

The Impact of COVID-19 on Construction and Infrastructure Projects: An On-Site Perspective

Jennifer Permesly

Partner / Skadden
212.735.3723
jennifer.permesly@skadden.com

Bryan Bellack

Managing Director / BDO
212.817.1799
bbellack@bdo.com

Matt Stamp

Senior Manager / BDO
303.807.2509
mstamp@bdo.com

Wiley Wright

Practice Leader / BDO
443-603-0185
wwright@bdo.com

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One Manhattan West
New York, NY 10001
212.735.3000

On January 14, 2021, Skadden and BDO Consulting co-hosted a webinar discussing the impacts of COVID-19 on complex construction projects. The program was based in part on the perspectives of owners and contractors surveyed by Skadden and BDO with direct experience addressing the impacts of COVID-19 on their projects. The panelists included **Jennifer Permesly**, a partner in Skadden's International Litigation and Arbitration Group; **Matt Stamp**, a senior manager in BDO's Construction and Environmental Solutions practice; and **Wiley Wright**, the leader of BDO's Construction and Environmental Solutions practice. The discussion was moderated by **Bryan Bellack**, managing director of BDO's Forensic Investigation and Litigation Services practice.

The panel began by discussing the various ways in which construction projects have been impacted during the pandemic, including: (i) government-mandated shutdown periods; (ii) new safety requirements and protocols, including PPE, reductions in work crews, limitations on work hours and closed/restricted site access; (iii) supply chain interruptions; (iv) delays in permitting and other government agency responses; (v) labor restrictions, labor shortages and travel restrictions impeding the ability of laborers to get to worksites; and (vi) difficulties associated with teleworking in a live construction environment. The impacts on construction projects may include, among others, delays in the as-built schedule, changes in productivity, escalating labor and material costs, and increased overhead. The webinar provided examples of how owners and contractors have attempted to calculate the impact of these changes on their projects.

The legal ramifications of the pandemic are still playing out and likely will not be resolved for some time. Anecdotal evidence suggests that *force majeure* provisions rarely have been invoked in connection with construction projects and, where invoked, have been limited to the period of mandated government shutdown and/or direct supply unavailability resulting from the pandemic. The infrequent use of such clauses may be due to the fact that *force majeure* obligations in construction contracts typically extend the time for project completion (which owners do not favor) and require each party to bear its own costs during the *force majeure* event (which contractors do not favor).

Commentary from the companies surveyed suggested that owners and contractors generally have been able to agree on limited time extensions to provide some pandemic-related relief, but whether these extensions will be sufficient given the ongoing conditions and whether parties can agree to further extensions remains unclear. As disputes arise over the sufficiency of extensions, those charged with resolving them will need to grapple with

Key Takeaways

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whether contractors should be required to mitigate consequences for owners or accelerate work plans to compensate for lost time; whether there is an obligation to use contract “float” to compensate pandemic effects; and whether the causes of project delays are linked to the pandemic, as opposed to other construction or supply issues, among other issues.

The experience of those surveyed also suggests that no agreement has yet been reached as to who will bear the costs of productivity impacts on construction projects. Clear and robust documentation segregating productivity effects that can be linked to the pandemic from other, nonpandemic ones will be critical in establishing entitlement. Early planning is critical in the context of construction disputes, in order to ensure a robust legal record in the event of a subsequent dispute.

In addition to COVID-19’s ongoing impacts on current construction projects, the pandemic already is effecting contract negotiations going forward. Owners generally are willing in new construction and equipment supply contracts to provide schedule and, on occasion, cost relief for COVID impacts directly resulting from a legal requirement. The issues debated in the contract negotiation are related to whether such relief extends to COVID-related issues that are *not* the result of a legal requirement, such as supply chain issues or labor shortages. The owners’ general position is that we are now far enough into the pandemic that supply chain and labor issues have been less problematic and contractors should be able to price in their risk. Owners and/or lenders also may ask contractors for transparency regarding impacts to date and planning for ones going forward. Contractors, on the other hand, are pressing for schedule relief and, if possible, provisions to address other unanticipated impacts as well. If unsuccessful, they may try to increase lump sum or unit-based costs to reflect the added pandemic uncertainties.