Guidelines for Construction Owners Responding to COVID-19

Across the country, construction projects of every nature are impacted by the COVID-19 pandemic. The situation and governmental response to the pandemic continue to evolve, and owners must keep abreast of these changes to ensure they manage their construction projects appropriately. There are a litany of issues, legal and practical, that owners need to assess when deciding how to manage ongoing projects and those in the pipeline. We prepared these guidelines to assist owners in navigating the situation from a risk management perspective.

Analyze Your Contractual and Legal Obligations and Remedies

- Undertake a project by project assessment of the contractual provisions of all parties, including termination and suspension rights, force majeure, notice requirements, change request requirements, entitlement to time extensions and cost increases, the effect of refused extensions, liability limitations including exclusion or waiver of delay and consequential damages, escalation clauses, changes in law clauses, flow down provisions, and clauses related to emergencies and safety.
  - Make sure to consider the implications of an extended suspension of work – it may permit contractors to terminate their contract without consequences, and may trigger mechanic’s lien deadlines.
  - Are there any contractual benefits gained from suspending the project yourself as opposed to relying on a government suspension?
  - Consider whether terminating a project in the face of an extended shut down is more favorable contractually and economically than suspending it.
  - Determine what types of events entitle your contractors to extensions of time and extensions of cost.
  - Does your contract include labor or materials escalation clauses that may come into play?
  - Are there profit sharing or risk pooling considerations impacted by delay?
- Pay attention to the current state and local orders impacting work.
  - States and local governments are issuing unique shelter-in-place and business closure orders that treat
construction operations differently. Some ban construction altogether, while some permit certain types of construction to proceed, such as infrastructure and affordable housing. And, in some states, such as California, counties and cities are also publishing orders that are not entirely consistent with their state’s order.

- States and local governments are also publishing requirements for the management of construction projects with detailed hygiene and safety requirements requiring contractors to provide hand washing stations, PPE, and to enforce social distancing amongst workers. Owners will need to assess who contractually should bear the burden of these increased requirements and also who practically is most able to procure materials and enforce the requirements. Given the shortage of PPE, these requirements could effectively suspend projects.

- Carefully assess your rights and obligations in the event that applicable orders require a suspension of work or otherwise limit access to the site. Even if your state has generally banned construction, applicable orders may permit your contractors to access the site to properly secure it. Your contract might have similar requirements. Also assess your rights and obligations in the event that your contractors and designers refuse to continue working.

- Determine whether contractors and subcontractors on your projects use union labor. If so, keep abreast of union positions on the pandemic. In some cities and states, such as Massachusetts, unions have unilaterally called for a construction shutdown despite state orders to the contrary. What contractual rights do you have, if any, in the event this occurs?

- Review your state’s mechanic’s lien laws.
  - An extended cessation of work may trigger lien filing deadlines.
  - For example, in some states, such as California, if all labor ceases on a private project for 60 consecutive days, it is a completion equivalent, triggering deadlines to file liens.
  - Make sure to calendar all major events on the site, such as work cessation, and any lien or contract deadlines they may trigger.

- Review applicable legal doctrines such as impossibility/commercial impracticality, frustration of purpose, and illegality, which may affect your ability to enforce certain contractual provisions.

- Ascertain the contractual avenues for protecting your projects should your contractors default, terminate, or go out of business.
  - Can you issue joint checks to subcontractors to ensure they are paid?
  - Can you accept assignment of subcontracts and complete the projects yourself?

- Review your payment and performance bonds. Determine what triggers the bonds and what your notice requirements are in the event a triggering event occurs.

- Educate yourself about the potential of a construction loan modification through Section 4013 of the CARES Act if you are at risk of default.

Communicate with Your Contractors and Designers

- Discuss the scope of any government orders potentially affecting your projects with your contractors. Determine if any intend to walk from the job because of orders, health concerns, union orders, etc. Let them know if you intend to suspend the project.

- Provide any notices required by your contract.

- If your projects can continue, discuss what additional materials and controls may be needed on the project, such as temperature checks, hand washing stations, PPE, access limitations, debris removal, etc. Can your contractor comply and at what cost? Consider whether you can and should assist the contractor’s efforts.

- Discuss current and projected impacts the pandemic and government orders will have on your projects.
  - Can you maintain the current schedule with social distancing and the current labor force?
Should portions of the project be resequenced?
Can you accelerate work when appropriate to make up for schedule lapses?
Are there materials the contractor anticipates will no longer be available, will be delayed in delivery, or will significantly increase in cost? What can you do to mitigate these issues? Can you gain any efficiencies in coordinating materials sourcing across all of your projects? If so, do your contracts permit you to do so? Can materials be ordered in advance and safely stored?
Are there any permitting or inspection deadlines you must meet that the foregoing will affect? Are local governments waiving requirements or granting extensions in light of COVID-19? Make sure the contractor is being proactive about these issues and if you have any staff that can assist, have them do so.

- If you have projects that will be suspended, ensure that your contractors are taking all reasonable steps to secure the project sites.
- Determine if your contractors or designers can continue any work remotely.
  - Is there any prefabrication work that can safely and legally continue offsite or can you increase the use of prefabrication? This would move work into an environment where health risks are more easily managed and reduce the on-site person count and health exposures.
  - If remote work is possible, consider investing in technologies that allow more fluid collaboration without requiring physical presence, such as digital project management and whiteboard systems, threaded messaging, and unstructured collaboration systems in addition to structured digital models and databases.
  - Ensure those working have a plan in place for efficient communication and work flow.
  - Are there unique controls or checkpoints for remote work you can install to ensure the value invoiced matches the value received?
- Request your contractors to set-up a separate billing code or tracking mechanism for cost increases related to COVID-19.
- Request your contractors to proactively assess schedule impacts and procurement timelines to reduce impacts on your projects.
  - Request an updated procurement log to daylight supply issues and identify alternatives before they actually impact the project.
- If your project is suspended and there are potential adverse contractual or legal effects (i.e. the ability of contractors to terminate after a specific period of suspension; triggering of mechanic's lien deadlines; or contractor solvency issues stemming from extended suspensions), consider negotiating a contract amendment or change order addressing these issues.
- If possible, have candid conversations with your contractor about their liquidity and ability to maintain a labor force in the event of lengthy job suspensions.

Assess the Reputational Impacts of Your Actions

- In light of the difficult economic and social implications of the pandemic, you should consider how your actions will affect your public reputation and your relationships with your contractors and designers.
- What are the implications of individuals making accusations if they became ill on your projects?
- If you play hardball with your contractors and designers when interpreting your contract and negotiating (or denying) change orders, are you going to damage relationships?
- Do you have a superior bargaining position based on your space in the market such that you can negotiate favorable deals on suspension agreements and change orders?
- Is there a benefit to your appearance in the community based on allowing work to continue or completing the project without delay?