Constructing in a COVID-19 world: looking forward

May 05, 2020

Although another global health pandemic has always been a possibility, and perhaps even a probability, the impact that COVID-19 is having has been extensive. Our crystal balls have never been as foggy as they are now.

In the construction context, owners and contractors are currently focussing on trying to get projects built in these uncertain times while scrambling to assess their legal rights. Although these immediate steps are appropriate and important, given the uncertain and rapidly evolving nature of this pandemic, it is never too early to start thinking about how things will look as its impacts begin to lessen.

Much has been written about today's world, and the impacts of *force majeure* or change in law or impossibility. This article is intended to look ahead to a world that emerges from the current restrictions into some semblance of normality.

A brief issues list

There are many issues arising as a result of COVID events. Looking ahead, we anticipate that these issues will include:

Claims: There are already many claims arising out of COVID-19. Owners with late projects, and contractors and consultants with increased costs. Whether the resulting claims are supportable at law or not, there will be a myriad of disputes. To the extent that these are not resolved by negotiation, it will be important to find ways to resolve these claims. Innovative fast track methods would be helpful to this process.

Bankruptcies: Unfortunately, the entire economic web. Owners, contractors and consultants may be facing economic hardship to the point that their businesses are not viable. Regardless of which party contractually bears this risk, projects will suffer. It will be important to reconsider the financial viability of your counter parties and their ability to execute their obligations.

Bond claims: Hand in hand with bankruptcies go bond claims. For all parties, ensuring that bond terms are followed is crucial, especially in times of increased financial risk.

Insurance: Much has already been written on the potential for insurance claims arising out of COVID-19. While much more will undoubtedly be shed resolving those claims, the impact on insurance will be equally or more important. Future coverage limitations, foreseeability, and premiums will all be subject to change.

Changes to current contracts: Live contracts for existing projects may or may not adequately address COVID-19. But in addition to claims, in order for projects to carry on, it may be necessary to address issues that have arisen or that are predicted to arise in the future. Understanding the current contract terms and making sure amendments to those are consistent and match the business terms agreed by the parties will be crucial. The only immutable law of the universe is the law of unintended consequences and parties must make sure that the changes they make to live contracts don't have unintended consequences.

Rush to RFP's and tenders: It appears clear that governments will want to use construction as an economic stimulus. They are already trying to fast track "shovel ready" projects. While this is a laudable goal, the largest failed projects are those that were rushed out the door to get shovels moving. Speed should be balanced against the risk of premature release of projects. Proper project planning and project documents reduce risk and generally make for fewer disputes and better projects. But these times are extraordinary and the larger risk may well be not having projects moving and money flowing to stimulate the economy. Innovative project delivery is more important than ever in such conditions.

Future risk allocation: Many contracts do not mention epidemic or pandemic by name, but when they do, they often have very limited recourse for contractors. Very few contemplate owners needing to be protected against any form of *force majeure*. Parties are now seeing the real impact such events have on projects and will want to discuss risk allocation for future contracts.

Future contractual processes: Events such as COVID-19 pressure test the parties and their contracts. Some survive that test, while others do not. One of the areas that has always been problematic is notice provisions for *force majeure* events. COVID-19 is particularly problematic because it has multiple faces with potentially different causes (e.g. a change in law vs. a *force majeure*) and is an ongoing event. Notice provisions struggle at the best of times, but are showing their cracks in this pressure test. Other processes, such as disputes and payment, are facing similar pressures. New and innovative means will be needed to deal with these challenges.

Suspension and re-start: The costs and time impacts of a suspension and re-start, howsoever caused, are always going to be challenging. To the extent that full or partial suspension has demobilization and remobilization costs, those are relatively calculable, but things like ramping up efficiency losses and mitigation and acceleration obligations are less simple. In many cases, the parties will simply want to get going again with some form of agreement to sort out the impacts later.

Supply chain: COVID-19 has highlighted the global nature of the construction supply chain. While there was some understanding of this before the pandemic, the fragility of the supply chain and the impact of delayed materials on the ability to prosecute the work was not universally understood. Parties may be prepared to pay more for supplies that are closer, but governments will have to consider their ability to do so in light of the

various trade agreements. However, governments may also wish to try and drive economic benefit to local suppliers, and will also have to consider trade agreements in that vein. Parties may also wish to try and negotiate stricter scheduling requirements for suppliers, with an ability to utilize alternate suppliers in the event of deals in the supply process. While owners and contractors would have to determine how to deal with the cost increases, this would at least provide an avenue for schedule mitigation.

COVID-19 v2.0: There may well be steps that the parties can take to deal with the impacts of COVID-19 v.2.0. Although no one can predict the impact of COVID-19 in the long term, it may be possible to put preventive measures in place or to re-sequence work to reduce the future impact of a potential “second wave” or other pandemics. These measures likely come at a cost, so the parties will need to work out the cost and time impacts of the measures. It may also be possible to reach agreement on how to deal with cost and time during the resolution of the first tranche of COVID-19 so the wheel does not need to be completely re-invented.

Financing: Some lenders are already dealing with the effects of COVID-19 on current projects. All of the various issues described above will potentially come to roost with lenders. Lenders may at some point decide that the project is untenable. For future projects, the risk from COVID-19 and other epidemics will clearly be top of mind and be something that lenders will consider. This will also likely impact re-financing of existing projects, some of which had anticipated a refinancing gain that may no longer exist.

Predicting the future

A number of the issues described above open the door, and in some cases demand, innovative solutions to very real problems. Ultimately, the effects of COVID-19, COVID-19 v.2.0 or another epidemic are just other project risks or events that need to be considered, managed and dealt with. The challenge is that the problems are very difficult to predict and the impacts very difficult to discern.

The easy prediction is that the construction industry of the future will look somewhat different from what it looks like today. How different is anyone’s guess, but there are certainly steps that the industry can take to help re-establish some level of commercial certainty. At BLG, our goal is to work with owners, contractors, procurement agencies, governments and others and to help provide thought leadership in the face of these challenging issues.

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