

Dealing with COVID-19

Protecting your projects and organization - USA

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Coronavirus (COVID-19) has presented us all with unprecedented challenges. As a result, the construction industry is and will continue to experience considerable disruption and even suspension of work due to government directives and economic pressures, as well as current and projected labor and material shortages. This will necessitate various contractual actions, potential claims resolution and remedies for all parties involved.

This document provides expert guidance and practical support in dealing with the issues you may be facing on your programs, projects and contracts.

We can help



Turner & Townsend has established a COVID Response Taskforce and is currently helping many of our clients with contract and commercial matters, as they manage through these challenges. We have resources and experts available to support you in regard to issues such as:

- Contract risk and management
- Commercial impacts
- Guidance on potential project delays
- Comprehensive supply chain audits
- Detailed program and project assessments

Contact our COVID Response Taskforce at: TTCRT@turntown.com

Now is the time to be proactive in managing your projects and related contracts, especially in the following key impact areas:

- Project documentation/inventory and record keeping at the time of suspension
- Thorough understanding of key contractual provisions dealing with suspension of work, termination, stored materials, cost recovery, change management, insurance, warranties, and dispute resolution
- Tracking impacts and capturing costs
- Ensuring proper compliance with recovery funding requirements
- Understanding the current and future supply chain and workforce capacity
- Getting ready for the "new normal"

Knowing your contracts

Although there are numerous forms of construction contracts in the market, most have been based on the terms and conditions noted in AIA, CMAA, ConsensusDocs and EJCDC contract boilerplates. In the case of government contracts, both at the US federal level (48 CFR) and at the state and municipal level,

making the difference

contract forms are based on legislation and regulation and are subject to periodic updates. Practical ways of dealing with events such as COVID-19 under standardized contracts are not necessarily defined and need to be thoroughly understood by all related parties. The COVID-19 pandemic is a significant event which may or may not be classified as an event/change under your contract.

Compared to past global scale events, COVID-19's impact is unprecedented in its level of challenge and complexity. Project impacts will likely be reflected in many types of delays, such as access issues, labor availability and productivity, material and equipment availability, disruption to pacing, suspension, financial default, and termination delays to name a few. This doesn't mean that the Contractor is automatically entitled to compensation or a schedule extension. The event will still need to be assessed and its impact understood in the context of the contract terms and against the progress of the work.

Private contracts

Although there are a number of contract models in the market place, many owners, especially those owners that have a large portfolio of work or operate as a multi-national corporation with significant capital programs, have developed their own models. These have been derived from multiple models or they have created their own unique contracts to address the specific conditions of their industry or company. Each contract has to be reviewed on its own merits to determine how impacts associated with this event may need to be treated.

In addition to the specific terms in the contract, a number of other factors will influence how change requests from contractors and vendors will need to be treated, including the phase of the project, the location of the project, the level of restrictions the government in that area place on the population and businesses, project size, and other factors. Owners need to review their contracts in the context of these factors to determine the appropriate response for dealing with contractor and vendor impacts. You need to pay particular attention to any clauses addressing the following areas:

- **Changes** – You'll need to identify the process for changes and the documentation needed to substantiate the impact and support any cost and schedule adjustment requests.
- **Notice** – Verify the period the contractor or vendor has to give notice of an impact
- **Force majeure** – If defined in the contract, is an "epidemic" or "pandemic" specifically listed as qualifying? How are such events treated under the contract – schedule relief, cost compensation, or both?
- **3rd Party impacts** – Does the contract address impacts caused by outside parties?
- **Schedule impacts** – You'll need to review whether a contractor is required to recover schedule delays and if they have to take reasonable steps to maintain schedule.
- **Suspension** – What are the conditions for suspending work on the project? This will have an effect on what liability they may have, like how onsite materials are secured and protected, what adjustments the contractor or vendor is due, and how materials in route are dealt with.
- **Termination** – Identify the termination terms in the contract, either by the owner or by the contractor or vendor. Determine, if the owner terminates a contract due to the contractor's inability to complete the work, what adjustments is the contractor or vendor due.

