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2021 Buckeye Conference
Emerging Issues

Supply Chain Disruption
and Ideas to Minimize Your Risk

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1

Real Word Examples

Glass Bottle Shortage Affects Wedding!

2

Real Word Examples

3

Time and Money

Supply chain disruptions can delay project completion and increase costs.

So, what can contractors do to limit their risk of supply chain problems?

4

First, read your existing contracts (both upstream and downstream)!

What do they say about:

- Price increases?
- Delays from supply chain disruptions?
- Force Majeure?
- Change Orders and Claims?
- Notice?

Find out what your current contract options are.

5

Different contracts say different things:

For example, in some standard Guaranteed Maximum Price (GMP) contracts, like AIA's A102/A201, the contractor guarantees its price against price escalations, *i.e.*, this is a contractor risk.

But, unusual delays in delivery are generally a basis for a contract time adjustment under many industry-accepted contracts (like AIA or ConsensusDocs).

But look closely at your contract as it may be modified from the standard version.

6

Force Majeure

Most contracts contain a Force Majeure clause.

Force Majeure refers to an event or effect that can be neither anticipated nor controlled; *i.e.* an act of God.

What happens when such an event or effect happens?

A typical clause:

Force Majeure. Seller shall not be responsible for its failure to perform under this Agreement if such failure results from causes beyond its reasonable control, including, but not limited to: acts of God; strikes or other labor disturbances; equipment failure; power failure; *inability to obtain suitable supplies, material, or parts*; war; acts of terrorism; *epidemics*; floods; fires; accidents or other similar events, the non-occurrence of which was a basic assumption at time the Agreement was made.

Other legal theories exist:

Impossibility or Impracticability of Performance

"[E]xcuses performance under a contract because it has been rendered impossible due to the occurrence of an unforeseeable event." Lehigh Gas-Ohio, L.L.C. v. Cincy Oil Queen City, L.L.C., 1st Dist. No. C-150572, 2016-Ohio-4611, 66 N.E.3d 1226, ¶ 15.

Frustration of Purpose

Performance remains possible, but such performance would produce a dramatically different result from what the parties anticipated when the contract was signed

9

For future contracts, negotiate!

Owners generally want prices to be fixed for the Project, absent a change order.

Contractors, subcontractors and suppliers want an unplanned event or condition that results in increased costs to merit an adjustment to both price and time.

Until recently, supply chain delays and substantial material price increases had not been a major problem – now they are.

10

Negotiation options:

Work out a mutually-acceptable price escalation clause:

- Identify specific material categories at risk for significant volatility.
- Define volatile pricing, *i.e.* 5% increase over 30 days/30% over 180 days.
- Consider a bilateral approach: If the owner shares the risk of price increases, then the owner shares the benefit of price decreases.

Same approach for delays.

11

Don’t forget about Change Orders, Claims, and Notice:

Regularly monitor cost and delivery issues and provide prompt notice of price increases or completion delays.

Maintain good documentation.

Pay attention to your contract requirements for the content, timing, and proper delivery of notice.

This will help preserve a Claim or request for a Change Order.

12

Thank you!

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