

Contractor Disruption Claims Driven by COVID-19

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Introduction: COVID-19 Contractor Disruption Claims

When push comes to shove, and it has, how confident are you that your company will bring to bear the expertise and resources necessary to successfully pursue a valid COVID-19-related disruption claim? If you miscalculate, or take a wait-and-see approach, others will answer the question for you. By now, you should have already given written notice to the owner if your work was and continues to be impacted by the pandemic. Now what? The purpose of this paper is to provide you with practical tools to control issues that arise when an owner directs you to proceed with work despite the pandemic. As I write this, you are likely working differently and harder than planned.

A. Delay

Recently, much has been written about force majeure in the context of COVID-19. Contractors use force majeure, or impossibility of performance-based defenses, to excuse their late completion of projects that are interfered with by major unforeseeable events. In each instance, the contractor contends that its inability to complete its work in a timely fashion is a result of a significant, uncontrollable force, such as a hurricane, war, or a global pandemic.

A contractor should first look to its contract to determine whether it may use force majeure as a shield against an owner-delay claim, or also as a sword to pursue recovery of its own unplanned costs. Some standard construction contracts specifically incorporate the term force majeure, French for “superior strength,” to describe a cataclysmic event, like COVID-19, affecting a project. Others imply it. Yet, even others are silent but leave room for contractors to argue impossibility or frustration of purpose to substitute for a favorable boilerplate clause. Regardless, no matter how well written, a contract cannot force a signor to perform an impossible task. Impractical is not impossible. Only the latter will trigger the proper application of a force majeure theory.

Some construction contracts direct that a contractor who is excused by a force majeure clause from liability to the owner for late performance is entitled to a non-compensable extension of time. In other words, it is protected from owner claims for lost profits, for instance, or liquidated damages, but must bear its own costs to occupy and staff the project for longer than planned and budgeted. Other contracts provide for a compensable extension of time and require the owner to reimburse the contractor for its general conditions costs incurred during any delay period.

Likewise, some contracts are automatically terminated upon the contractor’s delivery of a “force majeure notice” to the owner. If you pulled that trigger as a contractor, you had better be proven right about the existence of a true force majeure event and be justified in giving the notice. Other standard contracts provide that the contract may be suspended or terminated by one or both parties after a work suspension of a certain duration caused by an event such as a pandemic. Some

contracts refer to an “Act of God,” epidemic, Act of War, or other atypical event that, for all intents and purposes, stops work.

If it was automatic that all projects must stop when faced with a force majeure event, and restart only once the impact passes, this analysis (and whether the event was really so significant) would focus upon delay. Lose three months to COVID-19, shift the project’s substantial completion date forward by three months, allow all milestones to follow, and maintain original durations once free to perform the work as planned. The owner would either be required to reimburse the contractor for extended general conditions or not, depending upon the contract’s language. It may not be easy but at least this is a direct analysis that is susceptible to straightforward measurement.

B. Disruption: “Keep Going. Make it Work. We’ll Figure it Out Later.”

The focus of this paper is not the linear extension of the project duration due to negative impediments to progress caused by a force majeure event. Disruption-loosely termed as an unanticipated disturbance, hindrance, or interruption of the contractors planned work methods-is a different and often much more complex concept.

Oftentimes a contractor’s largest risk and variable expense on a project is the cost of labor. If external factors require a contractor to perform differently than planned, to install the intended amount of work during a shorter duration, or to install the work under materially different conditions, or even to perform a larger work volume during an unadjusted duration, the contractor is said to have been disrupted. The inefficiency factor the contractor used to estimate its labor hours and the anticipated cost of the work will prove inadequate under the actual as-built conditions. Labor will be less efficient than expected and there will be more of it. As external factors drive more changes in Plan A, and the contractor progresses to Plans B-F, that variable labor expense may explode. One driving question is who will bear the delta?

1. Some Owners, Under Pressure, Will Just Say “Keep Going.”

Instead of accepting that an unforeseen disruptive event has necessitated a complete work stoppage, bearing the financial exposure of lost rents and carry on loans, absorbing the lack of timely revenue stream during an agreed shut down along with potential exposure to claims for contractor delay costs, many owners will instruct their contractors and construction managers to proceed with the project, be as efficient as possible, and work around the impediments. That instruction will be passed down to subcontractors, vendors, and others who will try to build the project despite various on and off-site hurdles including a broken supply chain and new work rules. And, this decision will drive the most significant disputes.

