THE NEW NORMAL: NAVIGATING COVID-19
A PRACTICE MANAGEMENT WEBINAR BY VICTOR US

APRIL 22, 2020

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RESOURCES

- Blog Posts (victorriskmanagement.blog)
  - 2/5 Coronavirus can put every firm at risk
  - 3/12 Avoid contract default when COVID-19 strikes
  - 3/18 Look to your contracts and OSHA during the pandemic
  - 4/2 AIA provides COVID-19 advice
  - 4/6 Adapting for the new “normal”: 5 resources for design firms

- April 28th Webinar: Change-A-Virus: Anticipating, and Proactively Avoiding, the Adverse Legal Effects of This New Pandemic by Kent Stair, Paul Sperry and Tawny Mack of Copeland, Stair, Kingma & Lovell

TOPICS

- Project Management
- People Management
- Construction Phase Services
- Federal Relief for Businesses
- Other COVID-19 News
- Discussion of Issues Identified by You
IMPOSSIBILITY OF PERFORMANCE OR FORCE MAJEURE

Comparison of AIA design and construction contracts

AIA B101-2017
§ 3.1.3 As soon as practicable after the date of this Agreement, the Architect shall submit for the Owner’s approval a schedule for the performance of the Architect’s services. Once approved by the Owner, time limits established by the schedule shall not, except for reasonable cause, be exceeded by the Architect or Owner. With the Owner’s approval, the Architect shall adjust the schedule, if necessary, as the Project proceeds until the commencement of construction.

AIA A201-2017
§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, or of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; or delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

EFFECT OF CONSTRUCTION CONTRACT ON DESIGN FIRM’S EXPOSURE

Contractors will use every possible contractual remedy to increase Contract Time and Contract Sum.

AIA A201-2017
§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay, or interruption under Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent 1. that performance is, was, or would have been, so suspended, delayed, or interrupted, by another cause for which the Contractor is responsible; or 2. that an equitable adjustment is made or denied under another provision of the Contract.

Contractors will look to owner to extend Contract Time and Contract Sum.

Owner will look at design team for cost recovery efforts.

1. Were the specifications negligently prepared?
2. Is the design team holding up the project because of inability to perform on-site duties?
3. Did any other delay in design team’s service cause contractor delay?
4. Did designer certify payment without performing contractual duty?
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REASONABLE STEPS TO PROTECT FROM OWNER CLAIMS

Discuss situation with owner and document agreement that owner will consider as meeting contractual duties:

- Approvals at stages of design that are based on remote presentations and emailed communications.
- Delays by government officials extend time for services.
- On-site services conducted through video reviews or other certified photographic documentation are accepted.
- Designer’s role in certifying payments to contractor will be based on different criteria.
- Staffing constraints causing slower RFI and shop drawing review meet contractual obligations.

ADDITIONAL COSTS OF COVID-19

Know if your contract allows you to bill for additional costs caused by the necessary response to COVID-19.

- Design firms should negotiate for additional compensation to cover costs related to government requirements, remote working, and personal protective equipment.
- Firms should prepare to help suspend projects and to resume them by providing services requiring additional compensation.
- Documentation is essential to preserving rights and protections – the “we are all in this together” spirit will not last long.

DISASTERS CAN LEAD TO NEW SERVICES

Providing pro bono or unusual services can result in significant professional liability exposure.

- When providing pro bono or emergency services, attempt to use a waiver of claims and defense and indemnity provision in contracts.
- Services should be based on a firm’s expertise – not on a firm’s expectations of financial or marketing success.
- Tie an informed consent provision to any new services being provided, even if a limitation of liability through a waiver of claims is not possible.
Remote working raises productivity and security issues.

- Can your firm meet the same level of firm interaction and coordination with your subconsultants?
- Are you able to carry out your quality control/quality assurance programs while working remotely?
- Do you have robust protections in place to prevent cyber attacks?
- Is your system set up to protect access and limit modifications?
- Does your cyberliability coverage clearly allow remote working?

Employment practices liability still exists.

- You might create a hostile work environment if you force an employee into a situation where exposure is possible.
- Any termination of employment can generate a discrimination or wrongful termination lawsuit.
  - There must be a bona fide reason for any termination i.e., not reluctance to interact, age or other protected class.
  - You probably have no liability for exposure of former employee if exposure was unknown.
- Employment practices liability still exists.
REPLACING STAFF WITH TEMPS

If your contract allows it, you can use local firms or individuals to replace your services.

