

Presented to the Ohio Contractors' Association



Documenting and Prosecuting COVID-19 Delays

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Agenda

- 1 Navigating the Unknown Impacts of COVID-19
- 2 Sending required Notices under the Contract
- 3 Understanding excusable and compensable delays
- 4 Ways to track and document delays and the additional costs related to COVID 19, and Prosecution of claims
- 5 Prosecution of claims and upper tier defenses

What should I expect?

Just like the virus affects each victim differently, there is no “one size fits all” when it comes to anticipating the impact of COVID-19 on your company or any particular project.

Every situation/project is different . . .

What should I expect?

Plan for the worse, hope for the best (or better)

- AIA index points to major downturn in commercial construction
- Associated Builders and Contractors: Chief Economist forecasts a steep decline

What should I expect?

Plan for the worse, hope for the best (or better)

- Immediate Cash Flow Impact
- Shortage of Reliable Labor
- Supply-chain problems
- Project cancellation/termination for convenience
- Claims: Infected workers; Project Impacts

How do I protect my company?

Immediate Cash Flow Impact

- Implement cash management plan
 - Consider drawing down line of credit
 - Stimulus loan – maximize forgiveness
 - Aggressive collections/aged receivables plan
 - Extend payables/conserve cash

How do I protect my company?

Get down to the basics . . .

1. Keep making progress on projects
2. Comply with CDC guidelines/local/state orders
3. Enhance tracking receivables, pay application requirements – waivers, lien releases, etc.
4. Pursue timely or early release of retention
5. Timely pursue lien and bond rights
6. Strictly enforce “pay if pay” rights where possible
7. Minimize scope creep

How do I protect my company?

Reliable Labor/Supply-Chain – Critical Suppliers/subcontractors

- Long term things are expected to get back on track
- Some companies better prepared/some are not!
 - You need to know which is which and where are you vulnerable?
- Workforce/labor plan is critical
- Scrutinize key suppliers – Are they able to meet supply requirements? Be aware of risks. Demand visibility with respect to inventory, production, and PO fulfillment. Are you a priority?
- Identify and implement alternate plans for key vulnerable suppliers
- Extend your supply network
- Supplier inventory, production schedules, and shipment status must be a key focus

How do I protect my company?

Reliable Labor/Supply-Chain*

- Implement a process to monitor labor and supply chain issues – Predict and preempt shortages
- Immediately investigate slow downs and material supplier/subcontractor viability

** COVID-19 Managing supply chain risk and disruption, Deloitte Development LLC 2020*

How do I protect my company?

Project cancellation/termination

- Vulnerable/Unfamiliar Owners: Demand Adequate financial assurance
- Evaluate/understand project suspension rights
- Review rights to compensation for termination for convenience
 - Evaluate mitigation options – Supply/equipment cancellation
 - Subcontractor suspension/termination for convenience

How do I protect my company?

Effective Claim Management Program

- Infected workers – Document and enforce all safety measures. CDC requires anyone infected be contact traced and sent home for 15 days. Full compliance is key.

How do I protect my employees?
Effective Claims Management
• Infected workers
measures. Contact
traced and so
key.



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Responsible RestartOhio

General Office Environments



Mandatory

Employees & Guests

- Ensure minimum 6 ft between people, if not possible, install barriers
- Personnel should work from home when possible
- Employees must perform daily symptom assessment*
- Require employees to stay home if symptomatic
- Face coverings must be worn at all times while working
- Require regular handwashing
- Reduce sharing of work materials
- Limit travel as much as possible
- Stagger arrival of all employees and guests
- Post signage on health safety guidelines in common areas

Physical Spaces / Workstations

- Frequent disinfection of desks, workstations, and high-contact surfaces
- Daily disinfection of common areas
- Cancel/postpone in person events when social distancing guidelines cannot be met
- No buffet in cafeteria
- Utilize disposable tableware and other materials
- Establish maximum capacity (e.g. 50% of fire code)

Confirmed Cases

- Immediately isolate and seek medical care for any individual who develops symptoms while at work
- Contact the local health district about suspected cases or exposures
- Shutdown shop/floor for deep sanitation if possible

Recommended Best Practices

- Ensure seating distance of 6 ft or more
- Enable natural workplace ventilation
- Health questionnaire for symptoms at entry
- Temperature taking protocol

Redesign/space workstations for 6 ft or more of distance

- Close cafeteria and gathering spaces if possible, or conduct regular cleanings
- Limit congregation in office spaces
- Divide essential staff into groups and establishing rotating shift
- Availability of at least 3 weeks of cleaning supplies

- Work with local health department to identify potentially infected or exposed individuals to help facilitate effective contact tracing/notifications
- Once testing is readily available, test all suspected infections or exposures
- Following testing, contact local health department to initiate appropriate care and tracing

*Daily symptom assessments should include taking your temperature with a thermometer and monitoring for fever. Also watch for coughing or trouble breathing.

