

May 29, 2020

PRESENTING / ANALYZING COVID-19 CONSTRUCTION COST IMPACT

COVID-19 Cost Overview

With governmental restrictions being lifted to allow construction projects to re-commence work, owners, contractors and trades¹ will have to balance the return to the construction site with the management of the financial strain that may have been caused by the COVID-19 Pandemic. In an earlier article, “*Back to Work Plan – Steps to Consider*”², we address the project schedule and steps needed to develop a plan forward and preserve a project record of mitigation efforts attempted to minimize the impacts caused by the COVID-19 Pandemic. In this article, we outline the steps necessary to present and evaluate the additional compensation that the contractor may be entitled to recover as reimbursement for additional and/or increased costs caused by the COVID-19 Pandemic.³

RMC employs an eight-step process as part of its cause-effect analysis:

Identify
Capture
Process
Organize
Analyze
Establish
Quantify
Report

Provided below is representative listing of the construction costs and expenses that may have been, or are anticipated to be, incurred as a result of the COVID-19 Pandemic for which the contractor may seek additional or separate reimbursement:

- ✓ Shutdown costs associated with demobilization, temporary storage of on-site materials, securing of project site, etc.
- ✓ Cost for purchase of personal protection equipment (“PPE”) not customarily worn, including masks and gloves, individual drinking containers, etc. required to provide worker health safety protection.
- ✓ Cost to erect physical barriers or compartmentalize workers to comply with social distancing guidelines.
- ✓ Remobilization costs upon re-commencement of the work, including inspection of the project and assessment of the project’s current condition.
- ✓ Cost for additional labor hours to comply with new health safety guidelines, including staffing temperature testing stations upon entry to site, health safety supervisor, training for employees, segmented meetings, reduction in site congestion, etc.
- ✓ Increased labor costs associated with reduced worksite hours, shift work, overtime premiums, limited site access, including vertical transportation restrictions, or illness.

¹ Throughout this article the use of the term “contractor” is intended to also refer to trades and specialty contractors that are retained to work on the project site.

² Reference “*Developing a Back to Work Plan Post COVID-19 – Steps to Consider*” <http://resmgt.com/wp-content/uploads/2020/05/Developing-a-Back-to-Work-Plan-2020.05.15-Final-w-Attach.pdf>

³ This article does not address entitlement to certain costs which may be limited by the relevant contract provision(s) in your agreement. Consult legal counsel for guidance and direction.

- ✓ Labor inefficiency associated with minimizing site congestion to comply with social distancing guidelines, implementation of overtime or extended work hours to recover lost time, etc.
- ✓ Labor and material escalation due to reduced availability of workforce and supply chain disruptions.
- ✓ Material expediting costs to meet revised schedule constraints.
- ✓ Extended equipment hours to service additional shifts.
- ✓ Idle equipment hours due to revised work schedules or planned construction sequence.
- ✓ Cost to replace trade or other third-party services that are not capable of returning to the work site due to financial impacts caused by COVID-19, including workforce illness and layoffs;
- ✓ Additional field overhead cost to clean and sanitize the site on a periodic basis, install and maintain portable washing stations, etc.
- ✓ Impacts caused by delayed or altered inspection process.
- ✓ Increase in small tools and equipment inventory to minimize individual use and interaction; and
- ✓ In situations where acceleration measures are not implemented to recover lost time, general conditions for the extended time of performance.

No two projects are the same.

The same is true of the potential ill effects, in terms of cost and time of performance, that may be attributed to COVID-19.

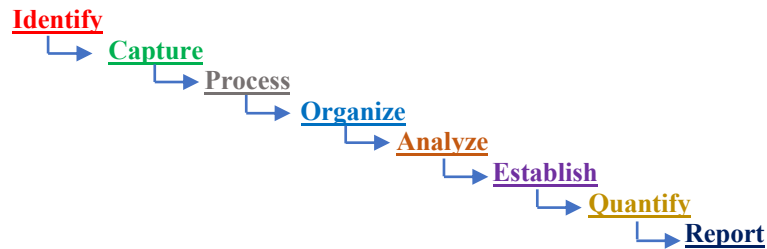
Each project should be analyzed separately to account for the contract requirements, scope-of-work, project participants, status of project pre-COVID-19, etc.

