COVID-19 I&CP Outlook
Changes to contracting, risk management, and productivity
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Agenda:

COVID-19 Impacts on contracting, risk management, and productivity

Legal considerations in a pandemic world

Insurance issues in the COVID-19 environment

Questions
About your speaker

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Mark Blumkin is a managing director in Deloitte’s Risk & Financial Advisory, with more than 30 years of experience working with owners of capital projects, advising them on improvements for the management, control, and execution of the projects. Mark’s experience includes working with public and private sector organizations including transportation agencies, port authorities, sports & convention center owners, higher education institutions, and health care facilities. Mark is a civil engineer with an advanced business degree and has experience working with some of the largest public sector agencies in the United States.

Areas of experience

✓ Strategic planning
✓ Project planning
✓ Project delivery
✓ Construction cost assessment
✓ Project management oversight
✓ Litigation support
✓ Expert testimony
✓ Forensic investigations
Deloitte’s Infrastructure & Capital Projects (I&CP) capabilities
Providing support across the capital project lifecycle in planning, risk and financial assessment, and project management delivery of complex portfolios

Project Management Office Support (Across Capital Project Lifecycle)

Market Analysis
Finance Strategy
Internal Processes Review
Risk Assessment
Feasibility Analysis
Budget Analysis
Best Practice Selection
Contract Review & Risk Management
Project Control Assessment
Development of KPIs and Construction Analytics
Dispute Resolution
Productivity Analysis

Initiation
Planning
Design
Bid Procurement
Execution / Build
Close out

Market Analysis
Finance Strategy
Internal Processes Review
Risk Assessment
Feasibility Analysis
Budget Analysis
Best Practice Selection
Contract Review & Risk Management
Project Control Assessment
Development of KPIs and Construction Analytics
Dispute Resolution
Productivity Analysis

Investment Confidence
Helping clients increase the efficiency and value of their asset portfolios through vigorous analytics and tools like advanced financial modeling and decision analytics. Focusing on resiliency and long-term success.

Delivery Confidence
Determining how a project or portfolio can be delivered effectively, considering outsourcing, procurement, and lifecycle. Identifying issues and realigning delivery when a project has gone off the rails.

Cost & Schedule Confidence
Assist in effectively planning, managing, and controlling a project’s cost and schedule throughout delivery by establishing processes, controls, governance, and oversight.

Digital Capital Projects
The transformation and analysis of project data through the latest digital platforms and analytics techniques to enable clear project visibility from executive level reporting to on-site management.
COVID-19 effects on construction across the country

In general, construction has continued; however there will likely be significant impacts to schedules, work productivity, and cost.
Polling Question #2
What might be next for contracting?

Health and safety concerns, coupled with increased financial strain, will drive the industry into the next normal, with likely changes to:

- the people
- the project
- the business
The people

Flexible and competitive overhead may be a differentiator for contractors who can train their staff in new ways of collaboration, including remote working and lean management practices.

Workforce may need to adapt to new approaches to **phasing and sequencing** work, as well as setting up **shifts**.

Re-negotiating or modifying **labor agreements** may be necessary to accommodate new safety requirements.

Availability of **skilled labor** is expected to continue to pose a challenge as projects compete for limited resources while the economy recovers.
The project

Increased safety requirements may shift production toward **prefabrication** vs. on-site assembly to benefit from controlled environment.

**Technological advancements** such as faster steel erection are expected to gain pace.

Changes to **regulatory framework** could streamline existing review, inspection, and approval processes.

Owners looking for flexible design options may increase demand for **modular construction**.
The business

Increased **M&A activity** is expected during recovery - larger firms can contribute to the **adoption / standardization of new technology** through M&As and workforce training.

Catalyst for **alternative project delivery** methods such as public private partnerships, design-build, etc., especially for essential projects such as infrastructure, health care and affordable housing where speed is increasingly important.