Federal/State/Local Government contracts

The COVID-19 crisis will also very likely impact the many current and planned Public Agency and Government performance contracts to extremes not seen in recent times. Beyond the direct effects, they will also present challenges in assessing the change and delay requests to be submitted. And, unless required by changes made to existing laws, governmental agencies are not likely to change the contract due to COVID-19 or change how they interpret the clauses in the contract. Project teams will need to determine how they can best address the impacts and requests for adjustment within the confines of the existing contract where subtle language can become quite problematic, if not fully understood.

First, absolutely everything needs to be documented. In the public contracting space, if it is not documented, it did not happen. All reporting going forward should be traceable and relatable to past events while realistically modeling and forecasting the future based on best knowledge today.

Second, the schedule is one of the very few contract management tools common to all government/public agency contracts. Project teams need to have properly developed, detailed, and updated project schedules to prove or disprove arguments.

On a more positive note, most government and public agency contracts include very detailed and specific language for dealing with unknown events and any resulting change and delay. Cooperation and communication in a very real-time environment between government agencies and project teams will be critical.

Future contracts

If your organization is preparing to execute a new construction or procurement contract, STOP!

We already know that most of the contracts currently in place are inadequate to address the unusual circumstances and impacts associated with the COVID-19 pandemic. Pause and think before executing new contracts until the clauses required to address this type of situation are addressed. While we may not be able to predict the exact nature and impact of future events, we now know we need to update certain contractual elements to better address these types of events.

Following the process

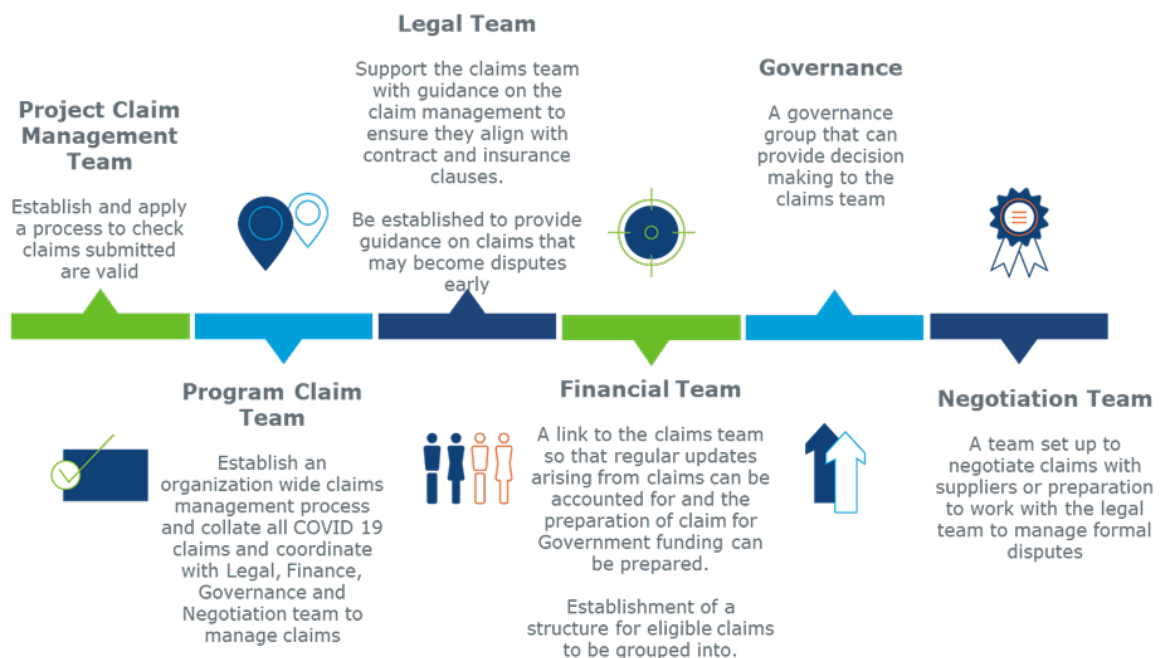
As the effects of COVID-19 are still new, everyone has been advised to look at their contracts to understand the requirements and assess the risks and associated impacts that are either happening or are about to occur. It's important to have three key commercial processes in place to ensure you are ready and set-up to manage these events: project change control processes, program/portfolio change control processes, and insurance processes.

