



# Mitigating Construction Contractors' Business and Financial Risks on the Job Site

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MITIGATING CONSTRUCTION CONTRACTORS'  
BUSINESS AND FINANCIAL RISK ON THE  
JOBSITE

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# THE ONLY CERTAINTY IS THAT THINGS ARE UNCERTAIN

**What is required of me on the jobsite to keep people safe?**

**What if I don't have enough PPE, do I need to continue working?**

**Will I have insurance coverage for claims?**

**How will my contract provisions be applied?**

**What if I don't have enough labor, and timely material deliveries?**

# WHAT IS REQUIRED OF ME?

**What must my safety plan provide?**

**What PPE do I need, and who is paying for it?**

**What is the ‘standard of care’ to be compliant**

**Flow down / delegation of safety obligations is permissible**

*Delegation may not completely relieve a contractor of safety obligations/liability*

## **MEANS AND METHODS IMPACTS, CHANGES AND RESPONSIBILITY**

**§ 3.3.1** ....The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract....

### **IS MY COVID-19 SAFETY PLAN A “CONTRACT DOCUMENT”?**

“.. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences, or procedures, the Contractor shall evaluate the jobsite safety thereof.... If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely notice .....

**WHAT IS CERTAIN IS THAT COVID RESTART WILL LIKELY  
AMOUNT TO CHANGED CONTRACT CONDITIONS**

**Does New COVID-19 = NEW DEAL**

**Contractors Generally Do Not Have A “Pre-existing Duty” to Perform Work Under the  
COVID-19 Imposed Conditions**

**This was not a condition anticipated when parties entered the contract, but will be for  
contracts and proposals (including change orders) after March 2020.**

**Did you accept the risk you are now encountering?**

**While the intent of the contractual parties will control, say what you mean  
rather than having a jury do it for you.**

# CONTRACT RESTART ANALYSIS

“The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days for ....:

“....An act of government, such as a declaration of national emergency, that requires all Work to be stopped...”

***BUT IF I DON'T TERMINATE....***

**WELCOME BACK.....**  
**MY HOW THINGS HAVE CHANGED**

***Re-acquaint project staff with your contracts!***

- **Notice provisions**
- **Change order procedures**
- **Safety obligations, and**
- **DELAY PROVISIONS**



# THE RESTART ANALYSIS

What did I buy and for how much?

Has the scope, duration and cost of 'buy out' terms changed?

What is my entitlement for recovering that additional costs and time

Have I preserved those rights

## COVID-19 DELAYS TIME, MONEY OR BOTH?

### Excusable Delay

- Work has been unable to proceed due to conditions set forth in the contract
- Extends Liquidated Damages deadline.
- Commonly called Force Majeure
- “...or other causes beyond the Contractor’s control”
- Confirm no concurrent delays

### Disruption/impact claims

- Work is proceeding but not at the productive rate anticipated.
- Impact on productive work created by shift personnel limitations, social distancing, additional cleaning duties, and pre-shift employee screenings.
- Volume of productive work is not proceeding as planned due to COVID-19 inefficiencies, and is now costing more.

# WILL MY COVID-19 CLAIM BE SUBJECT TO A 'NO DAMAGE FOR DELAY' PROVISION

“No Damage for Delay” is unenforceable when  
an upstream party:

- 1) affirmatively interferes with the work;  
or
- 2) fails to act in some "essential matter necessary to  
the prosecution of the work."

**GREAT.....**  
**BUT PLEASE ANSWER THE QUESTION...**

After the job shutdown that was then restarted, a contractor filed a delay impact claim despite a N.D.D. provision where the upstream party:

- *failed to timely issue a Project Schedule*
- *Failed to replace a key subcontractor*
- *re-sequenced the work*

**DEFAULT v. PERFORMANCE: A BUSINESS DECISION  
YOU MUST WEIGH EXPOSURE ARISING FROM CONTRACTUAL  
DUTIES, AND THE 'SOCIAL' DUTY OWED THIRD PARTIES**

**What is my exposure if I am defaulted:**

- **LD's?**
- **Waiver of Consequentials?**
- **Cost of completion?**
- **Is non-performance material breach?**
- **Relationship Management?**

**What is my exposure if I continue to perform:**

- **Voiding insurance coverages?**
- **Employee or third party claims?**
- **Gross negligence?**

**CAN I BE TERMINATED?**

# CONTRACT 'RESTART' NEXT STEPS

PROPOSE A 'RESTART' MODIFICATION / CHANGE ORDER

COORDINATE COVID-19 RESOURCES WITH OTHERS ON SITE

PREPARE RECOVERY PLAN

COMMUNICATE SAFETY PLAN AND ANY IDENTIFY DOWNSTREAM COSTS

SUBMIT, OR UPDATE, DELAY AND CHANGE NOTICES RELATED TO COVID-19 IMPACTS ON CONTRACT AMOUNT, SCHEDULE, UNIT PRICES, ALLOWANCES, ALTERNATES.

