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Does such insurance claims also cover the delay in engineering or procurement or construction due to this disruption? It all boils down to such contractual and legal interpretations.

Panel interpretation of the question: Does insurance cover delay in engineering, procurement or construction due to COVID-19?

Panel Answer: Whether coverage is provided or not will depend on looking at the exact language of the insurance policy. Generally speaking, coverage for business interruptions are tied to property policies that require some property damage to take place for business interruption coverage to kick in (i.e. fire in a hotel lobby requires the hotel to shut down). Accordingly, as a general answer, it is unlikely that insurance will provide coverage for the delays and disruption.

What about the differences between CDC recommendations (that have been shelved) vs. the "open the economy" recommendations (generally from unqualified political appointees)? What do you do?

Panel interpretation of the question: What do you do if there is a difference between what the CDC recommends and what local political entities order (specifically orders to open the economy)?

Panel Answer: From a contract perspective, if there is an order prohibiting work that is lifted, then a contractor/engineer is no longer prohibited from doing work despite other recommendations or guidelines being issued. Any contract clauses that provide relief (like a Force Majeure clause) when you are unable or prohibited would no longer provide contractual relief. There could be increased costs or complexity in incorporating CDC and other "work safe" strategies or recommendations and whether those are compensable or not depends on the contract and many other variables. As discussed on the Webinar, working together to determine what is best for the safety of project while understanding the contractual roles and responsibilities will be key.

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How are all these precautionary measures going to impact a company financially? Are these going to start being added to contracts in the bidding?

Panel Answer: For existing contracts, we expect the impact on individual companies to depend largely on which party bears the risks of force majeure and changes in law under the terms of the contract. As we discussed, we hope that parties will figure out a way to work together for their mutual long-term interests and help figure it out together. With regard to future contracting (e.g., contracts in the bidding and negotiation phase today), pandemic costs, as well as any potential foreseeable delays caused by a pandemic, will almost certainly be incorporated in the bids and contracts. Contractors will need to anticipate shut downs, slow downs, additional PPE, loss of productivity because of PPE and or medical screening to enter the work area, etc. We expect we will see problems in forecasting too little or too much “extra” to put in the contract.

If client rejects claim as Construction is deemed essential business.

Panel interpretation of the question: What happens if the client rejects claims for delay or force majeure because construction is deemed an essential business?

Panel answer: If construction is an essential business such that you are not prohibited from working, then you should consider whether aspects other than government orders have resulted in your inability to perform the work (e.g., labor shortages, shipment delays) that could give rise to force majeure relief for other reasons. If not, then it is unlikely you will have a successful argument that COVID-19 is a force majeure event that kept you from working. If you decide not to work, then you would have to look at other clauses to determine if you have other relief. One thing we did not have time to discuss on the panel, is that the federal government (CISA – Cybersecurity and Infrastructure Security Agency) has issued 3 different memos (latest one here https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_4.pdf ) that encourages certain businesses to continue working. If the rest of the industry is continuing to work and your company is not, it will be difficult to win an argument for relief.

How can we justify impact to especially engineering to both Schedule and budget?

Panel answer: The key for engineers is going to be showing lost productivity, but the lost productivity will need to be backed up by facts tied specifically to COVID-19. Some areas of engineering work that likely merit consideration include whether inability or delay in receiving vendor input data impacted the ability to complete work, whether new protective requirements (working from home, masks, social distancing, etc.) or the inability to co-locate people for HAZOPs or other highly collaborative meetings delayed the completion of engineering documents, and whether being unable or having delays in accessing specialized engineering equipment (e.g., databases, highly specialized technical information) impacted the ability to timely complete engineering work. These are the sorts of things that need to be examined, quantified and documented. That is only half the battle though. There are inefficiencies caused by designing out of sequence, continuing to design based on assumptions that later turn out to be faulty which requires significant correction efforts. This re-engineering activity that results from project changes that result from COVID-19 reasons should also be carefully tracked and documented. It will require the use of experts to try to quantify and give an opinion on the schedule, productivity and cost impacts.

