

Breaking Ground

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MANAGEMENT PERSPECTIVE

CONSIDERATIONS FOR CONTRACTORS RETURNING TO WORK FOLLOWING THE COVID-19 PANDEMIC

BY JAMES R. MALL

Risk is something that construction firms are used to dealing with on a routine basis. As we entered 2020, the construction industry was facing a number of anticipated risks — skilled labor shortages, escalating tariffs and a looming presidential election in November. There were reasons for optimism, too, as the U.S. economy continued to grow at record-breaking speed, with a stretch of 113 months of employment gains — the longest expansion in American history. Then, everything changed.

An unexpected risk surfaced in the form of a global pandemic, the effects of which have negatively affected not only the construction industry, but national and global economies, as well. As the COVID-19 virus spread from China to Europe and finally to the U.S., the impact has been devastating, resulting in tens of thousands of deaths in our country alone.

The effect on construction projects was unprecedented. On March 19, 2020, Pennsylvania Gov. Tom Wolf, in order to contain the spread of the virus, signed an executive order which shuttered all “non-life sustaining” businesses in the commonwealth, including public and private construction firms. Work on the vast majority of construction projects came to a screeching halt, with only limited exceptions permitted for work on healthcare facilities, emergency repair work, and work for which a waiver was obtained — most by contractors supporting life-sustaining businesses. PennDOT also allowed a few “critical” projects to proceed on a limited basis.

Any permitted work, meanwhile, requires numerous safety measures, including social distancing to protect the safety of the workers. While it is difficult to predict with any degree of reasonable certainty how long the virus will last, the extent of its spread and what its full impact will be, it is clear that there will be a significant impact on the construction industry for the foreseeable future, at least until a vaccine is developed.

When construction does come back to some level of normalcy, contractors will be confronted with some unprecedented short-term and long-term realities. In addition to the challenges of project management, the following areas have been greatly impacted by the pandemic and will need to be addressed in order to mitigate potential harm to workers and construction projects.

Workplace Safety

Safety is always a primary concern of construction firms, given the high level of danger typically involved with projects. Now, in addition to physical danger, workers are feeling legitimate anxiety and insecurity related to the pandemic. Many workers have a sense of panic and are not only concerned about their own safety, but also the potential of contracting the virus and transmitting it to family members. Contractors will be required to follow recommended health and safety practices to ensure a safe work environment and standard protocols on

job sites. The measures include the following:

- Tracking the number of workers who have been on the project site and have been tested positive for COVID-19;
- Regular cleaning and disinfection of common areas on the job site;
- Performing temperature checks on all individuals who enter the job site;
- Providing and maintaining handwashing stations and hand sanitizers at all portable restroom locations;
- Enforcing social distancing requirements, not only when work is being performed but during breaks and lunches;
- Requiring personal protective equipment (PPE) may be mandated by federal or state agencies charged with worker safety.

Implementing some or all of the above sanitation and infection control improvements could mean the difference between a project continuing to completion or being shut down. In practical terms, job safety plans typically designed to prevent physical injury of workers must now be amended to incorporate protection from this silent-but-deadly danger, COVID-19.

Material Delays

Once non-life sustaining businesses that were in lockdown return to work and production restarts, there is likely to be a massive strain on supply chains. As many commercial contractors or their suppliers rely on less costly Chinese-made goods and materials — conservative estimates claim nearly 30% of U.S. building product imports come from China — there is likely to be a rush on critical materials, resulting in shortages and potential project delays.

In part, this is because containment efforts by the Chinese government resulted in the shutdown of numerous factories supplying the U.S. construction industry. U.S. builders rely upon imported materials ranging from steel and stone to plumbing and lighting fixtures, and many companies may expect difficulty obtaining firm commitments for delivery of these products.

Contractors should begin to aggressively seek out alternative suppliers in the U.S. or in countries that have not been negatively impacted by supply chain disruptions. Contractors should look 30 to 60 days ahead to determine if there are materials presently off-site that might be in short supply once work resumes and consider expediting any material to the site. Shortages of crucial materials could be exacerbated if the government decides to authorize construction projects as part of a future stimulus package to rebuild the country's infrastructure.

