



Home / Business / Capturing All COVID-19 Impacts to Your Project, Regardless of Its Status

Capturing All COVID-19 Impacts to Your Project, Regardless of Its Status

By Joni L. Powell and Catherine M. Ward | Tuesday, June 2, 2020

Productivity , COVID-19 , Project Delivery



By now, the construction industry is well on its way to pivoting to a world where pandemic precautions will be a way of life. Construction projects are restarting, and businesses are reopening, facing new requirements imposed by various governing agencies, much of which changes from jurisdiction to jurisdiction. As

requirements evolve, it only reinforces the understanding that the world has fundamentally changed. Businesses must impose new office behaviors on personnel, implement precautionary measures and potentially redesign workspaces. All construction-related activity must now be considered in the context of social distancing and infection prevention. Is this adjustment permanent or temporary? If temporary, for how long?

While contractors are required to provide a safe work environment for its employees and trades to operate, the addition of monitoring and tracking of onsite workers, respecting physical distancing guidelines and wearing Personal Protective Equipment (PPE) not typically associated with each trades' respective work will create inefficiencies not previously encountered prior to coronavirus.

All of these factors equate to higher costs and potential liability. They have resulted in the redesign of projects and re-sequencing of work on existing construction projects. They are preventing designed projects from being built, and they will give rise to new construction projects. In each of those situations, contractors have both business and legal considerations that should be addressed.

PROJECTS NOT YET APPROVED OR IN THE DESIGN PHASE

While this presents what appears to be the easiest scenario for a contractor to protect itself, the new world in which we find ourselves mandates that contractors be proactive on issues that were not previously contemplated. This includes incorporating new clauses and provisions into subcontractor agreements to provide the authority to send a worker home if the contractor believes that a worker may have been exposed to COVID-19 (or some other pathogen), and to require regular and specific cleaning and disinfecting of work areas, temperature monitoring and the wearing of PPE.

According to Stradley Construction Chair Pat Kingsley, "Owners are being proactive and creative to protect themselves from COVID-related liability and are putting the onus on contractors to bear all costs and efforts related to virus-related safety concerns. Subcontractors and contractors are taking the opposite approach and are responding by embellishing force majeure clauses to expressly reference and include COVID-19-related delays and impacts. How this tug of war resolves remains to be seen."

In general, the contractor should ensure that the force majeure clause provides for the contractor to be held harmless and, if possible, compensated for financial impacts caused by the inability to obtain PPE or significant increases in cost caused by the inability to obtain materials in a timely manner, and project shutdowns as the result of a virus outbreak. Contractors must be prepared to address whether the contractor should be held harmless in the event the job is suspended due to a virus outbreak at the jobsite; how much responsibility should the contractor have in that situation? What if the contractor's requirements for job

safety are inconsistent with union requirements for its personnel?

At this phase, owners and architects who are either about to start project design or are in the design phase can pivot and incorporate changes necessitated by the impacts of the pandemic. The contractor has not submitted a bid and is not locked into a specific time schedule. There are opportunities to take the time to identify the relevant issues and address them in the contract with the owner.

As many non-essential construction projects restart, will that translate into additional coordination of activities on any given jobsite as all trades are now anxious to be working? What will the impact on contractors who will have to compete for trades, which will be in high demand as they may be called to numerous jobsites at the same time? How will this be addressed in the contractor's agreement with the owner?

PROJECTS IN CONSTRUCTION

Construction projects placed on hold when the novel coronavirus' impact became apparent are the most impacted by the costs of the "new normal." Some projects are paused temporarily or canceled altogether, while others require redesign and renegotiation. Project schedules are being reviewed with an eye toward the impact of balancing the interaction of trades on the project site and competing for limited trade availability, especially on a critically time-sensitive project. While every schedule typically has days of float assigned to specific activities, which incorporate the overall time between the early start of construction activity and the late start of the activity, without negatively influencing the overall critical path of the project, many restarting projects will experience float absorption. This will force contractors to increase efficiency using primarily a "best guess" in the near term, which will then be refined as time provides real data.

Paul Gabriel, vice president and northeast manager at Aegis Project Controls, notes, "The baseline schedule driving every project with the establishment of critical paths and milestones will reflect a change to the typical trade stacking method for work area sequencing to accommodate physical distancing rules. Time impacts are expected and will be different for any stakeholder, trade or activity."

Existing force majeure clauses in contracts will be just the beginning of conversations between owner, architect and builder. Will the new standards be clearly defined in each jurisdiction or will much be subject to interpretation? How much of a role should the contractor have (or insist upon) in any construction sequencing to accommodate safe work practices? Given the rapidly changing nature of the guidance from state and federal governments, the contractor may be better situated than the owner or perhaps even necessitate revisions to material and equipment handling specifications. Likewise, there should be an evaluation of whether there has been any interim deterioration to the project elements due to the shutdown. For example, if a construction project involves retrofitting an existing building, has the HVAC system been shut down for an extended length of time such that it may pose an indoor air threat without specialized attention and corrective action?

The importance of identifying all of the issues unique to each project cannot be overstated. Once identified, however, the parties must cooperate to find solutions to accomplish the original goal of completing the project on time and on budget while also incorporating new health standards arising from the pandemic. Now that we have experienced how devastating a pandemic can be, the parties should acknowledge where such acts of God can be anticipated and what happens when they cannot.

POTENTIAL NEW CONSTRUCTION PROJECTS NECESSITATED BY THE PANDEMIC

Social distancing and infection prevention measures must now be incorporated into all parts of business operations. Offices, warehouses, manufacturing plants, retail stores are all faced with changing the way they do business in a fundamental way. More businesses will allow employees to work from home, which may allow workplaces to accommodate more distancing between those workers who remain the office, warehouse, plant or store. Inevitably, either in the near term or the long term, physical changes to the workplace will be necessary.

More changes that affect project costs are coming as the world adapts to the existence of threats like pandemics, but those costs can be baked into contractor proposals. It is on future construction projects, however, where legal pitfalls will become most apparent. It could be that future contracts will incorporate an acknowledgment that even in the face of an act of God, parties to a contract can be judged by their response. Legal liability may, for example, evolve to include a standard for reasonableness in a pandemic or similar situation and the concept of “mitigation of damages” will take on more meaning in such situations. While it is difficult to say exactly how future construction projects will be impacted, it is certain that legal issues will be evolving to keep up and it would be prudent to revisit construction agreements with that in mind.



Written by Catherine M. Ward

Catherine M. Ward is a partner at Stradley Ronon Stevens & Young LLP and member of the firm’s real estate practice group. She can be reached at cward@stradley.com or (856) 321-2402.



Written by Joni L. Powell

Joni L. Powell is the regional manager for business development and client specialist for Aegis Project Controls’ Northeast region. She can be reach at jpowell@consultaegis.com or (609) 238-2614.