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Critical planning for construction companies during COVID-19

INSIGHTSARTICLE

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The COVID-19 pandemic is causing significant disruption in the economy, and construction companies are not spared. The first wave of disruption came from government orders that shutdown the economy. For the past week, Saxton & Stump's Construction Law team has been fielding calls and advising on which projects can continue with work, requesting exemptions, working across state lines, and addressing specific project-related disruptions to manpower and the schedule.

Over the next few weeks and months, additional disruptions and issues will arise. Your company will need a plan.

What is your company's plan?

1. What is your plan for handling COVID-19 events as they develop on your projects? It is highly likely that someone at your project sites will test positive for COVID-19, so it is important to have a hygiene protocol in place. Best practice is to be prepared with guidance and protocols on how to handle the staffing, quarantine, and other related issues that will arise if one of your crew members tests positive.
2. Is COVID-19 a force majeure event? Perhaps. A force majeure event depends on the specific contract language which may entitle an extension to the project schedule or additional compensation.
3. What is your plan for requesting a change order or responding to a construction change directive? COVID-19 may entitle a contractor or subcontractor to change orders, depending on the contract language.
4. What is your plan for time impact claims? COVID-19 related delays may be the basis for extensions of time or additional compensation, including delays, acceleration, productivity claims, and additional costs for unabsorbed overhead and general conditions.
5. What is your plan for noticing and preserving pending claims, including those that have not fully accrued? If you are entitled to additional time or compensation, then you must notice your requests. If the owner or higher tiered contractor rejects the request, then you must properly preserve your claim and progress it through the claims and disputes process, which depends on your project and the contract documents.
6. What is your plan for a termination? Due to COVID-19, there may be terminations for convenience or for cause. Depending on your contract, you may need to plan accordingly.
7. What is your plan for handling remote work? Do you have a remote work policy or "bring your own device" policy currently in place? Do you have a cybersecurity policies and procedures in place to protect your company data?
8. What is your plan for handling your workforce and employees? Companies will need to assess their current workload, evaluate their staffing needs, and make a decision by comparing the effect of the Families First Coronavirus Response Act (FFCRA), layoffs and unemployment compensation, or other options for financial funding that can be explored and executed with legal advice.
9. What is your plan for finding or using supplemental manpower? Companies providing construction services to the healthcare industry may find themselves in need of supplemental manpower for projects.
10. What is your plan if projects are slow to pay due to the impact of COVID-19 on the economy? Numerous state and federal funding and loan programs are being created to provide liquidity and cash to companies. Now may be a good time to consider which programs you may qualify for.

11. What is your plan for corporate structure, chain of command, and succession planning? Should company leadership or project managers need to take time off, how will you ensure business continuity?
12. What is your plan if a claim is made on a payment or performance bond, or if a lien is filed? Deadlines, procedures, and standard practice are different for breach of contract claims, indemnity claims arising from negligence, mechanics' lien claims, payment bond claims, performance bond claims, and claims against design professionals for faulty design. If a project falls apart, each of your potential claims may have different timelines for preservation and pursuit.
13. What is your plan if another contractor/subcontractor files for bankruptcy, or if your company should consider it? Now may be a good time to develop a proactive strategy to minimize your risk of loss and maximize recovery.

We are here to help with solutions

Saxton & Stump attorney Ron Pollock is available to discuss these and other questions. Our Construction Law group can help you navigate the variety of impacts on your business and construction projects resulting from COVID-19.

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