Whether processed as a change order request or claim submission, barring exculpatory language in your contract, the primary purpose is to place the contractor in the same position it was pre-COVID-19 in terms of the cost and time necessary to complete the remaining work as bargained in the executed contract documents.

Cost Entitlement and Quantum Analysis Process

The successful resolution of a change order request or claim is dependent upon the level of information that can be gleaned from the project record and the manner in which this information is presented so as to clearly and concisely articulate to the reviewer or entity from which payment is sought, the basis for the proposed request. Applying these proper dispute avoidance, documentation and resolution principles will place the owner and contractor in a position to fairly address the compensation that the contractor may be contractually entitled to recover from the ill-effects of

the COVID-19 pandemic. To accomplish this RMC employs an eight-step process as part of its cause-effect analysis:



The application of proper dispute avoidance, documentation and resolution principles is necessary to place the owner and contractor in a position to fairly address the compensation that the contractor may be contractually entitled to recover from the ill-effects of the COVID-19 pandemic.

It is through this detailed approach and emphasis on facts germane to the specific project that RMC has remained successful in assisting its clients in monitoring, mitigating and resolving disputes. Briefly discussed below is the manner in which each of the above steps should be considered in presenting or evaluating entitlement to costs attributed to the COVID-19 Pandemic.

Identify

Establishing the elements of *liability*, *causation* and *damages* involves the application of general principles befitting all claims situations, and the usage of time-tested techniques and relevant documentation relating to those issues. An essential element in the evaluation of a dispute involving the delay, disruption or acceleration of a project is the establishment of a causal link of specific acts, events, or conditions which create liability on the part of one party to the damages requested, i.e., establish causation.

While the primary issue in dispute will concern assessing the cost and time impacts caused by the COVID-19 Pandemic, the cause and effect of problems that existed pre-COVID-19 will need to be identified and addressed separately from the analysis. For example, a project that was experiencing a projected cost overrun and/or extended performance pre-COVID-19 may not be permitted to recover these additional costs or lost time as a result of the COVID-19 Pandemic. The exception that may allow recovery of these cost overruns warrants the contractor demonstrating that it had planned to implement mitigation measures that would have minimized these loss exposures, but such mitigation measures are no longer possible due to COVID-19 restrictions.⁴

The above issue cuts to the heart of establishing causation and a link to the resultant damages. Cost overruns and lost time that are projected to occur may not actually occur or may exceed then-current projections. Thus, it is important that an analysis distinguish between retrospective and prospective costs. Briefly, retrospective

⁴ This would require contemporaneous evidence that the contractor was, or was in the process of, implementing plans for mitigation as opposed to merely after-the-fact claiming that was the thought process.

costs are considered expenses that the contractor has actually incurred to date. Prospective costs are expenses that the contractor forecasts it may incur considering the information presently available. The *true* measure of whether costs and expenses should be considered retrospective or prospective needs to consider not merely whether the cost impact already occurred, but whether the contractor may be afforded the opportunity to mitigate or recover, in part or whole, from such cost impact.

Capture

Once the issues have been identified, it is necessary to obtain relevant documents / facts to support the request for additional or increased cost. Proving retrospective costs to purchase PPE may be as simple as providing copies of purchase orders and/or supplier invoices. However, project documents necessary to evaluate or monitor the projection of prospective costs may involve establishing baselines from which cost increases can be measured. These may include any combination of the following or similar type of project documents:

The true measure of whether costs or time impacts should be considered retrospective or prospective needs to consider not merely whether the impact already occurred, but whether the contractor may be afforded the opportunity to mitigate or recover, in part or whole, from such impact.

- Cost Reports
 - Job Cost Reports
 - Accounts Payable History
 - Contingency Utilization
- Daily Reports
 - Foreman Reports
 - Daily Logs
- Labor
 - Certified Payrolls
 - Detailed Labor History Report
 - Quarterly Union Fringe Reports
 - Correspondence concerning replacement of management and/or supervisory staff caused by COVID-19 and costs associated with replacement of personnel
- Materials
 - Purchase Orders and Invoices
 - Delivery Tickets
 - Inventories – pre-COVID-19
 - Storage
- Trades
 - Agreements and Modifications
 - Applications for Payment or Invoices
 - Correspondence concerning replacement due to financial hardship or layoffs caused by COVID-19.
- Equipment
 - Usage Reports
 - Transportation to/from project site.

