CARLTON FIELDS

Are You Protected Against the Risk of Construction Delays and Increased Construction Costs Due to COVID-19?

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Background

The World Health Organization (WHO) has declared the coronavirus disease 2019 (COVID-19) outbreak a public health emergency, and as of the date of this alert, the Centers for Disease Control and Prevention (CDC), a component of the U.S. Department of Health and Human Services, has reported confirmed cases of COVID-19 in more than 60 countries, with the vast majority of those cases being reported in China where COVID-19 originated. While it is currently unknown the extent to which COVID-19 will impact the construction industry in the United States, there are likely to be significant impacts based on such things as (1) unavailability of supplies; (2) delays in the delivery of supplies; and (3) shortages in or unavailability of construction labor.

In today's global economy, many of the supplies used directly for the construction of projects in the United States, and indirectly in the manufacturing of construction equipment, are shipped from countries around the world, including China. As suppliers are affected by the spread of COVID-19, delivery of those supplies could be significantly delayed or ceased altogether. Additionally, if the spread of COVID-19 increases in the United States, a shortage of labor in the construction industry could ensue. In either event, these risks likely will create significant impacts on overall cost and timely completion of construction projects, not just for new projects but also for those already underway.

How to Protect Against These Impacts

For new projects, contractors should consider including contract provisions that account for this uncertainty in prices by allocating the risk to the owner, or allowing for a reasonable adjustment to the contract price or contract time in the event of significant unexpected price increases for, or delays in delivery of, supplies due to COVID-19, either directly or indirectly. Alternatively, contractors should consider adding sufficient contingencies to their pricing to protect against the assumption of this risk.

For ongoing projects, these risks are more immediate and difficult to avoid. The first step is to review the applicable contract to determine if there are provisions that already address delays in the delivery, or unforeseen increases in the price, of construction labor or building supplies. For example, some contracts may have escalation or price adjustment clauses or express qualifications to the price proposal that might account for fluctuations in commodity or labor prices. In addition, there may be a force majeure provision that might apply to this new risk. All existing contract provisions should be reviewed to see how the risks for these unexpected delays and price increases are allocated between the parties.

Carlton Fields' Construction Practice can help clients navigate this uncertain terrain. We can draft contract provisions that protect against the effects of unexpected delays in the delivery of supplies, and price increases to the same, examine the contracts on existing projects to determine if there are ways to seek equitable adjustments to your cost or time of performance, or consider other possible alternatives to avoid absorbing the brunt of these unexpected risks.

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