

Moving projects forward in face of COVID-19

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AUTHOR

[Courtney Lynch](#)



Where we are. Though most cases are mild, the number of coronavirus (COVID-19) cases worldwide has now passed 115,000. The World Health Organization has called the coronavirus a pandemic. Last night, on a live broadcast, the President announced certain new travel restrictions from continental Europe for 30 days. Cities and schools are counting on the benefits of social distancing to keep the spread low; and reflecting such, classes are canceled and staff are being told to work from home.

So what does this mean for construction, an industry that depends upon the tangible—upon crews showing up at a jobsite and upon materials showing up as ordered and as expected? Though economic loss can never compare to the loss of human life that so many have experienced across the globe, the construction industry should prepare for the inevitable business interruptions that will occur as this global impact hits the shores of home, delays in schedule occur, and losses are felt economically.

Be proactive, not reactive

Protecting your schedule. Anticipate delivery interruptions and do what you can to prevent major impacts on your schedule. If you're an electrical subcontractor or mechanical technician who provides a significant amount of materials to a project, think about how you can overcome a possible lack of materials or an interruption in delivery of such materials. Do you have surplus materials in storage for easy access; and if not, is it possible financially and logistically to create such a surplus, now, that will carry your business through the coming months?

Construction is no stranger to labor shortage, and the industry should prepare for potential temporary labor shortages as communities are impacted by the virus itself and, if global trends are any indicator, by community shutdowns and restrictions on travel. If your typical operation works on a skeleton crew, plan now for how you will provide replacement man-power and consider providing extra coverage in anticipation for those who may call-in sick. Consider whether any work can be performed offsite, such as certain fabrications, if job-site performance becomes restricted.

Take time now to review your contracts. Review all notice procedures in your contracts and the time requirements for the same. If you think that material deliveries may be late and may impact your performance, notify the proper parties via the proper procedures. Make it clear in this notice why the disruption in delivery has occurred. Reassure all parties that you intend to follow through on your scope of work so that there are no possible retaliatory claims against you for anticipatory breach. Proactively seek time extensions if you anticipate delays.

Document, document, document. Starting now, create a paper trail that illustrates your attempts to perform your work on time. If your schedule is impacted by another trade on site, take photographs showing how the job is not yet ready for your work and create detailed job logs reflecting the same. Keep copies of all notices and their transmissions, and show compliance with the contract notice procedures. Your contract may require notices to be delivered within a certain number of days and to a certain address. Keep copies of all documents that show delays in shipments. Anticipate claims for delay damages and do what you can, now, to preserve all defenses against a wrongful/for cause termination. If applicable, keep bonding and insurance companies informed of impacts to the project.

Force majeure – the good and the bad. If your construction business is like most, then your goal is to get the job done as timely as possible given the current climate, and not to give up valuable work. A force majeure clause can relieve parties from their contractual obligations when certain circumstances beyond their control arise, which make performance impossible. Review your contract to see if a force majeure clause exists, and if it does, read it strictly. Force majeure clauses are typically drafted to identify specific events (acts of war, fire, terrorism, labor strikes, etc.), and your contract's clause may or may not include epidemics or pandemics. Take note of whether your clause requires you to show attempts at mitigation and whether there are specific notice

requirements that require you to provide notice to the other party within a certain number of days of the force majeure event. Seek legal counsel before invoking a force majeure clause, as there may be unanticipated consequences.

Again, be proactive, not reactive As the world pauses in response to the COVID-19 coronavirus, take the time to assess where you are now on each of your jobs, and evaluate how you can move your projects forward despite a potential disruption in labor and materials in the coming weeks.

For further information on this topic please contact [Courtney Lynch](#) at Kilpatrick Townsend & Stockton LLP by telephone (+1 281 809 4100) or email (cmlynch@kilpatricktownsend.com). The Kilpatrick Townsend & Stockton LLP website can be accessed at www.kilpatricktownsend.com.

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