COVID-19 Schedule Delay and Disruption
Navigating the Process

Presented By:

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Michael Munden, Flatiron Construction
Michael Baker, Snell & Wilmer L.L.P
Statement of Purpose

Learning Objective 1:
Understanding the Types of Delay

Learning Objective 2:
Interpreting Contractual Language in Regards to COVID-19 Related Delays

Learning Objective 3:
Recognizing Owner & Contractor Concerns Regarding COVID-19 Delays

Learning Objective 4:
Understanding the Schedule Impact Analyzation Process
Time-Related Terms on Construction Project

Delay
- When the project is not completed by its contractually required completion date or by interim milestone dates.

Disruption
- The method and/or sequence of construction upon which the contractor based its bid is changed and/or disrupted. Also called “interference” or “hindrance.”

Acceleration
- The process of speeding up the work of a contractor so that a particular activity, or the project as a whole, can be completed before the date required under the contract.
Types of Delay

**Inexcusable** – Contractor caused, may be assessed liquidated or actual damages or termination.

**Excusable** – Delay beyond the control of the contractor. Contractor may receive additional time/relieved from liquidated damages.

- **Non-compensable** – contractor is entitled to receive additional time but is not entitled to receive compensation.
- **Compensable** – the contractor is entitled to receive additional time and additional compensation for the delay period.
What May Courts Do?

• United States District court found an outbreak of Porcine Reproductive Respiratory Syndrome may rise to the level of a force majeure event when the outbreak interfered with the party’s contractual obligation to provide hogs.

• Avian Flu outbreak of 2015 at least created a triable issue as to whether it excused performance of a contract to construct a $9 million industrial egg dryer because the Flu precipitated the elimination of birds and their attendant eggs) essentially obviating the need for the dryer.

What Should You Do?

• Review your contracts’ force majeure clause for current projects.
• Review your notice provisions in the contract for current projects.
• Review insurance provisions/consult with counsel/agent for possible coverage.
• Provide notice any impacts of the pandemic on your performance.
• Request additional time, and if applicable, additional compensation, submit change order request, with a revised schedule, Fragnet, or TIA.
• Revise your contracts for maximum protection moving forward.
Review/ Revise Contracts

• Review Your Contract Clauses for Language that Excuses Performance for “Unforeseen,” “Uncontrollable,” and “Externally” caused conditions.

• Revise your contracts moving forward to include “epidemics,” “pandemics,” “disease outbreak of any kind,” and include an elastic provision, i.e., “acts of God” or “other unforeseen causes beyond contractor’s control.”

• If possible eliminate or minimize conditions precedent and any subsequent waiver language.
Comply With Notice Provisions

• Most contracts require notice of delay/disruptive event within a number of days of the event causing delay/disruption.
• Write correspondence which explains in detail:
  • The event giving rise to the delay and the additional time requested in accordance with the applicable contract provision.
  • Revised schedule, Fragnet, or Time Impact Analysis.
  • Change Order Request, which includes a request for time, and if applicable, compensation.
• Rationale: Gives owner opportunity to be part of the solution.
• Failure to give may act as a waiver.
Force Majeure Clause in Widely Used Construction Manager Agreement

If the Construction Manager is delayed at any time in the progress of the Project by any act or neglect of the District or the Architect or by any employee of either, or by any separate contractor employed by the District, or by changes ordered in the project, or by labor disputes, fire, unusual delay in transportation, adverse weather conditions not reasonably anticipated, unavoidable casualties or any causes beyond the Construction Manager’s control, or by any delay authorized or caused by the District, the above time schedules shall be extended by change order for a reasonable length of time.
Contractor Concerns

- What is our potential exposure/repercussions to having our employees work in this modified environment?
- Where in the contract would Covid-19 or a similar situation be identified and how is it classified?
- What type of costs are compensable from the client? From Insurance?
- What are the actual inefficiencies associated with putting work in place and how do we track them? How do we present these costs to a client?
- Vendors – concerns about meeting delivery dates (domestic and international) How long does this “impacting” issue remain relevant and what are our risks (LD’s, default, termination, etc.)
# Documenting & Tracking COVID Schedule Impacts

