

Construction and Design Claims During COVID-19 – Protecting Claim Rights

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As the COVID-19 health crisis continues its rapid evolution into a widespread economic crisis, its impact on construction has accelerated with each passing week. While Governor Holcomb's Executive Order classified construction as an "Essential Business," construction projects have nevertheless been particularly susceptible to COVID-19 related slowdowns and shutdowns. Labor and material shortages, supply chain disruptions, and the impracticalities of performing construction operations while social distancing have all operated to create delays, inefficiencies, and unanticipated additional costs.

These problems have been compounded by ongoing uncertainties regarding the prevalence of the virus, the effectiveness of preventative strategies, the availability of adequate testing, and the duration of social distancing requirements.

Construction and design contracts typically require compliance with applicable rules, regulations, and orders of public authorities that pertain to the work. For example, the American Institute of Architects (AIA) A201-2017 General Conditions § 3.7.2 provides that "[t]he Contractor shall comply with . . . applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work." The EJCDC C-700 Standard General Conditions also contemplates that a contractor may be entitled to pricing and schedule relief if laws or regulations change after bids are submitted.

As construction projects continue to be negatively impacted by the inefficiencies resulting from social distancing and new safety and hygiene requirements, managing the response requires a deliberate and thoughtful approach. As any construction attorney will tell you, the first response to a project suspension or delay event should be to "check your contract" and more specifically, the claim notice requirements. These provisions will identify the type of notice that must be given, to whom, and when. Whether the claim is for a change order, payment, or schedule relief, proper notice to upstream contractors, owners, and sureties is essential to preserving the right to relief. This is particularly true for subcontractors who must also be mindful of the notice requirements in the prime contract.

Notice provisions can be found in multiple locations within the contract documents. Some are in the front-end Division 1 specifications, or the general and supplementary conditions, while others are included in the scheduling, differing site condition, delay and additional cost/time provisions. Equally important are the flow-down provisions and order of precedence clauses that may incorporate additional notice requirements into downstream agreements.

Once these provisions have been identified, strict conformance with the timing and procedural requirements is often critical to the success of a claim. Notice for delay events is often a multi-step process with initial notice requirements tied to the impact event and subsequent requirements for when the costs become quantifiable. Other provisions may impose additional requirements for a "formal claim" submission, and ongoing delays may require periodic updates as costs continue to accrue. The technical procedures for claim submission must also be followed closely, including whether the notice is submitted electronically or by mail, and identification of the recipients who must receive the claim.

Supporting a claim notice with appropriate documentation is also important. For example, if the claim involves schedule relief, providing an accurate, up-to-date schedule at the time of the delay event can establish a benchmark for future impacts and any resulting inefficiencies. Similarly, a suspension claim should identify

operations affected by the suspension and any impacts to the critical path. It should also identify the damages that may result from the claim such as demobilization and remobilization costs, ongoing general conditions costs, idle equipment, equipment and material storage, or extended rental costs. Finally, if work is stopped entirely, careful documentation of field conditions, including staged and stored materials, in-progress and completed work will help eliminate disputes on payment claims for work performed.

Timely notice of claims serves an important function because it allows upstream contractors and owners to take appropriate measures to respond to and mitigate the underlying condition. An owner or general contractor that receives late notice may be limited in the options it has to respond. Because of the harm caused by the time delay in asserting claims, notice requirements are strictly enforced by Indiana courts. In one case, *Starks Mech., Inc. v. New Albany-Floyd County Consol. School Corp.*, 854 N.E.2d 936 (Ind. App. 2006), an MEP contractor submitted an RFI as its “notice” of design defects and related delays and later sent additional RFIs as construction progressed. At the end of the project, the contractor submitted a payment application with a claim line item entitled “engineering deficiencies” – the first notice of its actual costs. The court concluded that the contractor’s failure to provide timely written notice of its claim for additional payment in accordance with the parties’ AIA A201 (1997) contract barred it from recovering additional requested payment.

Because the failure to provide proper and timely notice will jeopardize the chances for success, it is imperative that contract requirements be strictly adhered to. Contractors who rely on partial or even substantial compliance with claim notice procedures do so at their own risk particularly in states, like Indiana, that strictly enforce notice requirements. A prudent approach to protecting construction and design claims during COVID-19 is to: 1) review existing contracts for provisions that address notice and claims; 2) identify all deadlines that are required to preserve claims; 3) carefully document and substantiate each claim including any increased costs for labor, materials and equipment, schedule impacts, and consequential damages; and 4) send claim notices on time and to the right parties.

For updates on COVID-19 and its impact on the construction industry, please visit our [COVID-19 Resources](#) page. The attorneys at Drewry Simmons Vornehm, LLP are continuously working to provide clients with timely, relevant analysis on those businesses and industries hardest by the pandemic are prepared to answer your questions. If we can help you navigate these extraordinary times, please contact us.

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