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Disrupting the Disruptor: How a Prepared and Proactive Owner Can Mitigate the Effects of Coronavirus on Construction Projects

Once a remote health issue in China, the rapidly spreading coronavirus (COVID-19) has become not only a global health concern but also potentially a global economic disruptor that could impact nearly every industry. The construction industry is no exception, and owners and contractors alike should evaluate and take proactive measures with respect to the physical and economic risks that coronavirus could pose for their projects. For owners and contractors, the virus presents significant risks to critical aspects of the project, including the health of project personnel, potential supply chain disruptions, and the increased potential of cost impacts and schedule delays, regardless of the contractual responsibility for infectious diseases. However, prepared and proactive owners and contractors can, with some forethought and groundwork, take simple yet effective measures to mitigate—or even prevent—these potential health, cost, and schedule risks.

TAKE CARE OF THE OWNER TEAM

A critical step for any owner is to take care of its personnel on the project, ensuring that such personnel are safe and able to successfully execute their roles on the project. This includes setting up the proper procedural infrastructure to minimize the risk of infection and to keep all personnel healthy and working—no matter the work site.

Developing and implementing a basic, multi-faceted COVID-19 risk management plan is a good starting point. One aspect of the plan should be to manage the travel of the owner's personnel to reduce the risk of infection. As an initial step, an owner might set up (and continually update) a list of countries to and from which its personnel should consider not traveling without company approval, or if travel is necessary, establish conditions and precautions under which such travel is taken. An owner should also consider eliminating all non-essential travel. If someone has already traveled to a restricted country without necessary precautions



(whether for business or personal reasons) or otherwise becomes infected, a next step would be to evaluate the impact that this travel might have on such person, including potentially implementing a mandatory quarantine period for such persons.

An owner's risk plan should also identify preventative steps and proactively identify potential cases of coronavirus. For example, owner personnel should be aware of the list of COVID-19 symptoms (e.g., posting COVID-19 signage in offices and other work sites)¹, and all personnel should be required to immediately report any such symptoms. Owners should also consider encouraging personnel experiencing symptoms of illness to stay home or otherwise refrain from reporting to the workplace, including providing paid sick time under appropriate circumstances.

In addition to health mitigation techniques, an owner should also plan in advance for potential economic disruptions. This includes making necessary preparations so that owner personnel can work remotely in the event that such personnel exhibit COVID-19 symptoms as well as establishing protocols to temporarily close non-essential offices. Such preparations might include providing laptops to additional employees to increase remote work capabilities, installing necessary programs and software on all work laptop computers (e.g., CAD software or Primavera scheduling software), setting up filesharing sites, implementing WebEx or other tele-meeting capabilities, and permitting personnel to log into the owner's systems by remote access VPN. With such measures in place, infected or quarantined personnel may continue progressing the project remotely, even during a quarantine scenario.

HAVE THE CONTRACTOR MANAGE POTENTIAL IMPACTS

A central piece of an owner's coronavirus mitigation strategy should be to have the contractor take proactive steps to prevent and manage potential impacts on the project. This means reviewing the engineering, procurement and construction agreement ("EPC") or construction agreement to identify provisions requiring the contractor or supplier to mitigate impacts related to the coronavirus, assessing whether contractor has established adequate mitigation measures, and notifying contractor of any additional steps it should be taking. An owner should consider taking these steps regardless of the party who bears the responsibility for impacts that may be caused by coronavirus. A good starting point would be for an owner to consider how certain contractual issues—such as equipment and material procurement, HSSE practices, and notice and mitigation requirements—may apply to potential coronavirus impacts.

Supply of Equipment and Materials

Under the EPC or construction contract, the contractor will generally be responsible for supplying equipment and materials necessary for the project. Disruption of global supply chains due to coronavirus, however, may cause delays to the supply of equipment and materials procured from certain source countries and may impede contractor's (or its subcontractors', suppliers', or vendors') ability to timely supply such equipment and materials. To prevent supply issues, an owner should consider contacting the contractor to make sure that it has an alternative sourcing plan (including a list of back-up sourcing options) to procure the same or sufficiently similar equipment and materials from sources acceptable to the owner.

Health, Safety, Security, and Environmental (HSSE) Measures

Another key step is to ensure that the contractor is performing the work in accordance with its HSSE policies, the owner's HSSE policies, or both (as applicable). For an owner, this means dusting off the contractor's HSSE plan (or, if not provided as part of the contract, requesting such a plan from the contractor), identifying those HSSE provisions applicable to the health and safety of all personnel and safety at the project site (and other locations work is performed), and ensuring that contractor has mechanisms in place to comply with such HSSE provisions.