2. I am Entitled to Work My Plan.

When a contractor is required to perform differently than planned, and to illogically seek out available, unhindered (or less hindered) work in a different sequence than scheduled, the work will either take longer to perform (delay) or will take more hours to finish “on time” (disruption) or both. If efforts to maintain planned durations, despite performing under materially different circumstances, fail, your project might encounter both delays and disruption, aka “taking it from both ends.”

Contractors must be ready, if an owner directs them to proceed, to make that customer fully aware of potential categories of impacts, rough order of magnitude of claims, and of the contractor’s

intention to seek additional payment if the contract and law both permit it. Don't stop at "my costs are increasing or have increased." Go directly to "I will track/have tracked these costs and will submit them to you for reimbursement."

C. Decisions Made Under Stress Vary in Quality.

If an owner has an option to suspend work due to COVID-19, but elects to proceed, some contractors will argue that the owner's instruction, not the force majeure event itself, constitutes an owner-imposed changed condition, owner-issued new contractual requirements, or potentially an owner seizing control over the contractor's methods and means of construction. Some owners will respond that they did not cause the pandemic and are excused from any financial impact encountered by the contractor because of it. Each of these arguments calls to the front the Changes provisions and unforeseen conditions clauses in most construction contracts. Now is the time to memorialize impacts, give solid notice, follow up on it, eliminate owner surprise, and to logically present your costs on a rolling basis.

1. Contractors Are Being Told To Suck It Up While Being Crushed.

The construction industry is uniquely dependent upon both an adequately functioning supply chain and the provision of reasonably productive, experienced, and well trained labor and supervision. Surprises in either often result in losses and write downs. If you, as a constructor, are impacted by either off site events such as a fractured supply chain's impact on your procurement, or on and near-site impacts such as government restrictions including social distancing, transportation limitations, and extra PPE, you will have to think hard about which notices of impact you direct to the owner.

If the contract documents do not permit you to recover for extended general conditions, instead of just accepting a delay if the owner directs you to proceed, you should give notice of a potential claim for disruption and of your right to be excused from owner claims for lateness. You should not wait until the project is substantially complete to identify these costs and to submit a claim. You should give written notice, advise and warn the owner about what might be coming and explain why you anticipate that those activities will cost more for you to perform. It is also important that you segregate all of these force majeure-driven additional costs from impacted costs unrelated to COVID-19. Assume nothing.

As an example of how some owners are responding, I recently reviewed a client's draft notice to an owner that read:

"This is our COVID-19 Notice. When we restart the job, we will submit a change order for the costs. Please let me know if you have questions."

The owner responded:

"I don't understand your letter. Construction is exempt from stay-at-home orders in this state. You have not demonstrated that the pandemic has fundamentally impacted your performance. As such, you have no grounds to stop work. Unless you are on site tomorrow and at full strength, we will conclude that you have abandoned the project and will notify your surety."

D. Disruption Takes Many Forms.

It is likely that state or local-specific safety requirements driven solely by COVID-19 have impacted your acquisition of labor, not just materials, for the project. If your workforce is heavily dependent upon public transportation, or is subject to travel restrictions and confusing stay at home orders, it may be impossible for personnel to come to work at all. If your workforce cannot get to work, you will have to replace them (if you can find replacement workers) and train the new personnel.

If you estimated a single rally point at which all of your crews would gather in the morning to be bused to the job site, but now because of social distancing you have several additional pick-ups, you will spend unplanned dollars to mobilize your personnel to the job site. If a bus transported 25 workers at a time in November, but was only allowed to transport 5 or 10 in April, you will spend additional time mobilizing to the job site. Whose cost is that to bear? And, that burden of idle or underutilized manpower can proliferate.

Likewise, once you have mobilized your entire workforce to the project, you may have new challenges in efficiently accessing available work areas. If local or state regulations require that workers have their temperatures taken, submit documentation, don special PPE, wait in line at multiple stations exposed to the elements while standing six feet apart, what used to be a hard 7:00 a.m. pickup and a 7:30 a.m. start on the job site could easily become a rolling 9:30 a.m. start. If leaving the job site at the end of a shift requires similar lost time, you could lose many hours each day, week, and month that could not have been foreseen at the time you prepared your estimate. Have you tracked this lost time and the impact of these new rules of the game?

1. Proof of Causation is Key - The Owner's Directive.

If the project owner could have suspended work and prevented these costs from being incurred-by you-but elected to make you "jump around" and find whatever available work you could, it may have exposed itself to changed conditions claims and to reimbursing you for the unplanned cost of your performance. In that case, the cause of your harm is not the pandemic. It is the owner's directive to proceed under changed conditions despite the pandemic.