Financial requirements from contractors, such as **bonds and insurance**, are expected to become stricter, forcing the industry to consolidate.
Contractor financial viability
Consider the last recession for an idea of how general contractors and trade contractors might be impacted

Firms that were able to manage through the recession were able to grow at a rapid pace. In 2014 construction firms had an average three-year revenue growth of 403% vs 195% in 2007.

As projects restart and new projects begin to kickoff again, it will be important to carefully review financial stability of bidding contractors. Procurement reviews should shift to include additional financial and firm information including:

- Cash on hand
- Current projects
- Staff/key personnel and their bios
- Work force size
- Firm longevity
- Quality of bond language and viability of surety provider

Scheduling impacts – common challenges

Delays and decreases in productivity due to COVID-19 will require project teams to revisit schedules

**COMMON CHALLENGES**

**Material delays**
1. Supply chain can be impacted due to restrictions on imports. In particular, lighting fixtures often come from China.
2. Even within the continental US, speed of material production can slow down due to social distancing in factories.
3. If manufacturing is shutdown, material can't be produced.

**Workforce productivity**
1. More time to sanitize tools will take away from productivity.
2. Possible low productivity and efficiency due to fewer coordination meetings and efforts to limit large gatherings.

**Alternating shifts**
1. The Associated General Contractors of America (AGC) encourages employers to stagger breaks and lunches, if practicable, to reduce the size of any group at any one time to less than ten (10) people.
2. Different hours for varying trades to maintain social distancing.

Scheduling impacts – Potential Responses

Delays and decreases in productivity due to COVID-19 will require project teams to revisit schedules

- **Redevelop existing schedules** with close collaboration between the contractor and owner based on need to rephase tasks or re-sequence activities.
- **Scrutinize contractor schedules** to understand the impact of challenges.
- Review **schedule changes for alignment with contract terms**, and review contract terms for necessary updates.
- Employ third-party **scheduling specialists for support** in development and review of schedules.
- Monitor actual **progress and productivity vs planned**.
- Continually **monitor the schedule logic due to uncertainties** in this constantly changing environment.
- Implement an **active risk management program** to help identify and manage risks to schedules.
Innovation in a time of crisis

Owners and contractors are innovating to respond to and recover from the crisis. The current state of construction may act as a catalyst for adoption of technologies:

**Increased use of robots as on-site labor levels decline**
- Construction companies are leveraging robots and autonomous rovers to reduce the need for humans to conduct **site inspections** and to automate repetitive tasks like bricklaying.
- This can help to address the challenge of reduced labor at construction sites amidst the lockdown.

**Leveraging drones for remote site monitoring and inspection**
- The pandemic is pushing construction companies to increasingly use drones for **remote surveillance** and **inspection** of construction projects.
- This is likely to reduce the disruption in construction activity caused by the pandemic.

**Using digital building twins, 5D BIM, and AR/VR during project planning and design**
- Digital building twins, 5D BIM, and AR/VR technologies are supporting the **planning and designing** of construction projects without being physically present at job sites, mitigating the disruption in construction.
- These technologies can help reduce costs incurred during project planning and speed up development timeline.
Innovation in a time of crisis

Owners and contractors are innovating to respond to and recover from the crisis. The current state of construction may act as a catalyst for adoption of technologies.

• Construction companies are gradually increasing the use of **cloud technology** as well as digital collaboration tools to help construction sites get connected, which makes remote management and collaboration easier.

• **IoT** is enabling intelligent asset management including inventory management and equipment monitoring and repair.

• Construction companies are gradually moving towards **modularization** of components to mitigate the impact of the pandemic.

• As the lockdown continues to disrupt construction, contractors are focusing on adding **module assembly yards** — strategically located sites for fabrication and assembling building elements that can then be transferred to a site for rapid assembly.
Polling Question #3
Productivity horizon

A number of variables will likely impact the cost of construction in the near term and long term, requiring sound risk management processes.