- Project Schedules (discussed in “*Back to Work Plan – Steps to Consider*”)
 - Photos or surveys of pre-COVID-19 conditions

While the terms and conditions of the contract may dictate the minimum project documentation to support a request for payment and change orders, it is recommended that the parties discuss the documentation that is available and necessary to support and evaluate the accuracy and reasonableness of requests for additional or increased costs.

Process

At this stage in the request development of an *initial* assessment should be performed to determine whether a causal link may exist between the costs incurred and the specific event claimed to have impacted the work (i.e., COVID-19 Pandemic). Having established that a causal link may exist and having captured the documents necessary to review relevant to the issues, the process for how these documents will be utilized and updated, if capturing prospective costs, is outlined below. This includes establishing benchmarks for future assessment of cost impacts as may be necessary to monitor mitigation measures that are being employed. For example, if pursuing inefficiency costs associated with implementation of health safety measures, there are two options that may be considered in developing the supporting documentation:

1. Estimate the lost time that may be realized for health screenings and training, site access restrictions, including vertical transportation, etc.; and/or
2. Record the actual time spent on these health safety measures on daily reports and submit the total hours for reimbursement at the end of each week or month.

In either case, with the uncertainty of how long certain health safety measures will have to be enforced, it is advisable that negotiations on prospective costs focus on establishing processes that will allow measurement and payment for specific periods (i.e., week or month). It is also advisable that the contractor engage the owner in discussion as to whether an estimate, in lieu of recording actual hours on a daily basis, will suffice for proper support. Often this decision will be dependent upon the ability of the parties to reach an agreement on a budget and ceiling for reimbursement of specific cost exposures.

Organize

Next in the process, the supporting documents are organized relative to topics germane to the issue in dispute (i.e., COVID-19 Pandemic) and cost categories for which the contractor will be seeking additional reimbursement. For example, all

The mere fact that additional or increased cost has been experienced by the contractor is not sufficient, in and of itself, to establish that this cost was caused by the COVID-19 Pandemic.

cost records supporting the purchase of PPE would be grouped together, separate from labor records that may be utilized to analyze labor productivity.

The three things to remember about project documentation are: 1) the importance of records; 2) records are important; and 3) the import of records. It is necessary at this stage to have captured, processed and organized the contemporaneous records that will be required to analyze the accuracy and reasonableness of requests for additional and increased compensation. This includes having established a process for monitoring and organizing documentation that is generated in support of prospective costs.

Analyze

The analysis of the factual information relative to issues in dispute requires consideration of contractual requirements, employment of mitigation measures and apportionment of liability. This includes establishing whether timely notice has been provided, that costs associated with the COVID-19 Pandemic are recoverable as an additional and reimbursable cost of the work under the applicable provision in your contract⁵; and whether other factors need be considered in deterring entitlement. For example, if the contractor is contractually entitled to recover only a non-compensable time extension, it is incumbent upon the contractor to request approval from the owner before employing acceleration measures to recover lost time. The same is true of analyzing the project record to evaluate whether contingency funds are available for use to recover lost time and/or cover additional expenses associated with the purchase of PPE.

Conversely, it is necessary for the owner to timely respond to such a request to allow the contractor to properly plan and coordinate its work. It also necessary to consider in rendering such decisions the uncertainty associated with the projection of prospective costs or measurement of labor inefficiencies – as discussed further below.

Establish

While certain health safety measures may not necessarily increase the cost or time of construction (e.g., staggering work breaks and lunches), other measures are expected to require additional labor hours or decrease the efficiency of the labor workforce (e.g., site access restrictions, acceleration measures). The mere fact that additional or increased cost has been experienced is not sufficient, in and of itself, to establish that this cost was caused by the COVID-19 Pandemic. Rather it is necessary for the contractor to establish a causal link between events-liability-damages. For example, a decision to employ overtime or shift work should be

The owner's refusal to timely address the contractor's properly submitted request for a time extension due to COVID-19 events may be considered a constructive change directive that requires the contractor to implement acceleration and time recovery measures.