If, in order to find work for your team, you split your crews into smaller groups, fanned them out throughout the building or work area differently than planned, and added supervision to manage their work, you have spent more money and have worked less efficiently than planned. It is a simple fact that crews which work each day in sequential fashion, with ready access to planned work, tend to perform their tasks faster than those that are illogically spread out throughout the job and who have to micro-plan or modify their plans each morning, or multiple times a day, to stay busy. Are your crews looking at the paper schedule and drawings once a week or are they consulting a color coded, hand-drawn calendar on a job trailer white-board that tells them which rooms are ready for them, which are not, and which floors are "hot" and need to be worked on out of order this shift, which devices are not on site, and which spools are missing? Is the subcontractor "ball-is-in-your-court" log a forty page spreadsheet? How long have your RFI's been pending with the A/E seeking direction about how to perform your scope with equipment and materials missing that will delay occupancy or required testing?

E. You Only Built What is on the Drawings - Why Would I Pay you more for that?

Many owners will contend that unless they required you to perform more work/greater scope than planned, they should not be responsible for any of the additional costs you incurred to perform the

contracted-for work. A recently read a letter in which an owner's representative wrote "The employer (UK project) hired you to build a 30-story tower. You are building a 30-story tower. The employer will not entertain extras because of COVID-19?" Wait. What?

Some owners will compel you to proceed in the face of unforeseeable hurdles to avoid their own short term cash flow crunch that would come with a work stoppage and will instead shift that immediate financial burden to you. Are you ready to finance the project as it works its way through COVID-19? If you are unprepared to record and protect your claim, your short term status and a project lender could become permanent.

1. I Don't Know. What Do You Think?

Few things kill progress on a project, and make labor less efficient, than indecision. Depending upon your country, state or locale, it is likely that you may read two different newspapers, visit two different websites, or watch back-to-back government press conferences, and draw different conclusions about how and under what restrictions your project may proceed. Regardless, it is axiomatic that you cannot install materials and equipment until they arrive on site. If you have told the owner that none of your floor tile will arrive in a timely fashion, or that needed valves may not show up until months later than planned, you should also explain the impact this will have on the trades-how one subcontractor's progress will restrain another's and how all of this will harm your ability to obtain temporary or permanent occupancy or provisional acceptance. Tell the owner what has changed and explain why you could not have planned or budgeted for the new and different work conditions and costs. Ask questions. Submit RFI's. Track time waiting for answers.

You should not assume that telling the owner that you received an e-mail from your supplier announcing that materials are hung up in the supply chain outside the U.S. will automatically convey the nature and extent of the impact to your work and associated additional costs that you intend to recover. You should continue to explain that you have and are going to spend more money to perform the planned scope because the conditions under which the owner is requiring you to work are very different than those incorporated into your estimate, plan, and schedule. Initially, many owners will read these notices as excuses instead of explanations. It is often easier for an overwhelmed owner to direct you to proceed with your work if you do not put any meat on the bones in your notices.

Assume that you have explained how a lack of flooring, doors, fixtures, spools and certain key equipment would make it impossible for them to occupy the building or to commission systems. Your goal should now be to provide adequate notice to preserve your claim as it develops and, as importantly, to give the owner updated real time information from which it may make timely decisions. Don't just become a blind letter writing machine. Work to drive the owner to the table to discuss construction scheduling, partial suspensions, future acceleration, phased turnover, and opportunities to lessen the blow of COVID-19, if any are available.

To the extent reasonably possible, it remains your obligation to mitigate damages and avoid expenses that you will otherwise later seek to recover. As a general statement, owners and contractors are not legally obligated to protect each other from their own incompetence or poor decision-making. Regardless, you are always better off to avoid damages and to shrink the scope of your disputes than to allow them to snowball.

Be a nag. Tell the owner in your notices, and repeat as the facts develop, that your baseline planned productivity and sequence of your work have been disrupted not by COVID-19, but by the owner's directive to proceed in the face of COVID-19. Improve your daily logs. I have rarely seen daily logs that could not use additional detail, segregation of impacts or better descriptions of events. The pandemic will not last forever. Neither will its fallout. Assign the resources to document the project better than you have ever done in the past. Focus on the need to critically and thoroughly memorialize impacts measured in weeks or, at worst, months. That task, while not necessarily easy, isn't impossible either.