(Bubble size indicates cost impact / cost to implement)
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Legal Considerations in a Pandemic World

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About your speaker

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Brian A. Shue practices in the area of construction law. Clients rely on Mr. Shue for not only his strong legal advice, but also for the practical real-world advice he provides, having worked directly in the construction industry. Mr. Shue drafts and negotiates construction agreements, architect and engineer agreements, trade contracts/subcontracts and license agreements on behalf of developers, contractors and design professionals. As a complement to his transactional practice, Mr. Shue also assists clients in disputes arising from public and private construction projects and has prepared pleadings and motions and coordinated pretrial discovery in complex litigations. He advises on the resolution of construction disputes through litigation, arbitration and mediation. Mr. Shue's experience in this regard extends to construction defect claims, delay and disruption claims, change order and extra work claims, warranty claims, property damage, insurance and surety bonding issues, mechanic's liens, default/termination and other related matters. Representative projects include: stadiums, courthouses, infrastructure/transportation facilities, hospitals, institutional buildings, schools, manufacturing facilities, hotels and high-rise commercial and residential buildings.

Areas of practice

- Construction law
- Alternative dispute resolution
- Project finance, documentation, and negotiation
- Claim avoidance
Legal Considerations for Mitigating Impacts of COVID-19

• Local and state restrictions on construction activity

• Relevant contractual provisions

• Future contract provisions in a post-COVID world

• Communication, negotiation, resolution
Local and State Restrictions on Construction Activity

• The definition of construction as “essential” or “non-essential” varies by state and municipality.

• Example: New York
  – Initial guidance was set forth in Executive Orders 202.6 and 202.8 and exempted many “essential” forms of construction from the shutdown
    o Roads, bridges, utilities, hospitals, affordable housing
    o Continuation of projects if in a stage deemed unsafe to halt
    o Continuation of a project for an essential business
    o Construction work being completed by a single worker as the sole employee/worker on the site
  – Subsequent guidance: New York Forward
New York Forward

- Phased plan for re-opening New York with seven core requirements
  1. Decline in total hospitalizations
  2. Decline in deaths
  3. New hospitalizations
  4. Hospital bed capacity
  5. ICU bed capacity
  6. Diagnostic testing capacity
  7. Contact tracing capacity
- Construction and manufacturing are included in Phase 1
Construction in a “New Normal”

**Precautionary Measures**

- Physical distancing of workers and limiting of gatherings
- Prohibiting non-essential visitors on site
- Providing PPE/other protective coverings to employees at no cost to employees
- Hygiene and sanitation requirements, hand hygiene stations, regular cleaning
- Screening/testing workers before arriving on site
- Contact tracing for employees

**Potential Cost Impacts**

- Delays from limiting personnel on hoists or service elevators, and other social distancing measures
- Supply chain disruptions
- Availability of governmental inspectors to approve work
- Travel restrictions
- Finding skilled labor
- Costs associated with re-starting activity
- Trade defaults
- Bankruptcies
Legal Considerations for Mitigating Impacts of COVID-19

• Local and state restrictions on construction activity

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• Communication, negotiation, resolution
Assess the Impact of the Coronavirus on Relevant Contractual Provisions

- Schedule and/or delay
- Suspension
- Termination for convenience
- Changes in the law
Assess the Impact of the Coronavirus on Relevant Contractual Provisions

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Events enabling a party to declare *force majeure*:
- Specific list or general provision in clause structure
- Type of claim related to the pandemic (e.g., labor shortage, work stoppage, etc.)