Most HSSE plans require the contractor to establish HSSE measures that are specific to the project and the site. Accordingly, an owner should seek to have the contractor establish site-specific best practices to prevent the spread of coronavirus to the project. Such practices, may include, for example²:

- updating the contractor’s emergency operations plan with the help of the local public health department, emergency operations coordinator or planning team, and other relevant partners to include COVID-19 planning;
- screening personnel for signs of a coronavirus infection;
- identifying and allocating space on the project site that can be used to evaluate sick personnel;
- developing an emergency communication plan for distributing timely and accurate information to on-site personnel;
- promoting the practice of everyday preventative actions among on-site personnel (including frequent hand washing with soap and water, cleaning frequently touched objects and surfaces, and requiring personnel to stay home when sick);
- providing COVID-19 prevention supplies on the project site (e.g., disposable gloves, soap, hand sanitizer that contains at least 60% alcohol, tissues, trash baskets, and disposable facemasks in case someone becomes sick while on-site) and setting up sanitation stations on the site; and
- planning for personnel absences by developing flexible attendance and sick-leave policies, developing and implementing a plan for alternative labor to make up for any such absences, and monitor and track COVID-19 related personnel absences.

The contractor should also consider employing the same steps for its project team that the owner employs for the owner team, as outlined above (i.e., managing the travel of all personnel; proactively identifying potential cases of COVID-19 infection; posting signage in work sites; making preparations for offsite personnel to work remotely; etc.).

Compliance with Notice and Mitigation Requirements

Another important preparation strategy for an owner is to review the EPC or construction contract and to identify those provisions requiring the contractor to mitigate against or provide notice of potential project impacts due to coronavirus. Some typical provisions would include, for example, providing regular progress reports that identify such impacts on the project, mitigating against force majeure events, and complying with applicable laws and regulations.

To keep abreast of any potential coronavirus risk to the project, owners should request that the contractor provide both regular updates and immediate notice of any potential coronavirus impacts to the project. As a matter of course, the contractor should specify in each progress report any potential coronavirus impacts on the project (whether occurring at the project site or elsewhere around the world—for instance, the disruption of a particular supply chain in a foreign country). In addition, the contractor should provide immediate notice of any potential coronavirus infections affecting the project (e.g., providing same-day notice of any personnel exhibiting COVID-19 symptoms and identifying any quarantine actions taken for such personnel).

In order to effect contractor’s mitigation obligations, owners should request that the contractor describe back-up plans for such impacts. For example, if the supply chain for certain materials in a source country has been disrupted, the contractor should be prepared to timely procure such materials from alternative sources agreeable to the owner to prevent potential delays to the project schedule. Or, if the rapid spread of the virus decreases the availability of healthy laborers, the contractor should be prepared to turn to alternative labor sources that have been identified in advance. Knowing these “Plan B” options upfront will benefit both the owner and the contractor in minimizing impacts to the



project, will head-off claims of force majeure (if allowed under the applicable contract), and will ultimately reduce the risk of cost and schedule overruns.

Just as importantly, owners should inquire as to how the contractor will comply with any recent COVID-19 related laws and regulations applicable to the project. This could include, for example, describing how the contractor will update its HSSE practices to account for any local, state, or federal regulations imposing on-site COVID-19 prevention measures.

CONSIDER CONTACTING LENDERS AND INSURANCE BROKERS

In addition to shoring up its own internal mitigation efforts and those of the contractor, an owner should also consider contacting its lender (if any) and insurance broker to get ahead of any potential COVID-19 impacts. An owner is well served to update and work with its lender, as an informed lender will want to work collaboratively through potential COVID-19 issues.

An owner should promptly and proactively evaluate its potential insurance coverage for impacts to the project caused by coronavirus and should take steps to ensure compliance with any policy conditions, such as providing notice to and cooperating with potentially responsive insurers. Personal injury claims arising from the sickness of an individual may be covered by worker's compensation, employer's liability, and/or general liability policies. Project delays and associated loss of business income may be covered by the owner's property, business interruption, delay in start-up, and/or contingent business interruption coverages. For example, many such policies cover losses sustained when a "civil authority" limits or prohibits access to the project premises and/or to a supplier's premises.

In addition, actual or perceived exposure of the premises to an individual who has contracted COVID-19 may fall within the policies' grants of coverage for "physical loss of or damage to insured property." It is important to work with your insurance brokers to avoid missing any deadlines and to avoid any missteps on compliance with policy requirements. Experienced coverage counsel also is critical to evaluating potential sources of insurance coverage and maximizing recovery.

DISRUPTING THE DISRUPTOR

As exemplified by the coronavirus, project teams in today's environment should take a more wholistic and proactive approach to safety planning that includes the risk of disruption due to infectious diseases. Owners should work collaboratively with contractors (and others, such as lenders and brokers) to develop a multi-faceted, front-end approach to handling such risk. With some preparation and planning, owners can disrupt the potential disruption of coronavirus and other infectious diseases on their projects.



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¹ See the Centers for Disease Control and Prevention Coronavirus Disease 2019 (COVID-19) Symptoms: <https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html>

² Centers for Disease Control and Prevention: <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/checklist.html>