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How do I protect my company?

Effective Claim Management Program

- Infected workers – Document and enforce all safety measures. CDC requires anyone infected be contact traced and sent home for 15 days. Full compliance is key.
- Project Impact Costs – Aaron, Jeff, and Chad will discuss the importance of an effective claim management plan

Proper Claim Management

- As always - Know your contract
- Keep lines of communication open
- Preserve your rights
- Every situation/project is different . . .

What Owners Are Saying

- “Act of G-d’ Disputes on The Upswing” (Wall Street Journal April 21, 2020)
 - * Force Majeure provisions
 - * Explicit – must be carefully read
 - * Implied by law
 - * Impossibility of Performance
 - * Exploitation of crisis to excuse other non-performance
 - * OWNERS ARE RESISTING ADDITIONAL TIME AND MONEY CLAIMS
 - * They (contractors also) argue: Other projects are working
 - * If other replacement crews are available is it force majeure?
 - * Increased safety demands?
 - * “Are you smarter than Dr. Acton?”

Impacts of Shelter in Place

- Social Distancing – slower crews, loss of efficiency
- Hand Washing – loss of efficiency
- Sanitizing and Cleaning – loss of efficiency
- Additional PPE
- Who has to pay these costs?
- Additional crew absence, sickness or quarantine
- Slowed performance of the work
- Inability to replace crews or obtain material
- Who owns this risk?

You must consider the impact of your Claim on the entire Project and all parties

PUBLIC PROJECT – the government decides. No cash from their personal pocket. But delay in use

- Lack of project contingency funds
- Reductions in revenue to pay for projects, let alone extra costs

You must consider the impact of your Claim on the entire Project and all parties

PRIVATE PROJECT – everyone takes a loss...

- Lenders – delay in being repaid and greater risk of default (lenders pull back funding)
- Owners – delay in project completion, impact on tenants/users
- Future tenants – delay in access, extended current rent
- General Contractor – additional costs to perform, extended performance, slowed performance. Possible slowed pay
- Subcontractors – additional costs to perform, extended performance, slowed performance. Possible slowed pay

EVERY MAN FOR HIMSELF! *Is there a fair compromise?*

Impossibility of Performance

- Impossibility of performance occurs where, after the contract is entered into, an unforeseen event arises rendering impossible the performance of one of the contracting parties. *State v. Curtis*, 2008-Ohio-5643

EXAMPLE – COVID 19, inability to get any crew to perform, inability to get material, inability to complete per schedule.

Impracticability of Performance

- Performance may be impracticable because it will involve a *risk of injury* to person or property that is disproportionate to the ends to be attained by performance. *B-Right Trucking Co. v. Warfab Field Machining and Erection Corp*, 2001-Ohio-8742
- “Impracticability” means more than “impracticality.”
- A mere change in the degree or difficulty or expense does not amount to impracticability.
- A party is expected to use *reasonable efforts* to surmount obstacles to performance, *and performance is only impracticable if it is so in spite of such efforts.*
- EXAMPLE – Crew refusal to perform, unsafe to work closely (But ODOT Orders)
- EXAMPLE - Despite PPE (including masks, hand sanitizer) crews refuse to perform

Impossibility to Perform – Government Actions

- Absent contractual terms, either party can often avoid an agreement when governmental activity renders its performance impossible or illegal. *Glickman v. Coakley*, 22 Ohio App. 3d 49, 52 (Ohio Ct. App. 1984)
- BUT: There is a line of decisions that Ohio adopted that places the risk of governmental interference on the party who contracted to render the performance.
- EXAMPLE: Shelter-In-Place order (but construction is “essential”)

Contract Provisions

- Force Majeure
- Suspension or delay caused by Project Owner or others
- Entitlement to extended time and money
- Relief from liquidated damages
- Share in costs of additional PPE and extended project costs

Why You Should Care About the Contract

Risk: Waiver of Claims

Owner Strategy: Make it hard to preserve and perfect claims

Owner Justification: Prevent contractors from Sitting on claims until the end

- Deal with claims in a prompt and timely manner

Best Practices To Preserve Claims

Send written notice requesting the equitable adjustment of the contract time and sum

WARNING: Does starting the work without a change order or construction change directive waive your rights?

