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COVID-19 PANDEMIC – RECOMMENDATIONS TO GCs AND SUBKs ON HANDLING COVID-19 ISSUES

ALERT: Will the Coronavirus (COVID-19) Pandemic affect, or impact, the construction industry either nationally or globally? The answer is “YES.”

How does a General Contractor (“GC”) prepare, assess, or capture the impact it will sustain during the COVID-19 Pandemic for schedule, hard money and soft costs? Does it? How does a GC improve its case to entitlement for any schedule or cost impacts it may incur?

Construction contracts will be adversely affected by COVID-19 Pandemic, and it will have an impact on the construction industry. **THIS IS A FORCE MAJEURE EVENT.** Supply chains are being disrupted, and will continue to do so, especially from distributors that get their products from quarantined countries, such as China, Italy, South Korea and Japan. State and Federal agencies, such as the Office Safety and Health Administration (“OSHA”) may require mandates for new procedures to protect workers from the spread of COVID-19, including new rules for personal hygiene, or in extreme scenarios, suspend their operations.

First, all must follow the CDC’s recommendations for personal hygiene. Additionally, GCs must protect their assets and investments. Construction companies must have a plan in place, and act accordingly. The following is an opportunity to act with common sense.

RECOMMENDATIONS:

1. **Identification of impacts**
   Consider all impacts that occur during the COVID-19 Pandemic on the construction contract.

   **Fabrication and delivery of supplies and materials:** The United States relies on foreign raw resources such as steel, wire, petroleum, and other materials, as well as domestic supplies. The supply chain will be affected as most deliveries these days are provided on a JIT-basis (“Just-In-Time”). For example, products from China and Korea are currently affected as these countries are currently under quarantine. There will likely be slowdowns and disruptions for the supply of “key” raw materials and will ultimately impact construction projects, not only in the short-term, but also in the future.

   **Labor shortage:** As the situation changes daily in the United States, we cannot predict the availability of trade labor to perform the work. Schools and public facilities are being closed. The USA is also currently experiencing a trade labor shortage; and this Pandemic will likely increase the extreme strain on available labor resources.

   **Impacts:** From these, as well as other potential influencers of construction contracts, the impacts that will occur are delays, loss of productivity, increased material pricing, extended equipment costs, and extended expenses. Are these impacts compensable?
2. Set Up Accounting Method & Record Keeping
Based on experience, most contractors attempt to capture cost impacts after the fact, which creates difficulty for entitled compensation. This issue presents an opportunity to protect the construction company from unexpected losses.

Fabrication orders: After shop drawing approvals, contractors submit orders for supplies, material, or equipment. Considering the current environment, contractors must track its orders more aggressively, keeping track of slowdowns, missed dates, deliveries, and other factors that may affect the progress of the contract. All impacts should be documented.

Labor and Equipment Records: Maintaining labor and equipment records is critical, and essential, to establish unexpected slow progress and losses of productivity. Lack of labor availability will certainly impact contract progress. Will this be compensable? Daily records, whether daily reports, diaries, or emails and/or letters should provide the crucial factual evidence to prove the party’s entitlement to any additional time (i.e., schedule relief) or potentially any additional cost recovery. Voice records on mobile phones, which are dated and timed, are another alternative for record keeping, with photographs and videos.

The recording of these impacts will provide the GC with a chronological history of the impacts it encountered.

3. Notify your Procurement contact
Commercial Notice to the responsible Procurement or commercial contact designee to their counterpart upstream should be provided the adequate Notice within the designated timeframe of their respective contracts to enhance the contractors chances to recover all impacts and damages incurred as a result of the COVID-19 Pandemic and the associated impacts it had to the project. As in any public contract, communications with the procuring party, notifying and identifying the impacts when realized are essential. I would request at the outset a Notice for a time extension to mitigate the company’s exposure to downstream Liquidated Damages and as other impacts are later realized, use this initial letter as your contractual Notice requirement. Lack of information and communication jeopardizes, or provides difficulties, establishing causation and any resulting effects. Any party making a claim must first prove its entitlement, and this is best achieved through documentation.

Notices, preferably through written correspondence, either letter or email, should provide an explanation of the situation and provide detailed information, so as to provide the Claimant (the GC) with a solid basis in justifying its entitlement for additional time and/or costs.

SUMMARY: GCs and SubKs must be proactive with monitoring all aspects of potential added costs and delays, record keeping, and communications to protect itself from experiencing substantial losses.

It is unclear whether, under law, a contractor is entitled to compensation for costs directly, or indirectly, attributable to new Federal or State-imposed requirements that increase the cost of, and time for, labor, as a result of the COVID-19 Pandemic. If there is going to be an opportunity for such compensation, it will likely help only those contractors that can accurately quantify their losses, including critical delays and extra equipment rental.

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