



EMERGING FROM COVID-19: IMPACTS TO CONSIDER

By: Charles F. Boland, PE, and Barrett L. Richards, CCC, CEP, PSP

Analysis of Developments in Construction Law for Division 1 of the American Bar Association's Forum on Construction Law -- Litigation and Dispute Resolution

The relaxation of COVID-19 stay-at-home orders and reopening of the economy is a prominent news headline. As the return to everyday activity progresses it is important to prepare in advance for this “return to normalcy”, which will almost certainly come in stages, especially as it relates to construction activity. As it happens, there will be numerous considerations depending on the stage of your project in the construction lifecycle, the status of the project stakeholders, and the implementation of revised or new safety requirements. Consideration should be given to productivity, schedule, and supply chain impacts.

Productivity Impacts

Projects that have been allowed to continue operations during COVID-19 restrictions should not expect normal work activity to be achieved as the stay-at-home restrictions are relaxed. Current social distancing and personal hygiene requirements will likely remain in place and continue to impact site access and worker productivity until a vaccine is developed or the severity of the virus wanes. There are numerous considerations for assessing realistic productivity when planning for work in the post-stay-at-home world:

- How will the flow and assignment of workers be coordinated and monitored to ensure required distances are maintained?
- What about coffee and lunch breaks?
- Are adequate cleaning stations and disinfectant supplies available per applicable regulations worker hygiene and tool and equipment cleaning?

Careful consideration of social distancing and personal hygiene requirements should be applied to projects resuming operations following a shutdown as well as those starting from day one. The construction industry's emergence from COVID-19 will be a slow, methodical process that will result in reduced productivity levels. Losses in productive time will come in many forms:

- Vertical transportation (hoist / elevator) limitations
- Site workflow constraints

- Getting workforce to project site
- Work area changes / restrictions
- Field health checks
- More regular cleaning requirements
- Additional tools to minimize sharing
- Longer/more workdays to stagger shifts
- Added supervision
- Limitations on labor on site

For projects that were suspended or restricted, a reforecasting of costs will be in order as many contractual Notice provisions require an estimated cost of the anticipated impacts to be provided to Owners. For new project starts, the same steps will be needed to justify changes in bid price.

Projects that have been shut down or slowed will need to account for demobilization and remobilization impacts. The pre-shutdown conditions and worker productivity must be thoroughly documented and communicated to all project stakeholders. This baseline condition will be critical to establishing the additional effort expended to remobilize and resume operations on site.

Schedule Impacts

On projects that have been shuttered, scheduling impacts will need to be addressed before work can resume and some of those steps may be significant.

- What will be the impact of the timing for restarting a project?
- What is the availability of labor, particularly in union markets?
- Will multiple work shifts or resequencing of work be needed?
- Are contractual actions required to document and address schedule impacts?

Validation of your project schedule will be necessary regardless of what stage your project was in when it was shuttered or otherwise impacted by COVID-19 restrictions. Some projects will require a recovery schedule to make up



for delays and account for changes resulting from COVID-19. This schedule should memorialize the schedule scenario that was in effect before the project was impacted by the virus and it should clearly show what changes were made to recover from any resultant delays.

There will be many projects looking to restart at the same time and that could put constraints on resource availability including materials, equipment, and labor. The work force will be restricted and will be driving the schedule not the other way around. Based on the work force and expected productivity, adjustments to the schedule will be needed to reflect reality. Only then can the labor force, to the extent possible, be effectively coordinated and a schedule implemented.

Notice of COVID-19 impacts submitted earlier should be amended to reflect current conditions, and the amended notices should accompany submissions of recovery schedules in order to: (1) strengthen contractors' arguments for relief, and (2) allow the owner to evaluate the financial implications of following the recovery schedule. Regardless of whether a recovery schedule is submitted and/or accepted, regular monthly schedule updates should be prepared and submitted in order to document progress as well as any additional COVID-19 related impacts that may arise.

Supply Chain Impacts

Procurement is another serious consideration because, although construction may be allowed to resume in your area, there may be supply chain impacts:

- Are subcontractors and suppliers located in states that remain under stay-at-home orders?
- Are subcontractors and suppliers able to pick up where they left off before a shutdown?
- Were lead times interrupted on orders placed before shutdowns came into effect?

All vendors should be contacted to confirm material delivery dates. These arrangements need to be made in advance of remobilization and resuming job site operations, especially if alternate options need to be pursued because of restrictions on the use of international or bankrupt suppliers.

Contractors should consult with their subcontractors and suppliers when they resume work. Overlooking these parties can give rise to unnecessary delays and claims. Clear communication on changes to the project and collaboration on recovery actions are some steps that can be taken to involve subcontractors and suppliers.

We will emerge from COVID-19, but it will take a concerted effort by all of us. It will be no different for the construction industry. Taking time now to consider and address impacts will set the stage for successful recovery that will benefit all stakeholders.

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About the Authors

GREYHAWK Principal and Chairman of the Board Charles F. Boland, PE, (left) has over 40 years of experience in engineering, construction, project management, and in cost/schedule analysis in the preparation and evaluation of contract claims on construction and industrial projects. Reach him at cboland@greyhawk.com.

GREYHAWK Senior Managing Consulting Barrett L. Richards, CCC, CEP, PSP, (right) has over 20 years of experience in project management oversight, claims and litigation support, project planning and scheduling, and preconstruction and construction cost estimating. Reach him at brichards@greyhawk.com.