Labor Constraints

As most of Western Pennsylvania was already challenged

for workforce talent, the outbreak will only serve to diminish the labor pool. Project managers may lose access to workers because of mandatory quarantine, lack of childcare or eldercare, or illness due to workers contracting the virus. In fact, the employer paid leave requirements mandated by the Families First Coronavirus Response Act (FFCRA) are effective through Dec. 31, 2020, so even when it is “business as usual” once again, there will be new labor considerations and constraints.

An already existing lack of specialty trade contractors, such as mechanical, electrical and roofing specialists, could cause additional disruptions because they are not easily replaceable.

If labor shortages prevent work from progressing, it may give the project owner a valid excuse to invoke a “termination for convenience” clause in order to locate and hire a contractor who can provide a sufficient labor force to complete the project in a timely manner.

Now that social distancing has become an integral part of the construction industry lexicon, technologies that allow for a reduced level of human interaction may be utilized, including remote and robotic drone inspection, 360-degree cameras, artificial intelligence and modular construction. While the construction industry does not lend itself to working from home, we can expect to see more remote and shift work, separated project offices, and isolation of trades working on a project.

Insurance Coverage

Most large construction projects contain a provision stating that “time is of the essence” and timely completion of projects in accordance with a previously agreed to schedule is critical to a project’s success. Any delays or disruptions will usually result in damages to the contractor.

One way to mitigate the effects of delays caused by the shutdown or related complications is to seek recovery from existing insurance policies. There are a number of policies that may cover COVID-19 losses. Business interruption coverage is a common endorsement to a commercial property policy and may provide coverage depending on the terms of the policy and whether the impact of the virus constitutes an “occurrence.”

Other coverages which may provide relief include builder’s risk policies that cover losses resulting from damage or destruction of the contractor’s work, workers compensation policies that cover sickness or disease suffered by workers, trade disruption insurance for firms with international suppliers, travel insurance for firms employing managers who travel frequently for business, as well as environmental policies, which may cover losses resulting from a pandemic.

Contractors should meet with their legal counsel and insurance brokers to ensure that all available policies are carefully reviewed and coverage appropriate for a post-pandemic world is obtained.

Legal Issues

While there is no dispute that the spread of COVID-19 was an unforeseeable event, contractors may still be contractually responsible for delays or cost overruns on existing projects. Thus, contractors are advised to scrutinize their contracts and consult with legal counsel to ascertain what contractual rights and duties exist for events caused by the virus’ spread.

Attention should be focused on contractual provisions relating to schedules, substantial

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completion, delays, liquidated damages and force majeure provisions that allow work to be suspended or terminated when certain extenuating circumstances arise. Depending upon the jurisdiction and the contract language, force majeure may or may not be applicable to the current pandemic. Many contracts also contain notice provisions which need to be analyzed and complied with by forwarding all necessary notices to all applicable parties. Even if the applicable contract is silent as to whether a pandemic constitutes an unavoidable delay, there are certain common law remedies available to contractors, such as frustration of purpose, commercial impracticability and impossibility of performance, which may grant relief to contractors unable to obtain relief from contractual damages attributable to the pandemic.

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If new contracts are being negotiated, contractors need to be sure to have provisions in the contract to shift the risk of damages for anticipated increases in material and equipment costs, and to equitably adjust the completion when such costs or delays are attributable to the pandemic.

In summary, the COVID-19 pandemic will change the way contractors perform work and manage projects in many diverse ways. It has been widely predicted that the U.S. and global economies will enter into a recession that will entail challenges to construction firms. Owners may defer or cancel scheduled projects due to financial uncertainty. There may be less demand for projects such as lodging and sports entertainment complexes. The impact may not be immediate since non-residential construction generally lags the overall economy by 12 to 15 months, but the full impact will be felt by contractors for years to come. Now is the time to prepare. **BG**

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