QUALIFY future scope of work proposals, and unit prices as subject to further adjustment based upon anticipated COVID-19 IMPACTS

**PAYMENT WAIVER AND RELEASES: EXPRESSLY 'CARVE-OUT'  
PENDING CHANGES/ CLAIMS FOR COVID-19 ISSUES**

## OTHER ISSUES TO CONSIDER.....

### WORKERS COMP IMMUNITY WAIVER

“Contractor expressly. waives as a defense to any indemnity obligation the right to assert any immunity provided under any workers compensation acts....”

### WHAT ABOUT EMR OR GL PREMIUM IMPACTS?

My labor will not return-  
IS THIS A CONDITION THE NON-OCURRENCE OF WHICH THE  
CONTRACT WAS PREMISED UPON?

# RETURNING TO WORK: WORKPLACE ISSUES

- Coronavirus and OSHA recordkeeping
- Workers Compensation: Coronavirus as an “occupational disease”
- Reporting positive cases: HIPAA and other privacy laws
- Taking temperatures and other employee screening issues
- Planning for the future: possible layoffs and furloughs



# FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

- Signed into law March 18, 2020
- Requires small businesses to provide paid sick leave and paid family leave
- Effective April 1, 2020 through December 31, 2020



# PAID SICK LEAVE

## **Paid sick leave at full salary (\$511 per day max):**

- The employee is subject to a federal, state, or local quarantine or isolation order
- The employee has been advised by a health care provider to self-quarantine
- The employee is experiencing coronavirus symptoms and is seeking a medical diagnosis

# PAID SICK LEAVE

## **Paid sick leave at two thirds salary (\$200 per day max):**

- The employee is caring for an individual who is quarantined by order of the government or a doctor
- The employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to coronavirus
- The employee is experiencing any other substantially similar condition, as specified by the Secretary of Health and Human Services

# PAID FAMILY LEAVE

- 12 week entitlement
- First two weeks paid at **employee's** option
- Two thirds salary (\$200 per day max)



# PAID FAMILY LEAVE

## Eligible Employees:

- Employed for at least 30 days
- Caring for a son or daughter (18 or under) whose school has been closed due to coronavirus
- Only for active employees (not employees receiving unemployment compensation)



# UNEMPLOYMENT COMPENSATION

- Expanded eligibility rules
- No seven-day waiting period
- Additional \$600 per week
- Additional 13 weeks
- No increase to employer's UC tax rate



# Risk Management and Projections

## Potential risk:

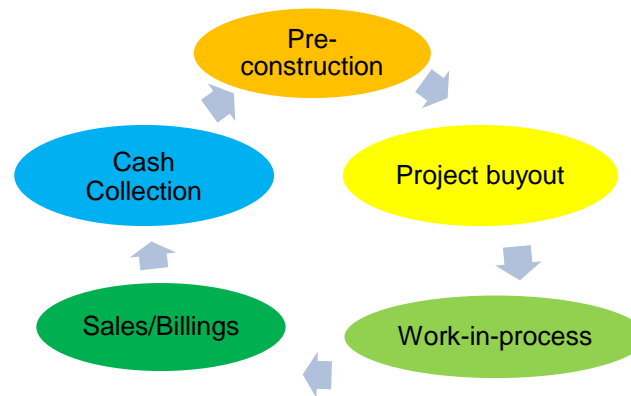
- Slowing of cash collections
- Delay in start dates
- Contract terminations
- Material availability and costs
- Internal workforce schedule and capacity
- Subcontractor availability
- Safety protocols impact on work efficiency

## Projecting cash flow

- Cash receipts/cash disbursements amounts and timing
- Rolling 13 week cash forecast
- Stress test your forecast – worst case

# Cash Forecasting Principles

- Increase receipts & delay disbursements
- The cash flow life cycle:



- Integration/coordination of operations and finance



# Change Orders and Claims Management

Changes happen in construction:

- Inaccurate specifications
- Errors in drawings
- Unforeseen conditions
- Design changes
- Material substitutions
- Budget
- **Outside influences**

Scope Changes – typically contract terminology will provide guidance on process

Non-Scope Changes – weather, schedule sequence, health/safety hazards, COVID-19

# COVID-19 PA Construction Rules Summary

- Pandemic safety officer
- Mask or face covering is required
- 6 feet of separation
- Hand washing stations
- Areas of high risk must be routinely cleaned and disinfected
- In-person gatherings limited to 10 people
- Temperature screenings

# Change Orders and Claims Management

1. Review your contracts
  - Re-review your contracts before going back to work
2. Review the plans
  - COVID-19 – Review the back to work requirements and safety plan
3. Open communication and understand communication procedures
  - Have open dialogue with the owner, GC, and subcontractors
  - Make sure everyone on job is monitoring their productivity and impact on the project
  - Follow contract guidelines or set your own protocol
  - Know responsibilities of all contract parties
4. Identify and project additional costs timely
  - There is no playbook and it will be difficult to know all additional costs
  - Evaluate and discuss with people in the field re-evaluate costs on an ongoing basis
  - Keep accurate records of additional costs as they are happening
5. Document in writing
  - If you are able to get a change order approved, make sure it is writing

# Contact the Presenters: [kmiller@kmco.com](mailto:kmiller@kmco.com)

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