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## CONSTRUCTION DELAY CLAIMS: SUPPORTING & DOCUMENTING COVID-19 AND POST COVID-19 PROJECT DELAY CLAIM

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Now that your project has resumed or is expected to resume shortly, there are changes that will be needed to accommodate for the impact of COVID-19. The project that was started in June, November or even February is no longer the same project identified in the contracts. In particular, schedules and durations that were previously planned have been delayed for weeks or months and will sustain further delaying conditions going forward. Normal schedule “make-up” techniques are largely or entirely unusable due to job-site safety restrictions and supply-side uncertainties. Materials and equipment may or may not be available within the near future. Permitting, inspections and utility company involvement may be delayed. Some subcontractors and suppliers may not have been able to survive the shut-downs and will need to be replaced. New schedules taking these factors into account will need to be generated and accepted.

If the parties were or are able to reach a comprehensive resumption agreement or contract amendment/change order that addresses these issues, they are infinitely ahead of the game. If they have not, or have left certain claims to be decided later, in addition to developing a plan to move forward, they must also make every effort to give notifications of claims, compile documentation of the past and current conditions and document support for anticipated ongoing claims and defenses to claims. While the best practice is to work on the mutually agreeable resumption plan and to work cooperatively to achieve a realistic goal, that process cannot be guaranteed. The realistic approach includes “**hope for the best, but plan for the worst**” by developing support for positions regarding claims that may arise.

DELAYS: Isolate separate periods of the project:

- Pre-COVID-19 delays need to be determined. On one hand, these will have a life separate from COVID-19-related delays. On the other hand, efforts to mitigate those early delay impacts will very likely be impacted by the COVID-19 shutdown or restricted work access:
  - Identify where the project stood prior to COVID-19 in relation to the approved schedule
  - Review and establish schedule impacts and concurrencies
    - For the contractor: accumulate and include subcontractor delay impacts and cost impacts for the pre-COVID-19 delay
    - For the owner/developer: review the actions of all who were on the project, including construction management and design professionals as well as the contractor and its subcontractors, to identify the source of delays and existence of concurrencies
  - Assess the impact of any pre-COVID-19 concurrent delays on the overall completion

- Identify any pre-COVID-19 acceleration efforts and costs, or “constructive acceleration” impacts
- Make sure contractually-required notices were sent, or are being sent, as soon as possible
- Consider engaging a scheduling expert to assess the pre-COVID-19 delays. **Note: this applies to the following two periods, also**
- The COVID-19 shut-down period needs to be assessed. This would include the time during which the project was fully or substantially shut down by governmental orders, including the time when primary subcontractors or suppliers were shut down. For that period:
  - Review the contract documents for force majeure and suspension provisions
  - For the contractor: If notice has not been sent for either a time extension or costs associated with the suspension, submit it immediately:
    - Compile and submit demobilization and other suspension costs, if incurred;
    - Assess daily logs and other project data to determine the productivity of any work that was being performed;
    - Develop and submit an updated schedule that accurately incorporates the period of substantial or full suspension.
  - For the owner: If work could have been performed, but wasn’t, document it:
    - If progress was less than what it should have been, even allowing for COVID-19 site restrictions, document it;
    - Promptly respond to any claim notices provided by the contractor.
- Post-COVID-19 delays will very likely continue due to re-mobilization time, site requirements, supply delays, replacement of subcontractors and suppliers, among other factors:
  - Review the contract scheduling and updating requirements, and create an updated schedule that accounts for time lost during the COVID-19 shut-down/suspension period. Attempt to get joint ownership of it;
    - Document any objections to the proposed updated schedule;
    - Even if a final schedule cannot be agreed to, proceed with it under “protest” and give written notice of the protest.
- For the Contractor:
  - Document and notify owner of re-mobilization time requirements for you and your subcontractors and suppliers;

- Document and notify the owner of any needs for subcontractor or supplier replacements caused by COVID-19 impacts;
- Document and provide notice of productivity impacts caused by COVID-19 job-site restrictions;
- Document and give notice of constructive acceleration costs;
- Document and continue to update with new delays caused by the owner, design team, labor or supply side delays, weather etc.;
- Communicate with suppliers and document and notify the owner of material and equipment supply delays.
- For Owners:
  - Require the contractor to provide daily reports showing workforce and locations of work;
  - Require the contractor to promptly identify any productivity or supply delays;
  - Document and notify the contractor of any identified new delays by it or its subcontractors;
  - Work with the design team and construction manager to expedite RFI's, submittal reviews, payment applications, change order request responses and delay mitigation efforts (ie. allowing for material substitutions to expedite delivery) that can avoid compounding delay claims to the contractor;
  - Document non-compensable weather and similar delays;
  - Assist the contractor in expediting governmental and utility company cooperation;
  - Work with any separate contractors to avoid interference with the contractor's work, particularly given job site safety restrictions;
  - Allow for overtime where reasonable;
  - Document the failure of the contractor to maintain site safety requirements as this could have a labor force impact.

As stated above, if a comprehensive resumption agreement can be reached, it is preferable. But, if it leaves areas open or cannot be reached, the above steps can assist the parties in supporting or resisting claims. Following the recommended steps will result in potential evidence at a future mediation, arbitration or trial after memories have faded.

*NOTE: The next "COVID-19 Alert" will address documenting damages associated with delays.*



## E-ALERT

For further information, contact [James Landgraf, Esq.](#), or any member of Dilworth's [Construction Industry Practice Group](#), with questions or to discuss successfully documenting and handling and defending delay claims associated with the COVID-19 shutdowns, suspensions and restrictions.