Project change control process - Contracts allow for changes to occur, but not many set out a process to manage them between the parties. Typically contracts do not define rules for what needs to be submitted with a change request, how the costs and schedule requests will be developed or assessed, and how any disagreements will be resolved. Applying a "reasonable" test is vague, as what is reasonable to the owner, may not be seen as reasonable by the contractor and thus cause a dispute.

Program and portfolio change control process - Create a systematic process in your organization to co-ordinate, prioritize, assess, negotiate and reject/accept claims associated with those projects. For relief from the government under a stimulus program or other emergency funds, understand the process required by those organizations to prepare and support such a claim.

Insurance and Government stimulus process - Determine what direct costs or contractor claims could be claimed and identify the processes necessary for reimbursement from your insurance company under the policy for a project or program. Government stimulus and emergency funding programs may require you to have demonstrated you have checked your insurance first.

Proposed process chain for the management of claims at an organizational level:



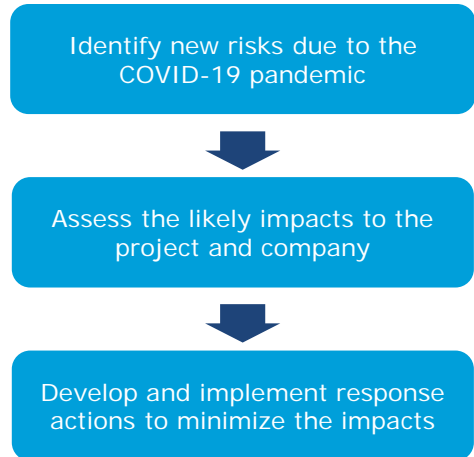
Managing Your risks

For owners, managing the risks associated with the COVID-19 pandemic will be critical to minimizing impacts to ongoing projects and the company as a whole. The risks are largely two-fold: direct impacts to a project's performance, and the likely disputes with contractors and vendors also impacted by the pandemic.

Managing these risks will rely largely on the primary steps of common risk management: *identifying* the new risks that this situation has created, *assessing* the likely impacts to the project and company, and *responding* effectively to avoid the risk or minimize it.

In dealing with direct impacts to the project, owner's project teams need to realistically assess their execution plans, all contractors, consultants, and vendors to understand what material and equipment deliveries are likely to be delayed; which contractors and consultants will have performance issues due to work restrictions or lack of workers; and what plans will no longer be viable due to the impacts. Owners need to start having conversations with all parties now to understand how the supply chain is being affected and any anticipated impacts to the project. They need to work together to develop response plans that will minimize the impacts, which may include significant changes in how the project is executed.

Additionally, look beyond just the project. This pandemic may be significantly impacting the market such that there is no longer a need for the project, or at least, the project in its current form. In which case, owners may need to suspend work until they can further assess whether the project should continue, be reworked, or terminated.



Conclusion

To minimize the risk of disputes with contractors and vendors, owners need to review their contracts to understand how this type of event is addressed, if at all, determine the remedies provided under the contract and what the process is for dealing with these issues. In these times, teams also need to make the extra effort to document activities, discussions and decisions. This documentation will be extremely helpful in the future to help resolve any areas of dispute.

However, what is most essential, is to start having conversations with the contractors and vendors now to work together to minimize the impact to the contractor and the project. Good faith efforts by both parties to resolve requests for equitable adjustments will go a long way to minimize impacts to the project and company as a whole.

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