

Supply Chain Delay Recommendations

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This bulletin provides guidance to contractors, subcontractors, suppliers, and others to ensure compliance with contractual change order requirements if work on a construction project is impacted by supply chain delays.

Contract Protection Tips:

The COVID-19 Pandemic and the recent dock worker strike are staunch reminders of the importance of making sure construction contracts provide for relief if there are supply chain delays. Most construction contracts do not accommodate time extensions due to supply chain impacts. To address this gap in contract terms, we recommend including language such as: “lack of or failure of or other inability to obtain necessary transportation, fuel, power, materials, machinery, equipment or facilities, delays caused by other contractors, subcontractors or their subcontractors of any tier, or any materialmen or suppliers” as part of the defined force majeure event under the contract.

This provision can be included in the Change Order section of the contract as well by including a provision such as: “If the Work is delayed by the failure of or other inability to obtain necessary transportation, fuel, power, materials, machinery, equipment or facilities, delays caused by other contractors, subcontractors or their subcontractors of any tier, or any materialmen or suppliers, contractor shall be entitled to a change order for its costs and time associated with the delay.”

If the contract does not include a supply chain provision, you should revise it to include a provision. Check the prime contract to see if supply chain delays have been addressed. If so, the owner and the contractor should not object to including supply chain provisions in downstream contracts.

Supply Chain Delay Action Items:

If you experience supply chain delay, it is imperative that you comply with the notice provisions of your contract and track your actual time and damages.

1. Provide notice and request for a time extension, as well as associated costs. Notice should be provided in accordance with the subcontract provisions. Remember to check the timing of notice (e.g., within 5 days of the occurrence of the event) and the method of notice (e.g., in writing delivered by certified mail return receipt requested).
2. Check all contracts for clauses relating to compensation in the event of a shutdown or delay. Is there a No Damages for Delay clause? **Look for a clause like this:**

No claim for damages . . . other than for an extension of time shall be made or asserted against the owner for any reason whatsoever. The contractor shall not be entitled to an increase in the contract sum, payment, or compensation of any kind from the owner for direct, indirect, consequential, impact, or other costs, expenses, or damages, including but not limited to costs of acceleration or inefficiency, arising because of delay, disruption, interference from any cause whatsoever.

If there is an enforceable No Damages for Delay clause, begin considering mitigation options that will reduce your job site overhead and general conditions, such as the ability to return rented equipment during any project suspension.

1. Keep meticulous records of all damages arising from any delay or increased expenses and provide supporting documentation as required to obtain payment.
2. Follow the recommendations set forth in "Protect Your Right to Payment."

Contact Partner **Denise M. Motta** with any questions.