

COVID-19 Strategies for the Construction Industry

As the scope and impacts of the novel coronavirus (COVID-19) pandemic continue to grow, everyone is struggling both to adjust to new ways of life and to grasp what all of this will mean for business. How governments respond to COVID-19 is changing hourly, with more and more businesses forced to run at skeleton crews or shut down altogether. There will be substantial delays and cost impacts as a result of COVID-19 and related government actions, but there is no way to predict what those impacts will be or when they will end. Some contractors may not be feeling any of the impacts yet because they have not been told to shut down or because they are considered “essential” for purposes of government work restrictions. However, it is very possible and likely that at some point, work will grind fully to a halt. Even if it does not stop altogether, work will be more costly or may take more time because of the totality of many small impacts. While it is impossible to predict the full impact of this entirely unprecedented pandemic, there are important actions that construction industry contractors, subcontractors, and suppliers should take now to better control their future when things start shaking out. Below are some of these steps that should be taken immediately to make safe your work force, your contract rights, and your cash-flow.

Safety

Of course, the absolute first step is for every company to make sure that it takes proper precautions to protect its employees and their families. Most construction work cannot be done remotely, or properly performed while social distancing, but steps can be taken to blunt the growth of COVID-19.

Check for official guidance

Everyone should regularly check for updates from their local health authorities, local governments, and the CDC for guidance in protecting employees, particularly those who are in increased risk groups. To the extent governments or authorities do not shut down operations, contractors should consider staggering shifts and sequencing work areas to avoid unnecessary grouping of workers.

Work remotely (where possible) and observe social distancing

Consider making project management meetings teleconferences and temporarily eliminating tool box talks, or doing so with substantially smaller groups. Of course, none of this should come at the cost of other critical safety measures on a project. Social distancing will not excuse any failure to have proper supervision, safety inspections, or accountability when performing dangerous work. The right thing to do will vary by company, by location, by trade, and, as this outbreak and government responses evolve.

Adapt your safety policies

Contractors should reassess and **revise in writing** their safety plans now and as more information becomes available — this includes for home office and trailer-based employees.

Protect your contract rights

You must review every contract — upstream and downstream — to understand how they address delays, changes, and notice. Most contracts provide for some relief due to force majeure events or “acts of god.” While the industry will debate for months and years to come whether any given COVID-19 related impact is a force majeure event or a change under the contract, it is critical that contractors meet the contractual notice requirements immediately. Most changes and force majeure provisions require contractors to provide notice upstream within only a few days of the event causing the time and/or cost impact. Failure to do so usually results in a waiver of any right



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to additional time or costs. It is therefore paramount that contractors get their notices out as quickly as possible, even though the full impact is not yet known.

Once the initial notices are out, that is only the beginning. Contractors must look downstream and seek written assurances that materials and equipment will be delivered as scheduled and that work will be completed on time. When adequate assurances cannot be provided, contractors must explore options. As contractors start understanding and quantifying the impacts in terms of both time and cost, they should communicate the information upstream and insist upon written directive to undertake any change from the original plan.

The need to update your initial notices may be defined in the contract documents. If not, contractors should work with their upstream and downstream partners and come up with a reasonable schedule. Although upstream entities (owners, GCs, etc.) may discourage contemporaneous and detailed documentation of these changes, you should remind them that we are all in an unprecedented era and these notices and documentation will only help all parties unravel the full mess from this when the dust settles. If you cannot come to agreement on a schedule of updates, document your attempts to develop a schedule and then continue to provide the updates as regularly as reasonably possible.

Pursue available insurance coverage

Contractors often have very broad and sophisticated insurance portfolios, but quite often do not really know what is or is not covered. On each job, you need to determine all of the applicable policies that may protect you. This includes downstream contractors that have included you as an additional insured. It may include policies from upstream such as those in OCIP or CCIP programs. It may even include builders risk policies. This is a good time to see if interruptions or impacts from this pandemic, specifically impacts from government actions in response to the outbreak or impacts from the supply chain, are covered by insurance. If there is a potential for coverage, it is important to submit your claim carefully and as required by the specific policy. As with notices under construction contracts, notices under insurance policies often must be made promptly or within a reasonable period of time after discovering the occurrence.

