



CONSTRUCTION
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Preparing for the Unknowable

Lessons Learned from the Construction Industry's Response to Significant Industry Disruptions

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“Prepare for the unknown by studying how others in the past have coped with the unforeseeable and the unpredictable.”



-General George S. Patton

- Covid-19 epidemic has reinforced that substantial industry disruptions can occur suddenly and unexpectedly.
 - September 11, 2001
 - Subprime Crisis of 2007
 - Hurricanes Katrina / Sandy
 - Trade / Tariff Wars
 - Supply Market Disruptions
- Different causes that impact similar areas.
- Limited value in planning for a specific event – better to manage risk by also focusing on the effects of disruptions and implementing less cause-specific measures.

Common areas of impact/risk from disruptive events.

1. Supply Chain
2. Labor Supply
3. Regulatory Compliance
4. Cash/Flow Liquidity
5. Other Areas of Impact

Supply Chain

1. Two primary supply chain impacts.

1. Transportation
2. Manufacturing

2. Money not always a solution.

3. Contractual Mitigation

1. Escalation / Material Indexes
2. Material Substitution
3. Purchase Order terms

4. Practical Mitigation

1. Early buys / inventory warehousing
2. Diversify suppliers

Labor Supply

1. Way in which disruptions impact the labor market and availability.

1. Work/travel restrictions
2. Employee accommodation requirements
3. Employee / labor force morale and availability

2. Contractual Mitigation.

1. Collective Bargaining Agreements

3. Practical Mitigation.

1. Adaptable employer work policies and engagement during crisis

Regulatory Compliance

1. Crisis inevitable leads to new regulations and regulatory response.
2. Contractual Mitigation.
 1. Compliance with law provisions.
 2. What is Applicable Law?
 3. Changes in Law provisions.
3. Practical Mitigation.
 1. Monitoring and response process.
 2. Engagement with subcontractors and owners
 3. Response and compliance team

Cash Flow / Liquidity

1. Multiple causes of delays in payment flow.

1. Lack of Owner / GC or project management
2. Budget crunch / cash-flow management necessitated by slowdowns or reductions in funding from Owner / GC sources.

2. Contractual Mitigation.

1. Strong drafting of payment clauses including rights of termination and attorneys fees
2. Accelerated dispute resolution for undisputed sums.
3. Balancing schedule of values to more accurately reflect cash-flows.

3. Practical Mitigation.

1. Diligent notice and enforcement of payment rights
2. Reviewing / ensuring sufficient payment security

Other Areas of Impact

1. Dispute Resolution

1. Project claims are a significant part of Project cashflow / success.

1. Maintaining efficiency/flexibility is key to permit continuation of proceedings during a disruption as to minimize delays in resolution.
2. Arbitration vs. Litigation; State vs. Federal Forums / Venues
3. Best practices in re experts / depositions and other dispute resolution proceedings.

2. Insurance Coverage / Claims

1. Historically speaking – insurance coverage has had limited applicability / availability in responding to outlier events such as terrorism, pandemics, etc.
2. Often express exclusions or limitations in coverage for these events as they fall outside standard underwriting risks.
3. Some coverage available where disruptions may lead to covered causes (i.e. fire, flood, etc.) but even those events must be carefully reviewed to ensure sufficient coverages.

Conclusion

Questions, comments, observations?



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