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Guidance For Contractors Dealing with Impacts of Coronavirus

The impacts that the Coronavirus has had and will continue to have on the construction industry and construction projects are significant and wide reaching. More and more states and localities are issuing complete or partial mandatory shut downs of projects. With respect to projects that are continuing to work, impacts at the project site could include the need for enhanced safety and hygienic requirements, social distancing measures, and interruptions and shut downs due to people testing positive. Labor availability has been impacted by people having to stay home to take care of family members or attend to child care issues, quarantines and people generally reluctant or unwilling to work due to fear of exposure. Impacts beyond the project site include disruptions to the supply chain caused by travel and transportation restrictions, plant closures and other governmental actions. These impacts can cause increased costs, including lost labor productivity, as well as schedule disruption and delay. It is important that contractors take appropriate action to protect their rights with respect to these impacts and to mitigate the effect.

Contractors should review their contracts carefully for provisions that address unforeseen conditions or excusable conditions or delays. Determine if the contract contains a “Force Majeure”, or act of god, provision and evaluate whether this pandemic falls within the terms of the clause. If there is no such clause, or if the pandemic does not come within the terms of the Force Majeure clause, determine if there are other provisions in the contract that cover events beyond the contractor’s control or that arise from unforeseen conditions. Such clauses should set forth whether and under what circumstances the contractor is entitled to an extension of time and/or additional compensation.

The contract must also be reviewed for provisions that require express written notice of conditions causing delays and for claiming additional costs. Pay careful attention to the time limits for providing such notice, to whom the notice must be provided and what the notice must contain. While the pandemic and the impacts it is causing may be patently obvious to everyone that does not eliminate the need to comply with the written notice provision. You cannot rely on verbal communications. Given the ongoing and dynamic nature of the impacts caused by Coronavirus it may not be possible to provide an assessment of the actual impacts at this time. At a minimum, provide general descriptions of the impacts experienced and reserve the right to

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provide further detail, refinement and elaboration when circumstances permit. That additional detail should be provided as soon as practicable.

Another contract provision to be mindful of in these times are suspension of work clauses. These provisions may be triggered by a short term shut down caused by someone on the site testing positive as well as a longer term shut down by an owner or government order. These provisions may provide for certain compensation if the suspension is of a given duration and may also be a basis for requesting an extension of time.

Lastly, it is important to take action to document and preserve information regarding the cost and schedule impact. If possible, set up a separate cost code to which employees can track time lost due to Coronavirus related issues including dealing with the additional protocols, special training, hygienic and safety requirements, absenteeism, testing or people testing positive and labor availability issues. If possible, try and track and document any differences in productivity before after the impacts of Coronavirus were felt

In this time of uncertainty as to what the ultimate impacts of the continuing spread of Coronavirus will be, it is important that contractors exercise and protect their contract rights and remedies and take the appropriate preventive and proactive measures to mitigate and reserve rights to seek compensation for any prospective loss.

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