- Your contract might not allow you to use subconsultants without the client's approval.
- Owner must agree to replacement as meeting terms of the contract.
- Delegation must comply with state registration law.
- Your professional liability policy provides:
  - Coverage for your vicarious liability.
  - No coverage for uninsured "temp" unless special care is taken.

MEETING OSHA REQUIREMENTS

You must meet all requirements of providing staff with a safe working environment including when at the site.

- Implement basic measures and policies related to:
  - Workplace hygiene
  - Policies for distancing (staggered hours, teleworking, no sharing of equipment)
  - Communication of flexibility to meet goal of workplace safety.
- Consider physically altering spaces, controlling air flow, as well as administrative controls.
- Provide appropriate PPEs and guidance for on-site employees.

CONSTRUCTION PHASE ISSUES
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- Site Visits
- Contractor Performance
- Building Officials

CONSTRUCTION PHASE – SITE VISITS

- How do you perform your construction contract administration duties? Site visits?
- Are you legally able to go to the site? Is your activity considered essential?
- Is your staff willing to go to the site? How do you decide who goes? What are the legal ramifications?
- Can you replace employee with contracted individuals?

CONSTRUCTION PHASE – CONTRACTOR PERFORMANCE

- Delay: What does the construction contract say? Excusable delays clause?
- Can you help the client evaluate how contractor performance is impacted?
CONSTRUCTION PHASE – CONTRACTOR PERFORMANCE QUESTIONS

- How are you monitoring your subcontractors from a financial health perspective? What due diligence process do you have in place?
- Has there been any impact on your supply chain due to COVID-19 and how is this affecting your ability to meet your project delivery requirements?
- Please provide details of COVID-19 business risk mitigation strategies. Have internal committees or review groups been set up to monitor your exposure to COVID-19/Coronavirus, including employee safety, supply chain and distribution channel diligence and your own production capabilities?

- Have you been able to fully understand your exposure to key supplier’s own supply chains and by extension any possible disruption caused to your production? Do you have second and third tier suppliers that you are able to engage with in case of a breakdown with your tier one suppliers?
- For procurement of materials, have any substitute products been identified? Do these products need design team sign off?
- Can the business operate with all (the majority of) offices/ functions working remotely?

CONSTRUCTION PHASE – LOCAL GOVERNMENT COORDINATION

- Local government operations affected.
- Officials asking/requiring design firms to step into role of government official to certify code compliance.
- Determine what legal authority the local government official has to make such demands.
- Are you able to obtain sovereign immunity protection for stepping into this role? Is your exposure to claims limited in any meaningful way?
- Increased fees? Waiver? Defense and indemnity by clients?
FEDERAL RELIEF FOR BUSINESSES

CORONAVIRUS AID, RELIEF AND ECONOMIC SECURITY ACT
“CARES” ACT – Signed Into Law March 27, 2020

3rd piece of legislation (HR 748) meant to address COVID-19

4th piece of legislation may be coming to include infrastructure

$2 Trillion Stimulus with $366 Billion set aside for Paycheck Protection Program and emergency grants administered by the US SBA

PAYCHECK PROTECTION PROGRAM

What?
- 2 year forgivable loan
- 1% interest rate
- Up to $10 million

Who?
- Businesses with less than 500 employees; sole proprietors; self-employed and non-profits
When?
▪ Deadline – June 30, 2020

How?
▪ Participating lender

What?
▪ $10,000 advance for costs other than payroll

Who?
▪ Small business owner – expands eligibility for access to ESOPs with fewer than 500 employees or any individual operating as a sole proprietor or independent contractor

When?
▪ No application deadline
▪ Covered period – through Dec 31, 2020

How?
▪ Apply direct to SBA online
"ESSENTIAL" CONSTRUCTION

- Interactive map available
  - Updated Daily
- Nationwide (as of 4/20/20) = 3499

DELAYED PROJECTS

- Interactive map available
  - Updated Daily
- Nationwide (as of 4/20/20) = 3499

BUILDING OFFICIALS SURVEY

- 1200 respondents (as of April 1)
  - From all 50 US jurisdictions
  - Good sampling of jurisdictions representing spectrum of sizes (ranging from 1000 people to over 4.6 million)
- Trends:
  - Majority still performing inspections (93%)
  - 65% of employees working remotely
- Virtual Capacity Challenges:
  - 40% can’t do electronic plan review
  - 30% can’t do electronic permitting
  - 61% can’t do remote inspections
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THANK YOU