

SUBJ: STORY IDEA: 7 Construction Contract Clause Issues You Probably Hadn't Prioritized 2 Years Ago

Hello {{MediaContactFirstName}},

I thought you might be interested in this story about construction contract issues that people probably hadn't prioritized two years ago, by construction dispute thought leader Jim Gallagher at Resolution Management Consultants.

A release with further detail on Jeff's trends and insight is included below. Please let me know if I can provide more information or arrange an interview. Thank you for your consideration.

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schedule an interview, please contact:  
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FOR IMMEDIATE RELEASE:

**POST-PANDEMIC CONSTRUCTION CONTRACTS:  
7 CLAUSE ISSUES YOU PROBABLY HADN'T PRIORITIZED,  
TWO YEARS AGO**

(Philadelphia, PA) The construction industry has faced a myriad of challenges over the last two years – a worldwide pandemic, supply chain issues, personnel shortages and inflation, to say the least. In many cases, construction contracts were not prepared to address this new reality. According to Jim Gallagher, a Principal at Resolution Management Consultants, Inc., “Many contracts signed pre-pandemic, often lumped unplanned issues into boilerplate catchall clauses, such as a force majeure clause, accepted with little or no detail or negotiation involved.

Unfortunately, the definition and proper meaning of those broad all-purpose clauses will end up in mediation or litigation where the courts will decide who is responsible for delays and budget overruns resulting from uncontrollable third-party influences.”

Gallagher observes that the industry has learned a great deal over the last two years - outside influences, like the government and disease, can have tremendous influence on the successful completion of a construction contract, plan, budget and timeline. To be prepared in the future, Gallagher outlines 8 clause topics that are especially important to negotiate and clarify in greater detail in future construction contracts:

#### 1) Who is Responsible?

Stoppages, pauses, disruptions and increased cost of performance resulting from 3<sup>rd</sup> party, government and/or health considerations are becoming more commonplace in today’s construction world. It is important to define, prior to project award, who among owners, contractors, subcontractors and others is responsible for specified increased performance costs and delays that may be caused by outside influences (i.e. the pandemic). Pre-pandemic work stoppages or shutdowns may not have resulted in contractor entitlement to additional compensation under the theory that work forces and resources could be shifted to other work. The same may not be true if all work in a specific state or jurisdiction is shut down due to pandemic concerns.

#### 2) Definition of Force Majeure

What events are included within the definition of Force Majeure? What has been a boiler plate clause that is often accepted without much thought or

discussion has become an important contract provision to negotiate. Government fiat and laws can have significant impact and yet they have been inconsistently applied at federal, state and local levels. For example, a federal project built in a restrictive locale can result in disruption while facing conflicting jurisdictions for remedy, further adding to the confusion. What does force majeure mean in today's world? Some states have categorized Covid-19 as a force majeure event while others have not.

### 3) Health and Safety Clauses

Pre-pandemic, following OSHA safety protocols was the provision most contracts focused on, and resources were committed to ensuring compliance. Today, detailed health protocols need to be negotiated including what constitutes a health exposure issue, which party is responsible for health monitoring and reporting and which party shall be responsible for these monitoring and reporting costs. What criteria constitute grounds for shutting down a project or participation by subcontractors also need to be considered? Pre-pandemic, projects were shut down for health/safety issues only after an unfortunate incident occurred or OSHA violation identified. The same may not be true in this new pandemic era. Today, it is more likely that projects may experience work stoppages or shutdowns due to worker illness or un-sanitized work conditions.

### 4) Material Cost Escalation and Accessibility

Inflation and supply chain issues have unexpectedly and dramatically affected budgets and timelines, introducing price and delivery stability challenging. Budgets will need to account for these unanticipated and uncontrollable costs, or contract provisions negotiated to allow timely resolution of these increased costs should they occur.

## 5) Mobilization and Demobilization

With the potential for suspensions and stoppages caused by outside project influences, contracts should address the manner in which these costs need to be documented and submitted for reimbursement. For example, the contractor will need to demonstrate the extent that specific equipment required demobilization were the project suspended due to pandemic concerns. This may include the contractor's knowledge as to whether the suspension period was known or the return to work could have been reasonably foreseen. The potential for having interim starts and stoppages must be negotiated.

## 6) Personnel Shortages

It is well documented that the U.S. labor market is challenged by qualified personnel shortages. The ability to forecast the labor needed to attain specified performance levels and proactively ensure that an adequate work force is available has always been an essential element of a successful project. In today's post-pandemic era, the ability to ensure that an adequate work force is available is of even greater importance. Contracts should include provisions to provide visibility to the personnel resources that the contractor and subcontractors are committing to the project, and project controls to monitor the labor levels actually attained.

## 7) Insurance

Insurance is always a key component of construction contracts, but in today's environment, Workers Compensation, Business Interruption and other blanket coverages may need to be reviewed, revised or added to account for post-pandemic issues.

According to Gallagher, "It's a new world out there and construction contracts of the past offer less protection against outside forces that can affect one's project. To limit exposure to litigation in the future, contracts need to be modified to protect against the unexpected, including post-pandemic issues."

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**About Resolution Management Consultants, Inc.**

Resolution Management Consultants, Inc. (RMC) is a nationally recognized consulting firm headquartered in Marlton, NJ. There are two sides to the business: the construction planning and management aspect – helping clients build more successful projects – and the litigation aspect – should matters go to court, providing analysis and testimony as expert witnesses. Founded in 1993 by veterans in the construction, contracting and engineering professions, RMC has assisted numerous private owners, public agencies and contractors in either achieving project goals or resolving cost and time disputes between the contracting parties.

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