- If So: you cannot start without a CO or CCD
- CO is agreement on sum and time
- CCD is just agreement the work is extra

If DIRECTED (or threatened that you will be in breach), then: Contractor IS PROCEEDING UNDER PROTEST, RESERVES ITS RIGHTS, WILL TRACK ITS TIME AND COSTS, AND SUBMIT FOR REIMBURSEMENT

Best Practices to Preserve Claims

Can you proceed?

- Do you need additional information to move forward?
- Ask for the information: UPPER TIER IS PREVENTING PERFORMANCE = Delay to Contractor

Does someone have to engineer a solution?

- Does Contractor have any design responsibility?
- If NOT – can NOT design the solution
- Demand a stamped and engineered plan for Contractor to review, price, and turn into a change order “equitably adjusting the contract price and time.”
- Cannot “proceed under protest” if Contractor has to change the design –
- Contractor lacks insurance coverage for design issues.
- Lack of plan = DELAY

Lien/Bond claim to secure funds

Often cannot bill without a change order

- Turns Contractor into a BANK!

Project Delays to Contractor

Excusable

- Contractor may be entitled to time and money
- Caused by upper tier, or causes within the control of upper tier

Excusable – Non-Compensable (contract specific)

- Not caused by anyone; i.e. weather, acts of G-d
- Generally only get time
- STILL NEED TO PROMPTLY PROVIDE NOTICE
- Sometimes tied to critical path delay
- Provide notice to avoid liquidated damages

Non-Excusable

- Caused by Contractor or a subcontractor
- Contractor has to recover the schedule at Contractor's expense

Project Delays

- Delays on the Contractor Side
 - Employee refusal to perform – due to quarantine
 - Inability to obtain material or equipment
 - Shipping or similar restrictions
 - Inability to prosecute the project
 - MUST DOCUMENT THE SAME

Project Delays

- Delays on the Owner's Side
 - Owner suspension of projects
 - Public Owners
 - Argue excusable and compensable
 - ODOT CMS
 - FAR 52.242.14 – any increase in the cost of performance of this contract (excluding profit)
 - DAMAGES
 - Securing the site
 - Idle equipment and labor
 - Maintenance of site and traffic
 - Demobilization and remobilization
 - Escalated labor and material

Project Delays

Delays on the Owner's Side

- Owner suspension of projects
- Private Owners
 - Driven by contract

Project Delays

Slowdowns in Work

- Caused by social distancing and need to sanitize
- Loss of productivity
- Resequencing required
- Deviations from the planned schedule
- Altering the work flow

Need to Give Notice of Delay

FOLLOW CONTRACT REQUIREMENTS!

- Notice of initial delay
- Weekly updates of costs
- Post delay summary and need for a revised and agreed schedule
 - NOTE: May be pushed to different weather

Notices must strictly follow contract requirements

- Claim liquidation – sharing lower tier claims up the contract chain
- Claim conduit – taking a neutral position on lower tier claims, but sharing them with the upper tier. Bind the lower tier to the upper tier's determination

EXAMPLE: Sub who claims they can't perform. Notice to surety...they return

What Key Items Must be in a Notice Letter

- Owner caused delay
 - Project Suspension
- Lower tier caused delay
 - Force Majeure

WHEN CAN YOU CALCULATE YOUR TOTAL DAMAGES?

Prosecution of Claim

- **Public Projects** – follow administrative or contract process
 - May include mediation
- **Private Projects**
 - Follow contract notice process
 - Arbitration/Mediation/Litigation

PATH TO SUCCESS:

- Align claim theme/theory with what is permitted under the contract and aligns with facts
- Have clear and defensible measurements of additional costs and schedule impact due to COVID-19
- Demonstrate efforts to mitigate cost and delay
- ALSO – Lien/Bond Claim to secure claim

Critical Tracking and Record Keeping for COVID-19 Issues and the Associated Impact

- Knowing your schedule helps to improve the timely identification, necessary action, and tracking of the delays and hindrances to performing the work
- Knowing your budgeted costs, actual costs, and production rates is essential to the information/data tracking and delay damages process
- Your documentation program needs to be triggered once COVID-19 delays, hindrances, or unexpected items are encountered and then throughout the impacted periods
- Tracking techniques and regimented record keeping – real time documentation, and job cost system including tailored cost coding for COVID-19 items
- Parties need to communicate and work together to try to mitigate the impacts

