

March 20, 2020

RECOVERY OF POTENTIAL COST & PERFORMANCE IMPACTS ATTRIBUTED TO COVID-19 EVENTS

As a result of the current rise of the novel coronavirus (also referred to as COVID-19), private owners and public agencies are deciding on whether to suspend projects and/or implement other *social distancing measures* that may present difficulties for Contractors and Trades assembling and working on construction sites. For the projects where work continues, additional obstacles may be encountered in reduction of workforce available due to sickness or concerns over social interaction that may spread the virus, and supply chain shortages and delays.

When anticipated pre-bid, construction participants are able to plan how to minimize the impacts and disruptions that may occur due to personnel donning protective gear, enduring security checks, constricted work site and lay down areas, restrictions due to ongoing operations of the facility, etc. Further, experienced Contractors will budget the cost and time impacts that are anticipated to be experienced within the baseline schedule and initial budgeted cost of the work. However, when these conditions are not known in advance by the Contractor pre-bid and pre-planning, such as the current pandemic crisis, the risk that cost overruns will occur and extended performance durations will be experienced, beyond that initially budgeted and planned, are dramatically increased.



*Is the
pandemic
caused by
COVID-19, or
resultant
quarantine
restrictions,
covered under
your contract's
Force Majeure
clause?*

Faced with changing project conditions brought on by the current pandemic, and likely resulting cost overruns and extended performance periods, contractors will be faced with determining how and if they are able to recover these cost overruns and time-related costs. Often reimbursement for such costs and/or entitlement to a time extension will be found with the Force Majeure provision of the contract.

Force Majeure clauses in construction contracts define the contractual rights and obligations of the parties should an unexpected event occur preventing the Contractor from performing or completing its work. These events typically include acts of God, fires, floods and other natural disasters that are not within the control of the Contractor. A reasonable interpretation of such clauses may also include within the definition of excusable events those delays or suspensions caused by workforce, material and/or equipment shortages that are attributable to labor strikes, labor disputes, acts of terror and civil disorder. Public health emergencies, pandemic, epidemics and similar occurrences such as that caused by COVID-19 and the resulting impact on construction performance may also qualify as a Force Majeure event.¹

¹ The contracting parties are advised that as each project is different, the same is often true of the specific construction contracts and provisions contained therein. Thus, it is advisable that a

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The mere identification of an event that may be classified as a Force Majeure event, however, does not ensure recovery for costs and performance-related impacts that may be experienced on a project. Rather, it is incumbent on the Contractor to properly document and capture these costs and time impacts to allow recovery, should the contract permit. For example, in the instance of a government-issued stop work order shutting down all project work operations where entitlement to recover cost and time impacts is not in dispute, there may come a point in time when the accuracy and reasonableness of the costs and time extension that the Contractor is seeking is questioned.

The successful resolution of such questions is dependent upon the level of information that can be produced from the project record and the manner in which this information is presented so as to clearly and concisely articulate to the Owner / Public Agency, the basis for the Contractor's request. In this regard, it will most likely be necessary for the Contractor to establish a cause-effect relationship between the costs and performance impacts claimed with the stop work order. For projects that continue throughout periods in which Force Majeure event(s) and the fallout have been experienced, quantification of the resultant cost and performance impacts will be more complex.

Provided below is general guidance on steps that should be considered to place your firm in the position to quantify and potentially recover such cost and performance impacts:

1. Review the contract to determine the following:
 - a. Definition of Force Majeure and whether or not it provides for a compensable time extension. A non-compensable time extension will provide for an extension of time, but not time-related costs.
 - b. Notice requirements that are to be followed to inform the Owner / Public Agency that an impact or delay has occurred, or is likely to occur based on



review of the specific contract language, and exclusions that may apply to the provisions for Force Majeure events, be undertaken to confirm whether resulting impacts attributable to COVID-19 may be covered under your Force Majeure clause.

then-current projections of available workforce, resources, access to project site, etc., and that the following is likely to occur:

- i. Additional cost to secure and maintain the project site (i.e., site cleaning or security to maintain protection of a suspended project site);
- ii. Cost to maintain the current projected completion date, provided work is not suspended; and/or
- iii. Relief from liquidated damages.

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2. Capture and record the current status of the project both in terms of cost incurred to date and the progress attained:

- a. Cost – while a payment application identifies the earned value of work based on the budgeted schedule of values, it does not accurately capture the costs necessarily incurred by the Contractor. Rather, job cost, accounts payable, payroll/labor reports, etc. provide the most accurate accounting of costs incurred prior to the Force Majeure event.



Consideration should be given as to how best to record costs incurred during and immediately following the Force Majeure event to segregate those resultant costs directly attributable to the event, as compared to those costs that are not easily segregable. For example, payment to expedite the shipment of materials are more easily identifiable than inefficiencies in labor and can be recorded on a separate line item.

To accomplish the above, it may be necessary to evaluate the level of detail and coding that is employed to track and monitor the budgeted costs.

