

PROTECTING YOUR DEMOLITION BUSINESS IN THE AGE OF COVID-19

It's not a stretch at this point to say that COVID-19 is disrupting almost everything – and has the potential to disrupt even more. This includes demolition projects. Government-imposed quarantines and activity restrictions, medical advice to self-isolate, and large-scale illnesses can all have severe impacts on demolition work, ranging from difficulties staffing jobs to project shut-downs dictated by local or national authorities.

So what can you do to protect your demolition business?

What To Do Right Now

1. Give Your Owner/GC Notice

Even if COVID-19 hasn't impacted your job yet, many demolition contracts require the contractor to give notice of potential delays and claims on very tight deadlines. Depending on how your contract's notice provision is phrased, you may be completely barred from making claims or receiving any extra compensation if you don't give notice in the exact time and manner the contract specifies.

Check your contract's notice provision and see how you're supposed to phrase a notice and who it has to be sent to. Something as simple as an email to your owner/GC stating "Notice of Delay – COVID-19 Impacts" may be the difference between recovering for delays and cost overruns, and getting nothing.

2. Track Impacts

Be on the lookout for cost overruns and delays related to COVID-19. Maybe your workforce becomes reduced or unreliable because workers think they're getting sick and have to self-isolate, or your job progress is delayed because of increased health and safety precautions onsite. Many demolition contracts require the contractor to track and give ongoing updates to the owner/GC after the contractor sends the original notice; as with the original notice requirements, you may be prevented from getting increased compensation if you don't send periodic updates tracking impacts.

If you know your job is being impacted by COVID-19 but you can't put precise numbers on the costs or delays right now, tell your owner/GC in the written notices that you know you are suffering impacts but can't quantify them yet. You may want to have your estimator re-estimate the job under the new circumstances caused by COVID-19 so that you can give the owner/GC specific numbers for days of delay and increased costs.

3. Check Your Contract's Force Majeure Clause

In demolition contracts, a force majeure clause can relieve the contractor from performing if specific listed events occur. If a force majeure event happens, the contract usually requires the affected contractor to give notice to the other parties, and then lays out a process for resolving what happens to the project and what compensation the contractor can recover. For example, a force majeure clause that lists epidemics as a covered event might give you the right to shut down your job if COVID-19 severely disrupts your performance.



Contracts can include force majeure clauses of many different types, with different notice requirements and covered events. You may want to have your lawyer review your contract to see if the COVID-19 impacts you're experiencing can support a force majeure claim.

4. Contact Your Bonding Company

In addition to notice to your owner/GC, you should make your bonding company aware of problems related to COVID-19 on your jobs. Alerting your bonding company promptly can help "paper the file" for a future dispute if the owner/GC claims your company has defaulted after COVID-19 disrupts your work. The bonding company may be able to get involved in the dispute and help you push back on default claims using its own investigation resources.

5. Contact Your Insurance Broker

Your insurance broker may be in a position to assist you with mitigating COVID-19 impacts as well. Your company may have coverage for business interruption, but it may require that you notify the carrier as soon as the "occurrence" leading to the possible loss is known. Don't miss out on possible insurance coverage by forgetting to alert your carrier.

6. Discuss Possible Suspension of Work with Owner/GC

If COVID-19 continues to spread and disrupts your projects, it really benefits no one for work to continue. There is even the risk of government bodies issuing stop-work orders for the sake of public health. You may want to approach your owner/GC to see if they are open to a potential suspension of work, and if so how compensation and scheduling will be handled in a change order.

What To Do If You Can't Move Forward With A Job

If COVID-19 makes conditions so bad that you can't keep going on a project, your contract's force majeure clause may have you covered. You aren't out of options if your contract doesn't have a force majeure clause, though, or if your owner/GC rejects your force majeure notice. It's usually in everyone's best interests to avoid legal disputes on projects, but COVID-19 may put severe financial pressure on owners and GCs, making them less likely to cooperate. Litigating or arbitrating a dispute may be your best option if the alternative is serious financial losses.

First, the principle of "impossibility of performance" may give a contractor the right to cease work on a job if performance becomes extremely burdensome for reasons that could not have been foreseen at the time the contract was signed. Most states' laws do not require that performance literally becomes impossible, but claiming impossibility requires strong evidence of conditions becoming so onerous that it is unreasonable for the project to go forward.

Second, the doctrine of "frustration of purpose" can relieve a contractor of the duty to continue work if the entire purpose of the project has ceased to exist, so that the contractor's ongoing performance is worthless to the owner/GC. One example of this might be demolition of an industrial building to make way for a mixed-use development, but COVID-19 and related economic deterioration cause the development to be canceled.





Third, some states' laws recognize that unforeseen, unreasonable delays and disruptions to a demolition project give a contractor the right to stop performance and recover its costs, even if the contract has a "no damages for delay" provision. For example, if an owner/GC shuts down your job for weeks on end due to COVID-19, without any indication when or if work will resume, you may have a legal claim that the owner/GC abandoned your contract, which excuses you from continuing to work. The same principle might apply if COVID-19 health and safety requirements double your job costs or seriously reduce your efficiency.

Conclusion

COVID-19 may put the demolition industry into uncharted territory. We just don't know yet how widespread the health impacts and related government restrictions on basic activities will get. The best course of action for demolition contractors is to read your contracts, try to work together with other project participants, and be prepared to stand up for your rights.

Prepared by Tom Trapnell, Esq., Ted Peters, Esq.,
and Art Dore III, Esq.
McAlpine PC
3201 University Drive, Ste. 200
Auburn Hills, MI 48326
(248) 373-3700

