

Now is the Time for Construction Impact Claims

As most states, counties, and municipalities across the country lift restrictions on businesses and travel, it is easy to think the worst is behind us, especially for the construction industry. However, this is exactly when contractors should be evaluating their records and considering whether to submit impact claims due to COVID-19-related restrictions.

In March, as governments began shutting down and adding restrictions to businesses and travel, many contractors issued broad notices of potential impacts upstream. At that time, the impact from government actions in response to the COVID-19 pandemic were difficult if not impossible to predict, much less quantify. We recommended that contractors carefully and thoroughly document the potential impacts on a rolling basis. As the country shifts to the reopening stages, now is the perfect moment for contractors to draw a baseline and measure the impacts to date and start measuring future impacts.

PAST IMPACTS — CLOSURES TO REOPENING

When governments first started closing businesses and restricting travel, many anticipated that there would be a variety of impacts on contractors from delayed receipt of materials and equipment to reduced workforces to project-wide shutdowns. Some of the more obvious and significant impacts are likely easing as we enter into the reopening phases. Projects that were entirely shutdown will reopen. Material and equipment suppliers that were closed or working on reduced staff will begin clearing backlogs. This means contractors may start seeing an end to disruption periods for these larger, discrete impacts, such as delayed materials finally shipping. Though, as discussed below, many impacts will be ongoing or even just beginning.

So, what should contractors do for these past impacts?

Determine if you were impacted

Impacts, disruptions, and inefficiencies are often the type of you-know-it-when-you-see-it claims. They are claims that develop over time as small daily or weekly changes and minor delays add up to tangible and materials impacts. A good starting point is to talk to field personnel. Did they feel impacted, delayed, or less efficient over the past couple of months? What are the sort of things that impacted them?

After getting feedback from field crews, review the project record. What issues were your team reporting internally and/or upstream? Were other contractors or subcontractors identifying similar issues? Does the documentation support the verbal accounts? If after this review you believe you have been impacted, you need to know by how much.

Quantify impacts and package claim

As these types of claims are often based on aggregate impacts, it can be challenging to calculate costs of the disruptions or inefficiencies. Frequently, contractors will need to engage experts to analyze their records and determine an appropriate calculation for the impacts. However, at the early stage, contractors should be able to determine a rough order of magnitude (ROM) from the impacts. Usually, this is done by comparing costs incurred to date against projections and bid data from before the effects of the pandemic were known. While the ROM will likely not suffice as a final claim number, it can be used to determine whether the costs are even worth pursuing.

If the numbers and documentation support a potential claim, contractors should promptly prepare appropriate claim documents to submit upstream. The mechanisms for seeking these costs can vary based on applicable contract terms. Sometimes a change order proposal is appropriate. In

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other cases, it is better to submit a request for equitable adjustment (more common in government contracting or contracts borrowing language from government projects or the FAR). Either way, the devil is in the details in these claims. The claim package should contain sufficient detail to show the extent of the impacts as well as an explanation of what reasonable actions you took to try to avoid the impacts given the circumstances.

Continue tracking long-tail impacts and new impacts

After submitting a claim, it is important to verify that any additional costs of the disruptions are tracked going forward. Consider whether assigning the claim a cost code would help to track costs as they are incurred during the project. Depending on the response from upstream contracting partners to your claim, now may be the right time to engage an attorney and/or expert consultant to help refine the claim. Experts can also help set up a stronger framework to catch ongoing cost increases for specific disruptions.

FUTURE IMPACTS — CONTINUED OPERATIONS WITH RESTRICTIONS

Just because we have entered the reopening phases does not mean that construction will not continue to be impacted. In fact, many of the more subtle impacts may likely be ahead of us. Most jurisdictions that have reopened have only done so by requiring strict compliance with CDC and other health department recommendations for safe workspaces. This includes screening at project entrances, increased use of PPE such as face coverings, social distancing, reduced crew sizes, and substantially increased cleaning and/or prohibitions on use of common areas such as lunchrooms, breakrooms, meeting/conference rooms, storage areas, elevators, and lavatories.

These new requirements for day-to-day life on projects will likely create inefficiencies, prolong basic activities, require resequencing of work, and may lead to critical path adjustments. Even the reduction of daily huddles may mean key project information is spreading more slowly and/or making it more difficult to coordinate among contractors. These smaller but ever-present disruptions are dangerous to contractors as the full cost impact (or even the fact that there is a tangible impact) sometimes is not felt for weeks or months.

Contractors must be more vigilant in identifying these potential impacts and tracking them on a daily basis. Additionally, as we previously warned, contractors must be careful to not execute lien waivers or payment applications that extinguish their rights before the impacts are even known. It is also important to check and recheck the applicable contract requirements for timing of notice and whether or what types of claims may be barred. To fully understand their rights, contractors should consult with attorneys about specific contract language. For instance, “no damages for delay” language may not necessarily preclude claims for increased costs due to disruptions or impacts, even if related to time-based costs.

Even if you do not think you have been impacted or will be impacted, now is as good a time as any for any contractor to ensure their project documentation is contemporaneous, accurate, and complies with contract requirements. Whether the project is delayed or impacted due to COVID-19 or related government actions or whether the project is impacted from more garden-variety issues like site coordination or inefficient work direction, good documentation is critical. Months or years from now when project impacts, whether from this pandemic or otherwise, are being arbitrated or litigated, this documentation will be the difference between a potentially successful claim and unrecoverable costs.

For strategies on responding to and documenting impacts from these government actions and COVID-19 in general, please refer to our previous client alert, [COVID-19 Strategies for the Construction Industry](#). Additionally, follow [Cozen O'Connor's COVID-19 website](#) for new updates. For additional guidance on whether your company may continue to operate as a result of governmental action, and/or for advice on preparing for and responding to pandemic-related construction 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.