2. Your Dailies Can Make or Break Your Claim.

You should add a section to your daily logs and meeting minutes called "COVID-19 Impacts." You should further break down that box into specific unplanned costs-ingress costs, egress, crew overtime, missing materials to be provided by others, and so on. List specific impacts to your work, not generic ones.

If you planned a 30 minute mobilization each day from an offsite parking lot to your urban tower project, and now because various restrictions that same process is spread out over 2 hours, then record 2 hours as your mobilization time on your daily log. Tell the owner in writing that your original estimate included a 30 minute mobilization and you are losing 1.5 hours per day just bringing your people to the job site because of social distancing and other local requirements. Write in one of your notice letters that there would have had been no impact on your mobilization costs had the owner stopped the project because of the pandemic. Be direct. Be matter-of-fact. Don't hope for the best. If equipment or materials are missing, identify them by name. Tell the owner when you had planned to install that work and why you can't. Finish with what the plan will be to piece-in that work later and why that will cost more money. Also ask your subcontractors to speak up at your meetings and take notes. You do not want them to surprise you with claims out of left field, after substantial completion, either.

Validate your planned costs. They are one end of your claims measuring stick. If you simply used to plug in a number for an activity that bears no relation to reality, then you have to recreate your baseline for that activity to accurately measure it. Evaluate how you actually performed on the project and what your mobilization time, for instance, was on average per day before COVID-19. If that timeframe is really an hour, not 30 minutes, then your daily lost time for mobilization is not 1.5 hours; it is 1 hour. You can "re-baseline" an impacted activity, any activity, once it becomes critical to your demonstration of negative impacts. Just make clear that this is what you are doing. A baseline is no less valid of a starting point for a measurement because it was actually measured in the field as opposed to in your estimate. Of course, whatever baseline you glossed over when preparing your estimate will wind up being the important one. You can address that with real data.

3. Produce Your Estimate.

Owners are not going to take things on faith. Why should they? When the time comes, be prepared to either produce your estimate to the owner to establish what your baseline costs were for certain activities that have been made inefficient, or to explain why you did not have that cost separately broken out in your estimate, but recreated it with pre-disruption figures to reflect actual durations. The same concept applies to other activities, up to and including circumstances in which you planned a certain duration per weld ("diameter inches") and had multiplied that figure by planned

lengths of pipe. Since you are no longer able to install pipe continuously from east to west due to missing equipment, you can determine an actual per weld or per meter efficiency of installation. You can demonstrate for the owner the stop and start of activities due to missing equipment, as well as the necessary comeback work once equipment arrived, and that both increased the all-in time and cost of your performance. Evaluate and compare by work breakdown structure (“WBS”) if you are able. Track separately the extra scaffold rental costs to support overhead pipe, leaving a gap for late equipment.

I am not suggesting that this is easy or enjoyable, but contractors who build things every day tend to feel that impact of jumping around the job site, seeking out available work that changes on a daily basis, rather than performing sequentially in accordance with the baseline construction schedule. Once you feel it, write it down. Take a photo of it. If you missed recording key data yesterday or last week, do it now before find yourself just making it up from a fuzzy memory.

To give yourself the best opportunity to present a valid claim, you must translate those hindrances to dollars by comparing planned to actual investment of resources and support the claim with project records. Photographs and video are your friends. Take and store all you can. You aren’t trying to spin anything. You are taking snapshots in time, literally and figuratively, to demonstrate how your planned costs were no longer sufficient to complete the work under owner-changed circumstances. And, if one or more of your subcontractors becomes the weak link, or if you are a subcontractor and one of the others keeps getting in your way and letting you down, the photos and contemporaneous records will serve a dual purpose on pass-down or pass-through claims.

4. Give the Claim a Real Gut Check.

In their defense, owners are going to receive a wide variety of claims, the quality and thoroughness of which will vary drastically. Don’t submit a total-cost/total-time claim in which you state that you expected to make \$500,000 on the project, COVID-19 happened, you lost \$500,000 on the job, so must be owed \$1,000,000. Or worse, if you calculate your claim in a fashion in which you anticipated a \$500,000 profit, lost \$500,000, but believe you are entitled to a \$2,000,000 recovery, something is likely drastically wrong in your analysis or math. You will not get a windfall because of the pandemic. Submit one of those pie-in-the-sky claims to start the bidding high and it will be ignored, pocket-vetoed, and die a lonely death on the bottom of the owner’s claim pile.

