Litigation Alert: New Safety Protocols for Construction Projects: How Will This Affect Your Costs?

April 30, 2020 – The COVID-19 pandemic has changed how the construction industry works. It has resulted in new rules, new procedures, and more stringent safety protocols, not only to prevent physical injury, but to also prevent the spread of disease. Recently, the New Jersey Department of Transportation (NJDOT) has requested that all project contractors and subcontractors voluntarily revise their Site-Specific Health and Safety Plans (HASP) to include procedures to address the COVID-19 pandemic. NJDOT has not issued change orders to address the revision, rather it has requested that the industry voluntarily submit revised plans.

This soon may be required on every jobsite post COVID-19. We anticipate, as was requested by the NJDOT, that some or all of the following will be implemented on a project site:

- Provisions and protocols for washing hands or hand sanitizing;
- Cleaning and sanitizing practices for equipment, work spaces, and sanitation facilities, both for everyday situations and for a situation where a worker is found to have been infected by COVID-19;
- Cleaning and sanitizing of devices and materials brought to the site for installation;
- Meeting arrangements, including techniques for remote meetings, maintaining six feet minimum spacing if face-to-face meetings are unavoidable, and trying to verbally communicate around loud machinery and operations;
- Protocol and plan for enforcement on who may access field office and material testing trailers to ensure social distancing is maintained;
- Protocol to ensure staff maintain social distancing while taking breaks from work activities, including the use of temporary lodging on remote jobs;
- Specific arrangements coordinated between the various plant supervisors to limit person-to-person contact and to maintain proper distancing in accordance with CDC guidelines;
- The planned use of shift work to minimize interpersonal contact between crews;
- Task-specific protocols that ensure people minimize contact and maximize social distancing while performing particular jobs;
- Protocol to ensure that materials testers, inspectors, and other similar persons can perform their work safely;
- Electronic communications and meetings;
- Protocol for delivery of delivery tickets electronically;
- Protocol for reporting potential and confirmed infections;
- Protocol for requiring symptomatic individuals to stay away from the project site; and
- Protocol for identifying and protecting vulnerable individuals.

As stated, the NJDOT has already requested that the above protocols be implemented. More government authorities may follow suit as well as owners on private construction projects. How will this new “normal” change the dynamics of a construction site? Will safety costs be significantly increased? The post-COVID-19 era will surely change the way the construction industry conducts business.

Contractors should be mindful of including an escalator clause in their contracts to help protect them against increased and

unforeseen costs due to changes in safety protocols or other sudden cost increases. An escalator or price-adjustment clause in a contract permits the seller to increase price based on an unexpected increase in costs. Escalator clauses are enforceable in most states and are commonly used in commercial contracts. An escalator clause should specify how to calculate the price increase and the types of cost increases that permit the price increase. To enforce a price increase under an escalator clause, contractors should be prepared with evidence to establish the amount of the price increase. Including an escalator clause in contracts will permit a price increase and help protect against sudden or unforeseen increased costs.

For more information about this Alert or any other legal issue affecting the construction industry, please contact:

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