- b. Schedule – in contrast to job cost reports that contain posting and transaction dates, a schedule represents a snapshot in time. It is important

Clear lines of communication need to be established with all project participants. Uncertainty as to the plan moving forward may negatively impact the ability of Contractors to coordinate Trade work, arrange for material deliveries, etc.

that the schedule be backed up (i.e., archived) in its native format to facilitate later analysis, should this be necessary.

Should a work around schedule be required or schedule logic be altered due to impacting events (i.e., Trade unable to perform), the then-current schedule logic should not be changed to reflect the alternate work plan. Rather, planning for these changes should be conducted through use of two-week look ahead schedules or an alternate schedule – then progress measured through comparison to the then-current (and unmodified) project schedule.

The then-current schedule should also be reviewed to identify any potential work tasks that may create problems, considering the current environment. For example, a crane that was scheduled for delivery next week should be confirmed as well as the availability of an operator (and backup operator should it be necessary).

- c. Track Labor Productivity - if not currently in place, develop a daily log to record the labor workforce, by category and to identify specific change over or additional staffing that may be necessary to maintain current progress.
- d. Materials Storage/Inventory – review and document the current inventory of supplies and materials on hand or in storage. Verify that long lead or recently ordered materials and equipment are scheduled for delivery on the committed dates.



Verify that procurement and delivery dates are properly reflected on the then-current schedule.

- 3. Communicate with Project Participants – ensure that your Project Team and others are aware of the current plan, understand what steps are being taken and agree to follow same:
 - a. Contractor Personnel – keep supervisors and project personnel aware of the current work plan and how changes in construction sequence will be communicated.

*Cost will
continue to be
incurred during
project
suspension and
may include,
storage of
materials,
temporary
power, site
security,
protection of
the public, etc.*

- b. Owner / Public Agency – discuss how changes in the work will be addressed and whether decisions need to be made as to whether to commit additional funds to complete work in the contractual timeframe (i.e., overtime, shiftwork, additional crews, etc.). This is particularly true if the contract permits only non-compensable time extensions for delays caused by Force Majeure events. In this scenario, an early determination as to the steps necessary to maintain the current contract completion date, in lieu of a time extension, needs to be timely analyzed and shared with the Owner.

Ensure that a change order log is maintained that identifies the date a change order request was initiated, the reason for why the changed work is being considered, the initiating party and the potential impact to the then-current schedule projections.

- c. Designer / Owner Representative – verify that designer personnel and/or owner's representative will be available to address requests for information, inspections or other duties that are required to complete the work.
- d. Trades – typically project meetings are held weekly or bi-weekly with the Trades to coordinate and plan the work. Should these meetings no longer be possible, establish another method of communication with the Trades, including confirmation that work on the project is continuing and whether the Trades are experiencing staffing shortages.

It is important to emphasize to the Project Team of the possibility that the current event(s) may negatively impact the performance and/or cost of the work. Develop a list of potential issues and impacts to raise awareness of the Project Team to be on the lookout for signs that these impacts are or may be realized – record this information on daily logs and table for discussion as needed.

4. Project Documentation / Exchange of Information – recognize that despite work continuing on the project, operations at each Contractor/Trade corporate office may be limited or restricted. It will be necessary to establish the manner in which project documentation will continue to be shared and maintained, and the method in which communications will be conducted.
5. Mitigate Impacts - merely because a delay or impact was experienced, does not in and of itself, warrant entitlement to additional cost or time. Rather, it is necessary to mitigate, to the extent possible, cost and time impacts that may result from the Force Majeure event.

IN SUMMARY

It is anticipated that the current pandemic crisis will create cost and performance impacts that will negatively impact the ability for Contractors to complete work within the budget and time requirements of the contract, as modified pre-crisis. To recover the increased cost and lost time, Contractors will have to submit requests for additional compensation that comply with the contract requirements and clearly delineate the costs and time-related impacts that can be attributed to COVID-19 crisis. Some requests may be rather straightforward, while others may include many types of costs that emanate from a suspension of the work or performance-related issues that had to be overcome to advance work and maintain current progress during the crisis environment. While these particular types of compensation requests (evolving from a pandemic or health emergency) may not happen often, the types of costs claimed and the manner of evaluating whether the costs claimed to have merit is not new. Applying proper dispute avoidance, documentation and resolution principles will place the impacted Contractor in a position to be fairly compensated for the ill effects of the COVID-19 pandemic.

Resolution Management Consultants, Inc. (RMC) is a nationally recognized consulting firm headquartered in Marlton, NJ, specializing in avoiding, minimizing or resolving problems that may evolve during the design and construction process. Founded in 1993 by veterans in the construction contracting and engineering professions, RMC has assisted numerous private owners, public (city, state and federal) agencies and contractors in either achieving project goals or resolving cost and time disputes between the contracting parties. The collective experience of our professional staff encompasses all phases of the design and construction process, including engineering, construction management, and accounting. For more information on how we may be of assistance, please contact James F. Gallagher, P.E., F.ASCE (j.gallagher@resmgt.com) or Jeffrey B. Kozek, CFCC (j.kozek@resmgt.com) or by telephone at 800/390-8800 or direct at 856/985-5000.