

CLIENT ALERT! BUILDING DURING THE COVID-19 PANDEMIC

By Milene C. Apanian, Esq.

As you know by now, Governor Gavin Newsom announced that construction is an “essential” business. For now, the Governor is NOT banning construction projects during the Covid-19 pandemic because he is satisfied California has “strict workforce efforts” in place to protect its construction workers. For that reason, construction industry stakeholders, including trade associations, project owners, contractors, subcontractors, suppliers and public agencies must work together to keep construction sites open and safe for all.

As we continue to build while navigating through the pandemic, please keep in mind the suggestions below. I will initiate a Zoom discussion on **Monday April 13, 2020 at 10:00 a.m.** to answer questions. E-mail me at mca@agrlaw.com and I will share the login number.

FOR PROJECT OWNERS:

Owners are always focused on completing construction projects on time and within budget. As difficult as it may be, project owners must realize that the Covid-19 – and the unexpected consequences – are a reality that must be accepted.

PROJECTS WILL BE DELAYED! PROJECTS WILL COST MORE THAN EXPECTED! End of story.

Prioritize Health and Safety: Owners should prioritize the health and safety of the workforce and accept the unavoidable costs and inefficiencies of keeping workers safe. Owners should require general contractors and subcontractors to immediately create and implement a Covid-19 exposure, prevention, preparedness and response plan and designate a Covid-19 Supervisor at the jobsites to enforce the plan and governmental orders.

Time Extensions: Owners should discuss, evaluate and provide **reasonable time extensions**, postponing the project completion dates. Demanding unreasonable timelines will not help the situation. If crews must be staggered, and social distancing implemented, the construction crews will be less efficient than before, and the work will take longer. If manufacturing plants are shut down or have reduced production capabilities, material deliveries will be delayed, and materials costs will escalate. Contractors, subcontractors, and the distributor suppliers will NOT be able to expedite material deliveries, regardless of owner demands.

Added Costs/Extras: Owners should discuss, evaluate and agree to **reasonable change orders** addressing cost escalations. Complying with governmental orders, purchasing additional personal protective equipment, cleaning and sanitizing the jobsite/tools/equipment, providing additional wash stations, and ensuring the safety of the workforce costs money. It is an extra expense that contractors did not anticipate when they executed the construction contract. Additionally, as discussed above, labor inefficiencies mean delays, added contractor overhead and costs. Material shortages and cost escalations are to be expected. Consider alternate products and different suppliers or accept the added costs of using the specified materials. The contractor, and the subcontractors should not bear the financial burden of the Covid-19 related delays or costs.

Owners should communicate with those building the project and mutually agree to cooperate to mitigate the Covid-19 related delays and costs. Plan for, and expect, claims from contractors and subcontractors. Evaluate and find a reasonable solution for all.

FOR GENERAL/PRIME CONTRACTORS:

Prioritize Health and Safety: Even more than before, general contractors must prioritize the health and safety of the workforce. Contractors should immediately implement a written Covid-19 exposure, prevention, preparedness and response plan and designate a site specific Covid-19 Supervisor to enforce the plan and policy. Both are mandated, at least in Los Angeles, and are a way to keep workers safe and prevent the spread of the virus. Require your subcontractors (and their sub-subcontractors) to prepare and implement a similar Covid-19 plan. Conduct routine employee screenings at jobsites, yards and offices and ensure the confidentiality of those screening records. Establish and maintain employee/subcontractor Covid-19 acknowledgements and waivers. (My April 2, 2020 Alert discussed new Covid-19 safety measures for jobsites. This article will not repeat the details.)

Document, Document, Document! Contractors should document the time and cost impact of the Pandemic, including the delays and inefficiencies, reduction of crews due to social distancing and the staggering of trades. Also keep track of cost escalations due to changed/added scope of work; material shortages and cost increases by suppliers; the added cost of having the Covid-19 Supervisor and complying with the governmental orders and requirements.

Give Notice: Contractors should review their contracts and give written notice to the project owner about the impact of building during the Pandemic, including potential delays, inefficiencies and added costs.

Communicate: Contractors should keep the lines of communication open. You are the middleman between the project owner and the subcontractors. Identify the real issues and concerns and discuss them openly with the project owner. Cooperate in establishing a completion/recovery schedule – one that considers the Covid-19 compliance requirements and one that the subcontractors can realistically perform. Don't make unrealistic and unreasonable demands to subcontractors and suppliers. Plan for your claim to the owner, expect and plan for subcontractor claims.

FOR SUBCONTRACTORS:

Prioritize Health and Safety: You and your employees are the ones in the field building the construction projects. Your workforce will be impacted the most by the ongoing construction. Take measures to ensure the health and welfare of your workforce. Purchase the necessary personal protective equipment. Train your employees about Covid-19 safety. Follow directives from the project owner and general contractor. Communicate your labor shortages to the general contractor.

Create and implement a Covid-19 exposure, prevention, preparedness and response plan.

Document, Document, Document! Like contractors, and as discussed above, you should also document the time and cost impact of the Pandemic. Plan to submit your claim.

Give Notice: If you haven't done so already, provide notice to the general contractor about the real impact of building during the Pandemic. Review your subcontract and follow the notice timeline and requirements. Do not assume a time extension or an additive change order will be automatically issued without your request.

CONCLUSION:

To conclude, now is the time to be reasonable, and to set aside the finger pointing and posturing regarding delay and extra work claims and litigation. All parties should cooperate and discuss solutions, they should

also negotiate and grant reasonable time extensions and change orders in order to limit future liability. If contractual obligations become impossible or impractical to perform (because of unrealistic demands or expectations) the parties may use *force majeure* provisions to cancel the contract. Additionally, if the parties do not proactively resolve the issues discussed above, they are inviting (i.e. guaranteeing) costly and timely litigation!

Furthermore, regardless of whether you are an owner, a contractor, a subcontractor, a supplier or a consultant or an attorney serving the construction industry, we must understand the importance of keeping our workforce safe and healthy. Each individual improving a project is a valuable member of the construction industry. Each probably has a family at home; has the same concerns about securing food for their families, earning a paycheck, the future uncertainties and most importantly staying healthy and safe.

The health and safety of the construction workforce should be of paramount importance as we continue to build. This should be our new normal, at least for a while. Be safe!

If you need assistance in drafting Covid-19 claim notices, waiver and acknowledgement forms, or the required Covid-19 exposure, prevention, preparedness and response plan email me at mca@agrlaw.com to discuss further. For most contractors and subcontractors, the required Covid-19 plan can be prepared for a flat fee.

Milene Apanian is a partner at the law firm of Abdulaziz, Grossbart & Rudman, an adjunct professor of construction law and contracts and is passionate about getting clients paid! She assists clients collect on construction projects by drafting & reviewing contracts and by pursuing contract remedies, and enforcing mechanic's liens, stop payment notices, bond claims and prompt payment violations. **Milene Apanian can be reached at mca@agrlaw.com**

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