Time and Cost Components for COVID-19 Claims

1. Schedule delays, hindrances, and impact due to COVID-19
2. Unexpected project factors impeding the work and the additional costs specifically attributable to COVID-19
3. Direct cost components
 - Direct labor, material, equipment, and subcontractors costs
4. Indirect cost components
 - Jobsite overhead – onsite supervision, project management, and support staff
 - General conditions
 - Home office overhead

Identifying and Documenting COVID-19 Schedule Delays, Hinderances and Impact on the Project's Work

A. Delays on the owner's side:

- Project that is underway and progressing is officially suspended
 - Recommend photo/video documentation of the project's status, and a jobsite inventory, at the time of suspension
- Project is set to commence, but does not start
- Construction administration – A/E turnaround of design changes, Change Orders, submittals, RFI's, and progress payments
- Disruptions to the Work – labor inefficiencies, loss of productivity, and changes to the work processes

Identifying and Documenting COVID-19 Schedule Delays, Hinderances and Impact on the Project's Work

B. Delays on the Contractor's or Subcontractor's side

- Procurement delays/late deliverables – material, equipment, and fabricated items
- Construction delays
- Inability to prosecute the work
- Employee refusal to work
- Reported labor unavailability

Cost Tracking Measures for Project Delay Damages

1. Project that is underway and progressing is officially suspended.

- Costs to shutdown and secure the jobsite:
 - Manhours expended, needed material, and equipment used to secure the site – itemize on the Daily Reports, code all LME items, and create a shutdown cost log/spreadsheet
 - Headcount – note the total # of workers before the suspension, the number of workers when work initially resumes, and the timeframe it takes to get back to the pre-suspension workforce level
 - Jobsite photos – document with time and date stamped photos all site condition changes attributed to the suspension of work
 - Demobilization – record the material, equipment, etc. taken from the site; track temporary storage, restocking, and create a demob log/spreadsheet
 - Security service, if necessary – costs incurred for jobsite guard, patrol, or additional security cameras
 - Public safety – maintenance of traffic; maintaining sidewalk or other closures; barricades; signage and temporary signaling for the jobsite

Cost Tracking Measures for Project Delay Damages

1. Project that is underway and progressing is officially suspended. (continued)

- Remobilization costs (when work resumes) – detail everything coming back onsite, the transportation costs, re-set up costs, and all associated costs.
- Idle manpower
 - Manpower – document all the idled workers; and detail the tasks/schedule activities they were last progressing and note if work was on the critical path.
 - Document the start date, end date, and duration of the idled period.
- Idle equipment
 - Company owned equipment – detail all the idled units; and record whether equipment was left onsite and unused or removed from the site and able to be utilized on another project.
 - Rental equipment – document the rental units being called off, rental balances, additional pick up charges, etc.
 - Document the start date, end date, and duration of the idled period.
- Critical path impacts and tracking
 - Provide regular schedule updates showing impacts to the critical path caused by COVID related delays

Cost Tracking Measures for Project Delay Damages

2. Project is set to commence, but does not start

- The project's timeline pushes out to changed performance conditions including into winter conditions, mandated construction restrictions, etc.
 - Portion of the work shifts into periods with higher wage rates – record the affected manhours and the wage rate differential.
- Material escalation – for suppliers, subcontractors, and lower tier
 - Increased costs for the project's major procurement items – detail the cost differentials from the original and Bid figure vs. revised proposals.
 - Increased market pricing for building materials when the Project actually does start – maintain a comparative pricing log/spreadsheet, and have the original material quotes used for the Bid and the subsequent revised material quotes.
- Labor escalation
 - Increased wage costs for contractor self-performed, Subcontractors, and lower tier – detail the cost differentials from the planned and higher wage rates, and maintain a comparative wage rate log/spreadsheet.

Cost Tracking Measures for Project Delay Damages

3. Loss of Productivity (LOP)

- Work performance and production assessment for COVID-19 issues
 - Social distancing – negatively impacts the efficiency of individual workers, crews, and the interdependent work of the subtrades.
 - Daily health and safety steps – negatively impact each worker's efficiency and the overall daily progress able to be achieved on a project.
- a) LOP Analysis – for a Project that continues through the COVID-19 matter
 - Assess: (1) the pre-pandemic production rates vs. (2) the impacted production rates during the height of the pandemic period and vs. (3) the production rates during the downside of the pandemic period.

