2020 - Connecticut



Peter Martin

With the outbreak of, continued escalation and unknowns with respect to the 2019 Novel Coronavirus (COVID-19), the construction industry must anticipate time and cost impacts to work on construction projects. The declared states of emergency nationwide, travel restrictions, quarantines and current and future contractions of this disease will likely cause project delays resulting in increased costs, including but not limited to extended general conditions, material escalation, labor escalation, increase storage costs, increased home office overhead, and increased travel and shipping costs.

While stemming this contagion and ensure public safety is of utmost importance, the construction industry professionals must also take practical steps to mitigate project impacts and financial harm:

Protect employees. The CDC has issued guidance to employers on how to deal with COVID-19. The CDC's most recent publication, titled Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), February 2020 (the guidance), is a good starting point. Additionally, the Occupational Safety and Health Administration (OSHA) is also providing resources for employers to deal with the outbreak. Employers should review their employee manuals, safety programs and emergency plans to ensure compliance with CDC guidelines and OSHA regulations.

Know your contract rights. Construction contracts will likely provide for whether or not time extensions and/or additional compensation are permitted for such impacts. Many contracts contain what is commonly known as a "force majeure" clause. Contractual definitions of force majeure events commonly include war, strike, riot, or acts of God. In addition, the Federal Acquisition Regulation, FAR 52.249-10 Default (Fixed-Price Construction), specifically identifies delays caused by "epidemics" and "quarantine restrictions" as excusable. "The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if ... [t]he delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include .. epidemics [or] quarantine restrictions." At this time, it is unknown whether courts and arbitrators define this outbreak and the resulting impacts as a force majeure event.

Provide notice. If, but more likely when, the Coronavirus impacts your project, you should immediately provide notice to parties to whom you have contractual privity. Be sure to follow the notice requirements prescribed by your contract, which will likely include specifically identifying the impact and the date the impact started. It is important to reserve rights to seek time extension and additional compensation if the impact is not fully known or quantifiable. In addition, keep track of lost time through schedule updates and maintain back-up for additional costs incurred.

One thing is for certain – the full impacts of the Coronavirus are unknown. While public safety remains a top priority, the construction industry must be proactive to protect itself and mitigate project impacts.

Peter Martin is partner and construction litigator at Hinckley Allen, Hartford, Conn.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540