



RISK MANAGEMENT ADVISORY | ARCHITECTS AND ENGINEERS | PROFESSIONAL LIABILITY INSURANCE

Evaluating contractor delay claims related to COVID-19

It is certain that construction projects will be impacted by the ongoing COVID-19 pandemic. Almost immediately after provinces and territories issued stay-at-home orders, contractors started putting owners on notice that they are likely to have delay claims due to the social distancing guidelines as well as expected supply chain disruptions. If your mandate includes construction contract administration responsibilities on design-bid-build projects, it is prudent to affirmatively take steps to avoid being dragged into delay claims.

What does the construction contract say?

Contractors often have the right to seek both an extension of time and increase in costs if they are delayed for causes beyond their control. Given the nature of stay-at-home orders that were passed all over the country and the federal government's physical distancing guidelines that are likely to remain in place for the foreseeable future, contractors may have to let owners know that they intend to seek an extension of the contract time due to COVID-19 impacts.

As the design firm, you have a responsibility to document and communicate to the owner any notice you receive from the contractor. You should know exactly how the construction contract states the allowable causes for excusable delays so that you can help the owner evaluate the contractor's claims.

Evaluating the contractor's delay claims

You are often required to provide an owner with an objective evaluation of the contractor's claims. You will need both the regularly updated construction schedule and the contractor's initial schedule of values to evaluate any changes to the schedule and cost. The owner should ask the contractor a set of questions that will help you and the owner evaluate the impact of COVID-19 on the construction schedule and project cost. Here are some questions that the owner can ask of the contractor:

- How are you monitoring your subcontractors from a financial health perspective? What due diligence process do you have in place?
- Has there been any impact on your supply chain due to COVID-19? If so, how is this affecting your ability to meet your project delivery requirements?
- Have internal committees or review groups been set up to monitor your exposure to COVID-19, including employee safety, supply chain and distribution channel diligence, and your own production capabilities? Please provide details of COVID-19 business risk mitigation strategies.

- Have you been able to fully understand your exposure to your key suppliers' own supply chains and by extension any possible disruption caused to your production? Do you have second- and third-tier suppliers that you are able to engage in case of a breakdown with your first-tier suppliers?
- For procurement of materials, have any substitute products been identified? Do these products need design team sign-off? (The answer to this question should help you plan for additional services (for additional fees) that you will provide to the owner.)
- Can the business operate with all (the majority of) offices/functions working remotely?

These questions are a starting point; firms should prepare more specific questionnaires for the owner's use. From a risk management standpoint, ongoing communication between the owner and contractor during this time could help stave off unanticipated delay claims by the contractor. If you can help facilitate that ongoing communication, it may be less likely that you will be dragged into a delay claim by the contractor.

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