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The U.S. construction industry felt the first wave of the impact of COVID-19 when China's Hubei province went into lockdown and manufacturing facilities that produce construction materials for U.S. consumption were forced to halt production. In more recent weeks, significant labor force and supply chains challenges in countries around the globe, combined with government-imposed shutdowns, are stopping some U.S. construction projects in their tracks.

All parties involved in construction projects (e.g., owner, contractors, suppliers, sureties, bankers, etc.) are likely to feel the adverse impact of this epidemic. To prepare for and assess the impact of COVID-19 and mitigate risk, it is critical to seek professional advice from your surety, insurance agent/broker, and licensed construction attorney(s) in the local jurisdictions you operate. These key partners will be able to help you ensure you review and understand all relevant contracts and supporting documents.

Specifically:

1. Review and clearly understand banking and equipment loan agreements.
  2. Review and clearly understand coverages, rights, obligations, limitations, exclusions, documentation required and notice provisions within insurance policy contracts.
  3. Review contracts, subcontracts and purchase orders for each project individually to fully understand your rights and obligations.
    - a. Identify and assess contract language regarding force majeure, excusable delays, work suspension/termination, events beyond control or reasonable control of contracting parties.
    - b. Clearly document the rationale for the source of delay impact; provide written communication for proper notice to the owner, representative or contracting officer as soon as possible, but within established contract parameters, stating all reasons within the notice such as government shutdown, act of god, force majeure, not within control of contractor, or not foreseeable
    - c. Document all delays to baseline schedule with purpose of establishing connection to Coronavirus event and resulting damages. Also, be cognizant there may be contract requirements for necessary performance to mitigate damages
    - d. In the absence of specific force majeure clauses, scan the contract for catch-all language stating such things as any events not reasonably foreseen and not within reasonable control of the parties. This language is likely to be viewed as including pandemics such as Coronavirus. In some
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circumstances, the law provides for performance of the contract to be excused when it would be impossible or impractical or the core practice of the contract is frustrated due to an unexpected event.

- e. In federal contracts pay attention to the following clauses:
    - i. **Section 52.249-10** of Federal Acquisition Guidelines, Default, Federal Fixed Price Contracts providing non-compensable delay time: The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if the delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor including Epidemics and Quarantine Restrictions.
    - ii. **Section 52.249-14** of Federal Acquisition Guidelines, Excusable Delays providing non-compensable time: **(a)** Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes include acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, epidemics and quarantine restrictions. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. **(b)** If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be deemed to be in default, unless: (1) The subcontracted supplies or services were obtainable from other sources; (2) The Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and (3) The Contractor failed to comply reasonably with this order.
  - f. In projects using the American Institute of Architects AIA-201 General Conditions:
    - i. **8.3 Delays and Extensions of Time**
      - 8.3.1** If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, **unusual delay in deliveries**, unavoidable casualties, adverse weather conditions documented in accordance with Section
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15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine. This provision would appear to cover the current Coronavirus situation as well.

### **Monitoring and management throughout the crisis**

We remain in the early innings of the Coronavirus epidemic. Actual damages for delay or otherwise potentially attributable to the Coronavirus may not be fully known for some time. We recommend you:

- Continue to monitor federal, state and local government announcements regarding construction shutdowns that may be part of any shelter-in-place requirements
- Communicate early and at all levels. The safety of your employees is paramount.
- Reassess business continuity plans to assess needs regarding current pandemic-driven requests for all to work at home (if possible)
- Review future contracts to include contingencies for how the pandemic might affect pricing and schedule

Liberty Mutual Surety is your partner and we want you to know we will be with you through the COVID-19 crisis. We empathize with your daily struggles through current uncertainty within the construction marketplace. Although we are temporarily working from home environments, we are open for business and fully operational to service your business needs via email or cell phone. We have dedicated regional surety legal, claims, accounting and engineering personnel available to help you as needed. We have key external professional partners across the U.S. to assist you and our firm.

We extend our best wishes to remain healthy and safe through this unprecedented situation.

*The information contained herein is intended for general informational purposes only and is not intended to provide or be a substitute for formal legal advice. Please consult a licensed attorney in your jurisdiction for any legal questions you may have.*

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