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What are the disruptions faced at EPC contractor side? say like in delay in deliverables due to less manpower and/or social distancing, delay in receiving materials (say piping/electrical/instrumentation bulk items), delay in equipment delivery, delay due to engineering centers?

Panel Answer: Disruptions are determined on a project by project basis. No two projects will experience the same delays, disruptions or impacts, so each project needs to be thoroughly evaluated. Many of the possible disruptions caused by the pandemic were identified in the posed question. However, some other possible disruptions to consider are shutdowns as a result of COVID-19 positive workers, potential quarantines related to traveling to or from a work area, modified work plans to limit the numbers of workers that are encountering each other, running and staggering multiple teams and shifts in the event one team or shift has someone who tests positive and difficulties in getting people to and from the project site because of air travel.

What are the disruptions in client side? Like reduced manpower and reduced interest in projects and more focus in production? How these 2 separate causes are factored in schedule or cash flow and construction duration?

Panel Answer: This answer is a bit more multi-dimensional. On the Owner side, the Owner not only has to consider COVID-19 specific health issues, but also the market conditions, their own financial health, the financial health of their intended customer, commodity pricing, cost of construction, cost of mothballing and restarting construction, cash flows, and the impact of COVID-19 on the market for which they were building the project (and from which they planned to purchase the feedstock). Delays in projects are generally regarded as bad things, but in rare circumstances (especially when there have been fundamental shifts in the markets the project was intended to serve), that might not be the case. If a contractor is experiencing its own delays from COVID-19 and the Owner is ok with deferring capital spend and slowing a project, both parties may be able to find some relief in that scenario. Every project will be unique with many possible resolutions or disputes. That is why we suggested that it was important for parties to come together and try to figure out what was happening to their particular project together.

How the change management process was managed for the COVID-19 delays or changes?

Panel Answer: It is too soon to tell. At this time, many letters and responses about potential impacts are being exchanged. However, setting up separate cost codes to track COVID-19 related impact costs, including standby time (if applicable), as well as equipment, demobilization and remobilization costs are a few best practices that can help segregate those impacts and may be helpful should change orders be discussed between parties. As with all change management, the better documented the impacts are the easier it will be to justify them (with the other party or in litigation/arbitration if it comes down to that). This would be a better question to revisit after the summer.

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What were the clauses in the current contract anticipated such disruptions and how it is planned to be revised?

**Panel Answer:** Force Majeure, Owner caused delays, Contractor caused delays, Safety, Notice requirements, Safety shutdowns (emergencies), Changes in Law, Acts of Government, Suspensions/Termination, and Price Escalation. These are just the most common ones. This does not mean there are not others in a particular contract that have some bearing on the issue.

In negotiating a contract earlier this week (post discovery of COVID-19) one of us came across the following provision (edited to show only the relevant parts): “**Representations and Investigation.** … Subcontractor acknowledges that prior to the execution of this Subcontract, it has: (a) by its own reasonable independent investigation ascertained:… (2) the conditions involved in performing the work… Any failure by the Subcontractor to independently investigate and become fully informed will not release Subcontractor from its responsibilities under this Subcontract.” This is not an uncommon clause to see in a construction contract.

Before COVID-19 we would be primarily concerned with things like underground obstructions, the presence or discovery of hazardous materials, shipping and transportation issues. But now, does “the conditions involved in performing the work” include COVID-19? We would assume it does. Let’s say that this subcontract is for an above ground trade with a fairly stable environment to work in (painter, welder, pipe insulator). The conditions involved in performing the work might really only refer to gate access, scaffolding, temperature, weather, lay down space. In that instance, the conditions are fairly quantifiable. But now with COVID-19, is the subcontractor responsible for enhanced health measures, social distancing, shutdowns, quarantines, etc. Perhaps, so. Everyone needs to carefully reconsider their contracts with COVID-19 in mind, because it assuredly has changed how you will view certain provisions and how risks should be apportioned. Notice that this provision is NOT the force majeure clause, a delay clause, a safety clause or one of the other common clauses. It now has to be read and contemplated in a new light.

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