## COVID Impact Tracking Log

<table>
<thead>
<tr>
<th>Area</th>
<th>Level</th>
<th>Item</th>
<th>COVID-19 Impact</th>
<th>Mitigation Strategy</th>
<th>Cost Impact</th>
<th>Schedule Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>All</td>
<td>Electrical switchgear and distribution</td>
<td>GC verbally notified by Encore that workplace restrictions and manpower interruptions related to COVID could jeopardize 8/27-7/12 shutdown. Notice forthcoming from Encore.</td>
<td>Encore currently real-allocating manpower from other activities and evaluating other strategies</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Office</td>
<td>LVL 8 OFFICE</td>
<td>CRAC Units</td>
<td>Spring isolator manufacturer based in Long Island and shut down until 4/18 at min.</td>
<td>GC requested Apollo look into alternate sources or substitutions</td>
<td>TBD</td>
<td>Y</td>
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<tr>
<td></td>
<td></td>
<td>Sound Vibration Controls</td>
<td>Specified product unable to be procured due to COVID</td>
<td>Alternate submittal delivered 3/25</td>
<td>TBD</td>
<td>TBD</td>
</tr>
<tr>
<td>All</td>
<td>All</td>
<td>Administration</td>
<td>Owner/Architect staff are (in part) working, remotely. Potential time lost in transferring samples between parties.</td>
<td>GC evaluating whether to engage courier</td>
<td>TBD</td>
<td>Y</td>
</tr>
<tr>
<td>Int. Lobby</td>
<td>LVL 3 OFFICE</td>
<td>Tile - FF-5</td>
<td>12-14 weeks as of 3/17. However, no guarantee with COVID since manufacturer is in Italy.</td>
<td>871 SF in stock in Denver but no cove base. Acerno can field cut but will be a CO.</td>
<td>Y</td>
<td>TBD</td>
</tr>
<tr>
<td>Singleton</td>
<td>LVL 2 DOCK</td>
<td>Tile - FF-5</td>
<td>12-14 weeks as of 3/17. However, no guarantee with COVID since manufacturer is in Italy.</td>
<td>871 SF in stock in Denver but no cove base. Acerno can field cut but will be a CO.</td>
<td>Y</td>
<td>TBD</td>
</tr>
</tbody>
</table>
Analyzing COVID Schedule Impacts

As-Planned Schedule – Switchgear Project
Analyzing COVID Schedule Impacts

Impacted Schedule – Switchgear Project
## Schedule Comparison (As Planned vs Impacted)

<table>
<thead>
<tr>
<th>Activity ID</th>
<th>Activity Name</th>
<th>OD</th>
<th>Start</th>
<th>Finish</th>
<th>Total Float</th>
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<tbody>
<tr>
<td>0000</td>
<td>PROJECT START</td>
<td>0</td>
<td>03-Feb-20</td>
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<tr>
<td>1000</td>
<td>PREP / SUBMIT 12KV SWITCHGEAR SUBMITTAL</td>
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<td>03-Feb-20</td>
<td>28-Feb-20</td>
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<tr>
<td>2000</td>
<td>REVIEW / APPROVE 12KV SWITCHGEAR SUBMITTAL</td>
<td>15</td>
<td>02-Mar-20</td>
<td>20-Mar-20</td>
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<tr>
<td>3000</td>
<td>FABRICATE 12KV SWITCHGEAR</td>
<td>35</td>
<td>23-Mar-20</td>
<td>08-May-20</td>
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<tr>
<td>4000</td>
<td>DELIVER 12KV SWITCHGEAR</td>
<td>8</td>
<td>11-May-20</td>
<td>20-May-20</td>
<td>0</td>
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<tr>
<td>5000</td>
<td>INSTALL 12KV SWITCHGEAR</td>
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<td>21-May-20</td>
<td>27-May-20</td>
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<tr>
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<td>29-May-20*</td>
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### 12KV SWITCHGEAR PROJECT (IMPACTED)

<table>
<thead>
<tr>
<th>Activity ID</th>
<th>Activity Name</th>
<th>OD</th>
<th>Start</th>
<th>Finish</th>
<th>Total Float</th>
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<tbody>
<tr>
<td>0000</td>
<td>PROJECT START</td>
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<td>03-Feb-20</td>
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<tr>
<td>2000</td>
<td>REVIEW / APPROVE 12KV SWITCHGEAR SUBMITTAL</td>
<td>15</td>
<td>02-Mar-20</td>
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<tr>
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<td>FABRICATE 12KV SWITCHGEAR</td>
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<td>08-May-20</td>
<td>-20</td>
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<td>CV01</td>
<td>ADDITIONAL FABRICATION TIME - COVID</td>
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<td>11-May-20</td>
<td>22-May-20</td>
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<td>4000</td>
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<td>DELIVERY IMPACT - COVID</td>
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<td>CV03</td>
<td>COMM TEAM AVAILABILITY IMPACT - COVID</td>
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Questions?
Presenter Contact Information

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