Cost Tracking Measures for Project Delay Damages

a) LOP Analysis – continued

- LOP on measurable work – via schedule tasks/activities and schedule durations
 - Planned original duration of a task/activity
 - The actual duration, % complete, manhours, and costs for the % done prior to COVID-19
 - The manhours and costs expended during the COVID-19 period, and the additional actual workdays to reach 100% complete for a task/activity
- Determine the proven productivity trend on the project to date – manhours to achieve x% of a quantity of work, or manhours to achieve x\$ of the work's total value
- Compare the proven rate to the impacted manhours to achieve x% or x\$ during the COVID-19 period

Cost Tracking Measures for Project Delay Damages

b) Anticipated LOP – for a Suspended Project

- A separate and additional LOP will be experienced when work on a Suspended Project resumes
- The various tasks and trades will need to pick up where work left off, and this condition requires detailed planning, coordination, and scheduling
- Projects will likely experience another round of learning curves after restarting

Cost Tracking Measures for Project Delay Damages

4. Procurement Delays

- Late major procurement items and/or late material deliverables and the downstream impact on the construction schedule – time extension request & time extension

5. Construction Delays

- Suspension period – time extension request & time extension
- Delayed project start – change in contract time and the contractual completion dates

Unexpected Project Factors Impeding the Work that are Specifically Attributable to COVID-19

1. Effects of Social Distancing on performing the work
 - Discrete time lost for workforce and the crews having to maintain 6' distancing
 - Loss of productivity because of Social Distancing
2. Instituting additional health and safety protocols on project sites
 - Discrete time lost for the daily required temperature checks of the workforce
 - Discrete time spent on onsite disinfecting and cleaning (done multiple times daily each workday)
 - Additional time and material costs to install hand washing stations, as well the time to adhere to increased hand washing and disinfecting practices
3. Effects of the State's Shelter-in-Place Order on performing the work
 - What has the workforce done?
 - Continued in full force or with reduced manpower
 - Temporarily paused work, but has since resumed
 - Stopped work

Cost Tracking Measures for Quantifying Additional Costs of the Unexpected Factors

1. Workday Trackers – create record of the steps taken and time spent by the workforce adhering to the COVID-19 health and safety protocols.
 - Develop a template form for the project, and forms for each worker filled out by foremen or an assigned support staff.
 - Determine discrete lost time and the lower production from the workday trackers information.
2. Additional health and safety protocols – with vendor invoices.
 - Additional PPE costs for the Project's workforce.
 - Additional cost for hand sanitizer products on the jobsite.
 - Additional cost to bring hand sanitizer stations onsite at the temporary toilets.
 - Additional jobsite sanitation costs.
 - Additional cost for jobsite cleaning and disinfecting products.
 - Other related expenses.

Additional Direct Costs Due to COVID-19 and Cost Tracking Measures

1. Direct labor, material, and equipment costs
 - Jobsite documentation
 - Daily Reports – by the Contractor and from all Subcontractors; note the work progressing, on hold, suspended, and when resumed -- Daily Reports are pivotal
 - Work tickets and extra work authorizations – signed by lead party/rep onsite
 - Front line correspondence including emails, Meeting Minutes, etc.
 - Company documentation
 - Real time correspondence with all Project parties including Notices, primary letters, etc.
 - Job cost system – including adding specific COVID-19 cost codes and monitoring/managing the data and variances
2. Subcontractors and lower tier – pass through costs of appropriately supported items
3. Time-related costs

Additional Indirect Costs Due to COVID-19 and Cost Tracking Measures

1. Jobsite Overhead

- Superintendent(s)
 - Quantify the discrete hours spent administering or overseeing the additional health and safety protocols – cost during the impacted period or over the extended project duration
 - Quantify the additional hours spent coordinating work crews and work location assignments in order to maintain the 6' social distancing
 - Additional foremen or assistant superintendents required on the project due to split crews and working conditions caused by COVID-19

Additional Indirect Costs Due to COVID-19 and Cost Tracking Measures

1. Jobsite Overhead – continued

- Project Management – PM's, Assistant PM's, Project Engineers, and onsite support staff
- Quantify the hours spent managing the additional health and safety protocols, revising and updating the project schedules, and additional interface with the project parties
- Supplemental PM personnel necessary due to COVID-19

2. General Conditions – extended costs tied to the Project Delays and Schedule Impact

3. Home Office Overhead – cost tied to the Project Delays and Schedule Impact

Questions?



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