⁵ Reference "Recovery of Potential Cost & Performance Impacts Attributed to COVID-19 Events"
<http://resmgt.com/wp-content/uploads/2020/03/Recovery-of-Potential-Cost-Performance-Impacts-Attributed-to-COVID-19-Events.pdf>

supported by a critical path method (“CPM”) schedule analysis that shows the projected delay is due to COVID-19 and that employment of the acceleration measures is forecasted to result in recovery of all or part of time lost.⁶

It is also necessary to consider how a cause-effect analysis will be performed on prospective cost impacts that are not readily discernable at this point in time. These may include labor inefficiencies that are not easily measurable and for which the parties cannot reach agreement on an estimate of the potential lost productivity, or projected supply chain disruptions that are not anticipated to occur for several months. It is advisable that contractors establish the basis for their current budgets and resource utilizations to allow for later use in evaluating these requests.

“Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence.”

John Adams

For example, a contractor concerned that uncertainty with labor availability due to illness or no-shows will result in loss-of-productivity may want to provide a breakdown of the labor planned to be employed on specific work activities and a record of actual labor that was employed pre-COVID-19 on this or similar work. By providing timely notice to the owner of its concern and the process established to analyze and quantify the potential cost impact, the contractor is properly taking the steps to allow it to assess the loss-of-productivity impact at a later date.

Simply stated, the requested recovery of these costs should pass the simple test of:

1. These costs would not have been incurred absent COVID-19; and
2. The contractor does not have the ability to mitigate or reduce the cost exposure through the employment of readily available resources.

If the answer to either of the questions above is no, consideration should be given as to whether denial or deferment of the reimbursement for these costs is warranted by the owner.

Quantify

The quantification of additional and/or increased cost should account for whether the costs that have been incurred to date or are anticipated to be incurred as the project progresses under modified health and safety guidelines. Costs incurred to date should be supported by actual cost records, whereas prospective costs have not been fully realized and are only forecasted to occur. Based on RMC’s collective experience, more than 2/3rd of dollars sought for additional reimbursement are associated with time-related damages caused by escalation, stand-by, acceleration

⁶ Reference “Developing a Back to Work Plan Post COVID-19 – Steps to Consider”
<http://resmgt.com/wp-content/uploads/2020/05/Developing-a-Back-to-Work-Plan-2020.05.15-Final-w-Attach.pdf>

and extended performance – supported by a CPM schedule analysis. If a contractor is seeking additional costs due to loss-of-productivity, it may choose to employ either a total cost (or modified total cost) approach, a measured mile approach, or resort to one of the various industry guides that attempt to capture the cost of inefficiency due to the effects of overtime, stacking of trades, weather, and a host of other factors.⁷

Regardless of the approach employed, the contractor is advised to establish that it is seeking to recover the costs necessary to place it in the position it was pre-COVID-19 and not take advantage of the COVID-19 crisis to increase its project margins. This should not be looked upon as an opportunity to recover costs (i.e., “get well”) by attempting to incorporate prior losses into an equitable adjustment request for the COVID-19 issue. This is also true of work performed or involving subcontractors and vendors for which the contractor is passing on requests for reimbursement of cost impacts. Furthermore, due to the potential forgiveness of payroll under SBA’s Paycheck Protection Program, the issue as to whether the contractor forgiven payroll and expenses can be included as support for additional or increased costs needs to be considered.⁸

Report

Contractually required reports, memos, letters, etc. should be prepared and presented to the owner in a simple, clear and concise manner by text and graphical presentation, with the detail and substance needed to support the findings and proposed request for reimbursement of additional and/or increased cost.

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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. RMC has briefly outlined the steps necessary to present and evaluate the additional compensation that the contractor may be entitled to recover as reimbursement for additional and/or increased costs caused by the COVID-19 Pandemic. Applying these proper dispute avoidance, documentation and resolution principles will place the owner and contractor in a position to fairly address the compensation that the contractor may be contractually entitled to recover from the ill-effects of the COVID-19 pandemic.

⁷ One needs to be careful in the application of loss of productivity methods as some are limited in the situations in which they can be used, while others are subjective and subject to easy challenge.

⁸ Reference “Should Contractors be Permitted to Recover Payroll & Expenses Forgiven under SBA PPP Loan Program under the Change Order Process?” <http://resmgt.com/wp-content/uploads/2020/05/PPP-Loan-Forgiveness-COVID-19-2020.05.06-Final.pdf>

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