Call on your sureties

If there are performance and payment bonds on the job, or subcontractor default insurance, you should start immediately exploring whether the surety will be available to help finish the work or pay for it. If you posted bonds and you foresee cash-flow being tight in the coming months, consider enlisting your surety now to help you through the upcoming downturn.

Document everything

Contractors must carefully track and document their time and costs in detail. Cannot get full crews on site because of travel restrictions? Document it. Having difficulty obtaining materials or procured equipment because of trade disruptions or international border closures? Document it. Need to spend five times as normal for basic project necessities such as gloves and safety masks? Document it. Experiencing lower production because trades are working farther apart or other “social distancing?” Document it. All construction on your project halted by government order because it is “nonessential?” Document it.

What do we mean by “document it?” To start, contractors need to meet what is required in their contracts in terms of who receives notices, when they are due, and what level of detail is required. Meeting the contract requirements is of course important, but you should consider this the floor and not the ceiling of your efforts. Contractors should track carefully and daily the impact to every person, piece of equipment, and delivery of materials. Most contractors are already in the habit of keeping daily reports, however, these reports usually only give raw numbers of workers on site and vague descriptions of areas of work. Make it a practice moving forward to include more information.

Identify daily project work data

As always, be sure that your daily reports detail and identify which workers were doing what, where, and for how long.

Note sick workers

You should now specifically note which workers called in sick or because they had to take care of dependents.

Track delivery dates and issues

Identify what materials did or did not arrive on site and include information from downstream suppliers about issues they anticipate or which may arise.

Identify inefficiencies and delays

Be careful to observe and track what work was slowed or made less efficient because of social distancing or other changes made in response to COVID-19.

Include productivity metrics

If you think your productivity has been degraded, you must measure and document the units of production and hours spent.

This is a start, but it is going to have to be tailored to each job and each circumstance. What project managers, superintendents, and forepersons should be considering in preparing these reports is “will someone in two years be able to read this and understand how and why we were delayed or why our costs increased?” Because that is exactly what will be happening.

Plan for the worst

The only thing that we can predict about this pandemic is that it is going to get worse before it gets better. There already have been substantial layoffs and companies will likely have to make other hard decisions in the coming weeks and months. Government funds to prop up various industries will most likely come, but it may be too little, too late. As a result, a number of construction companies will likely face bankruptcy. If you are concerned that bankruptcy is a possibility for your company, you should consult bankruptcy professionals now.

Re-double your diligence in terms of payment

As always, make sure that your downstream contractors (through all relevant levels) are providing releases of lien and claims each month.

Keep your eyes open and ears to the ground

Contractors experiencing sudden changes in management, labor roll-over, or equipment or material shortages may be in crisis. If you have concerns, ask for confirmation/proof of payment to all laborers, including withholding taxes, union benefits, and insurance premiums.

Plan for downstream contractor bankruptcies (remember the 2008 financial crisis)

It is likely that you will be tied-up in another company's bankruptcy proceedings in order hire a replacement contractor to move the job forward, or trying to get money you are owed, or trying to avoid giving back payments received in the lead up to that company's bankruptcy.

Get practical legal advice now

The effects of the COVID-19 pandemic are evolving and growing every day. While your projects may be entirely unaffected today, they could all be shuttered tomorrow due to government action (e.g. Boston, Pennsylvania, and California) or insolvency from the project owner as a result of the stock market. In order to best respond to each development, contractors are best served by consulting with attorneys sooner rather than later. While it is possible to develop strategies to avoid or pursue claims after the fact, it is almost always more expensive and less likely to succeed. Early intervention to ensure proper contract compliance and detailed documentation procedures is an important step to help manage some of the uncertainty and risk facing the construction industry right now.

For more information on critical issues arising out of the COVID-19 outbreak, please visit our website. For advice on preparing for and responding to pandemic-related cost and schedule impacts, please contact any one of Cozen O'Connor's Construction Group attorneys who can help guide you through the legal challenges.