If you don’t ask you won’t get. While this is not the time to pile on, it is the time to make sure your claim is well supported and includes all of the relevant components that are permitted by contract. Successful contractors will submit claims in a segregated and specific fashion so a rational owner can fairly evaluate them. One of the simple ways in which you can track your claims with specificity is to add cost codes.

5. Liberally Use Cost Codes.

If you have been badly disrupted on the project as a result of the owner’s requirement that you proceed, it is likely you have had to add supervision to the project. If you are forced to add additional supervision such as superintendents and project managers to the project because of COVID-19, then you should list each of those additional supervisors in a different cost code and have your team track their hours to those numbers. That way when the owner asks about your additional supervision

costs, you can go directly to your payroll records and job cost data and identify who was added to the project as a result of COVID-19, when they arrived and left, and how many hours they worked.

Similarly, if you have had and/or are going to have periodic comeback work for your pipe crew to account for gaps in pipe installation due unavailable equipment or materials, you should create a separate cost code for that out of sequence work. Then, if you are able, track all of the manpower that is sent back to partially installed work to close gaps. You should also track their time associated with installing the equipment when it gets there and adding it to the pipe run and stripping scaffold. Same for missing spools. Make sure that your crews, or your field engineer, is recording time spent on base contract work under one cost code and comeback work under another.

That way you are not left with a circumstance in which you planned a \$200,000 cost for installation of a certain pipe run, and tell the owner that it cost you twice that and you would like to recover the delta, please. Instead, you can readily identify your planned cost and demonstrate how much of that was spent to install the work leaving gaps, then identify the dates on which manpower returned to the discontinuous line and what exactly it is they did. When the owner asks what your additional costs were to wait for and perform comeback work to install the missing equipment in a piecemeal fashion, a few men on a few days a week, you can generate that information from your job cost reports. If you have this data but have not migrated it to separate cost codes, have your field engineers or PM's do it now, not six months from now while the claim is being considered. By then you will be too busy on productive things.

For example, assume that you spent \$225,000 (instead of \$160,000) to perform 80% of the work in one area under adverse conditions. You spent another \$75,000 to go back six times to piecemeal rig and install the rest of the equipment and pipe once it arrived months late. Your overrun is \$100,000 and can be validated by the fact that you installed a similar pipe run, with all of the spools and equipment available, for your planned \$200,000 cost.

I understand from experience that contractors protect cost and bidding information like state's secrets. That being said, if an owner asks you to provide your estimate to establish your baseline and job cost reports to establish which personnel performed which tasks out of sequence and with what additional effort so they could check the names against gate logs or other records, you have two choices. If you refuse to produce the information you are asking to be believed instead of proving your claim. If you litigate, the owner will get these records in discovery anyway. If you show the owner at the claim stage, you are instead providing a real-time and real-cost data driven explanation for your position. You can certainly ask that the owner agree to execute a basic confidentiality agreement to keep the information private.

It is possible that, if you have been disrupted as described in this paper, you will have had a significant investment of additional and unplanned time and expense, no increase in the actual work volume, but a substantial additional expense for labor. You may have all of that and, despite your best efforts, the project may complete later than planned. You may be in a situation in which you may use a force majeure defense a shield, to protect you from liability to the owner for liquidated damages for late completion, while also using it as a sword to support your claim that the owner's directive to proceed under radically changed conditions actually caused your extra labor costs.

Lastly, do not hold onto your notices and claim out of concern that the owner will get mad at you and stop paying undisputed sums. If anyone tells you that they were just about to cut you a fat

check, but now won't because you protected your company by submitting a proper claim, they are lying. That, and "I'm almost finished," are the two biggest lies in the construction industry.

Conclusion

Many analogies may apply here, but I often think of the "leaky raft." If you are hired to be a white water rafting guide, you might find yourself sitting on the bank after a rock unexpectedly tears a hole in your raft. You might have a roll of duct tape with you. If you roll up the raft and stuff it in your truck, your customers' trip will likely be ruined, but at least no one will drown. If the customer puts a gun to your head, literally or figuratively, and forces you to tape over the hole and get everyone back in the water, he has taken responsibility for the foreseeable bad things that come next because of that order. In this example, the rock did not cause your harm. Rather, the response to that uncontrollable force, the directive to proceed, did. It is easy to imagine how you both could regret the decision to proceed and hard to discern how you could come out ahead if you are not prepared and vocal.

For more information please contact a member of the firm's [Construction Practice Group](#).

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Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.

