As the U.S. attempts to contain the COVID-19 outbreak through social isolation and curtailment of normal business activities, construction companies face specific challenges. With governments shutting down non-essential activities and workers forced to stay home, many projects will be halted temporarily. Construction owners can expect all projects to be delayed by supply shortages and other issues. In this bulletin, we offer clients some perspectives on how to meet these challenges, starting with ensuring the health and safety of employees.

Health and safety risk

The risk of exposure to COVID-19 is no different for employees of construction owners, contractors, and suppliers than for the general population. Owners, therefore, must consider the physical well-being and safety of all project team members, stakeholders, and participants on construction projects and follow reasonable guidelines and recommendations of governmental authorities and healthcare professionals. As experience has shown in other countries, confirmed cases of COVID-19 expand exponentially if health and safety controls are left unheeded.

Construction owners should enforce all health and safety procedures on their construction sites including sanitary protocols, proper hygiene, social distancing, use of personal protective equipment (PPE), toolbox talks on special COVID-19 requirements, and prompt reporting of health issues related to COVID-19 by construction workers. Contractors and subcontractors must put safeguards in place to keep workers exposed to COVID-19 away from construction sites for at least 14 days after the last potential exposure.¹ Some emerging better practices on construction sites include actively encouraging sick workers to stay home, curtailing large meetings, staggering shifts and lunch times, regular cleaning of common offices and lunch areas, and—for large projects—expanding the capacity of on-site medical facilities and measuring workers’ temperatures and assessing worker symptoms prior to the start of work.

OSHA also recommends that employers develop an Infectious Disease Preparedness and Response Plan. This should spell out where, how, and to what sources of COVID-19 might workers be exposed; non-occupational risk factors at home and in community settings; workers’ individual risk factors; and controls necessary to address those risks.² For more information on current OSHA guidance, see the publication entitled Guidance on Preparing Workplaces for COVID-19.³

² Guidance on Preparing Workplaces for COVID-19
³ Ibid.

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Completion risk

Due to the potential of widespread impacts of the COVID-19 pandemic, many construction projects and programs will experience delays and disruption. On March 17, Boston ordered all construction work to shut down for at least two weeks—the first city to do so. In the San Francisco area, construction workers are expected to adhere to the shelter-in-place orders from state, city, and county governments, which are expected to continue until at least April 7. In a tight labor market, construction firms were already struggling to find the workers to complete projects on time.

COVID-19 is also causing supply-chain disruption, cash-flow concerns, and funding/financing restrictions. As a result, critical work activities may need to be extended or rescheduled, and contractors may need to adjust their means and methods for performing work to comply with governmental instructions and mandates.

Construction owners must act quickly to identify, assess, and mitigate completion risks on their large capital construction projects and programs. This may require owners to conduct detailed schedule reviews for ongoing projects, especially those in early to middle stages of completion. Instead of adjusting determinative schedules, owners may decide to perform quantitative risk assessments, or QRAs, on their schedules to understand the range of uncertainty regarding likely completion dates. Developing procedures for and executing QRAs on large construction projects is a project-control leading practice for both owners and contractors.

Commercial Risk

COVID-19 impacts also include commercial risks, such as commodity price swings, labor-cost escalation, extended performance costs, and higher interest payments. If contractors must source concrete, steel, lumber, and drywall from suppliers charging higher costs due to COVID-19 interruptions, owners may be asked to foot the bill. Labor costs may also be higher if contractors are forced to choose from a limited pool due to travel restrictions. If project completion dates are extended, owners are also exposed to higher costs for internal project management staff, third-party construction managers, and consultants. Such delays are also likely to result in increased financing costs, management fees, and developer costs.

Owners can prepare for commercial risk on construction projects by engaging with contractors and stakeholders in early discussions on the potential impacts of COVID-19 containment measures. Owners are encouraged to assign personnel and develop processes to document all commercial impacts for which contractors and stakeholders may later seek economic recovery. Most importantly, owners should advise contractors, suppliers, consultants, and others that notice provisions in contracts will be strictly enforced and that COVID-19 impact costs will not be considered unless owners are kept informed per contract requirements. Owners should also be vigilant about reviewing daily, weekly, and monthly progress reports; analyze changes in the contractor’s labor force; and query contractors about all cost and schedule impacts reportedly related to COVID-19 issues.

*Jenn Goodman, “Boston 1st major US city to order halt on all construction,” ConstructionDive.com, Mar. 17, 2017*
Contractual Risk

The responsibility for delays, disruption, and commercial risks are typically spelled out in construction contracts and appropriately allocated to the party in the best position to mitigate such risks. Delays caused by COVID-19 impacts may be covered under a force majeure or similar clause of the contract. Contractors will argue that COVID-19 related delays were wholly unforeseeable and outside of the contractor’s control, and therefore the contractor should not be held responsible. Under these circumstances, many contracts entitle the contractor to a time extension of the project completion date, and some contracts also allow for the contractor’s recovery of increased performance costs.

Price-escalation provisions in contracts permit contractors to negotiate labor and material price increases if they exceed pre-defined thresholds or percentages of the baseline cost estimate. Should COVID-19 related impacts increase the contractor’s labor and material prices beyond these thresholds, the contractor may be entitled to an equitable adjustment of the overall contract price. Contractors will need to supply the owner with objective evidence of price increases and show that such increases exceed contractual limits.

Owners are encouraged to review their construction contracts and determine if there are force majeure, suspension of work, or stop work order clauses that would provide relief to contractors seeking time extensions. Project directors should pay particular attention to contract provisions that allow the contractor to request compensation for: acts of God, governmental action, pandemics, or owner-directed suspensions and work stoppages.

As noted, owners should encourage early discussions between project teams and contractors to determine if COVID-19 related impacts are likely to affect their projects. Owners should state, orally and in writing, that contractors and major suppliers must provide notice of delays and cost impacts under proper contract clauses and that detailed record keeping will be required to substantiate claims.

With the likelihood of increased contractor claims due to COVID-19 related impacts, owners should prepare for receiving, processing, and managing claims. Better practices around claims management include the following procedures:

- Evaluate your contracts and suppliers to determine both immediate and long-term contract and supply-chain risks.
- Align project priorities with both the health and safety of project personnel as well as changing organizational needs and priorities.
- Utilize quantitative cost and schedule analysis combined with macro scenario modeling to support portfolio and project decision making; plan for best- and worst-case scenarios.
- Review contractor claims promptly and request any missing support or documentation from the contractor.
- Timely review and disposition claims in the ordinary course of business—don’t wait until the project is finished to deal with claims.
- In cases where rejection of a contractor’s claim leads to a dispute, strictly enforce timelines and procedures set out in the contract’s disputes clause.
- Rely on technical specialists for complex delay, disruption, and damages issues.
- Keep senior management informed of cost and schedule risks related to contractor claims and disputes.

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Conclusion

Owners are encouraged to review COVID-19 related risks on capital construction projects, programs and portfolios sooner than later. While COVID-19 construction risks may vary by project type, size, and location, one thing is for certain—owners will need to implement strong controls to support stakeholders and protect contractual rights. If support is needed, KPMG’s Major Projects Advisory professionals are here to help you.

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