Consequences from declaring *force majeure*:
- “No damages for delay” provision
- May allow contractor to recover actual provable delay costs
- May include a “grace period”
Assess the Impact of the Coronavirus on Relevant Contractual Provisions

- Schedule and/or delay
- Suspension
- Termination for convenience
- Changes in the law

In a convenience suspension, owner may be responsible for:
- “Cost and time” caused by the suspension, delay, or interruption
- Contractor’s additional staff costs
- Additional trade costs

Contract termination may be allowed after extended delay
Assess the Impact of the Coronavirus on Relevant Contractual Provisions

- Schedule and/or delay
- Suspension
- Termination for convenience
- Changes in the law

Key considerations:
- Additional costs payable immediately
- Possible invalidation of warranties
- Costs to re-start
- Handling defective work
Assess the Impact of the Coronavirus on Relevant Contractual Provisions

- Schedule and/or delay
- Suspension
- Termination for convenience
- Changes in the law

- Look for the definition of “legal requirements” or “law” in the agreement
- Contractor likely entered into agreement based on laws at the time of execution
Legal Considerations for Mitigating Impacts of COVID-19

- Local and state restrictions on construction activity
- Relevant contractual provisions
- Future contract provisions in a post-COVID world
- Communication, negotiation, resolution
Consider Future Contract Provisions

- Force Majeure
- Notice
- Suspension/Termination
- Workplace Safety
- Insurance Protection
Legal Considerations for Mitigating Impacts of COVID-19

• Local and state restrictions on construction activity
• Relevant contractual provisions
• Future contract provisions in a post-COVID world
• Communication, negotiation, resolution
Communicate, Negotiate, Resolve

• Communicate before problems add up to a claim
• Be proactive
• Understand likelihood of mutual financial discomfort
• Consider:
  – Pay for certain “key staff”
  – Discuss mitigation of potential project disruptions
  – Request updated schedules
  – Prioritize work areas
  – Confirm health and safety measures are being taken
  – Furlough or salary reductions for certain staff
  – CARES Act
  – Review and communicate with supply chains, workforces, etc.

• Resolve problems outside the contract
Polling Question # 4
NYC Construction
Insurance Issues in the COVID 19 Environment

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About your speaker

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Philip Glick is a Senior Vice President for the Property & Casualty Division of Conner Strong & Buckelew. A 42-year veteran of the insurance industry, Glick is responsible for generating new business opportunities and directing account services for large strategic business relationships. He has extensive experience in the design, placement and servicing of insurance coverages for large clients including both private and publicly-held firms. In addition to his consulting experience, Phil has held senior positions with several large national and regional insurance brokerage organizations for over three decades.

In addition, Phil is a nationally recognized insurance educator having written national examinations for the Society of chartered Property and Casualty Underwriters and taught both graduate and undergraduate courses as an Adjunct Lecturer at LaSalle University in Philadelphia and seminars for the Pennsylvania Bar Institute, and The PA Institute of Certified Public Accountants

Areas of practice

- Professional Liability
- Workers Compensation
- Commercial Insurance
- Umbrella Insurance
- Casualty Insurance
- Underwriting
Background on the NY Insurance Marketplace

- Existing difficult Insurance marketplace conditions for NYC contractors and their development clients
- Negative impact of NY labor codes 240 and 241 on General and Umbrella Liability insurance coverage for contractors
- Overall tightening of insurance market for all coverages including Liability and Builder’s Risk Insurance
Specific Insurance Challenges in light of the COVID 19 situation

Builder’s Risk Insurance

- Difficulty / Inability to obtain business interruption coverage for COVID 19 related delay claims for:
  - Extended general condition costs
  - Costs due to delays in completion and potential future acceleration costs
  - Soft costs and other delay in completion costs
  - Potential for coverage due to other related covered claims i.e. due to vandalism, water damage, or windstorm losses
Specific Insurance Challenges in light of the COVID 19 situation

- Commercial General Liability and Excess Liability coverage and claims
  - Impact of standard pollution liability exclusion vs.
  - Potential additional exclusion of virus related claims vs.
  - Impact of a broad communicable disease exclusions

- Potential for increased claims related to Labor Code 240 and 241 requirements “Follow form” coverage vs. additional exclusions in excess liability policies.
Specific Insurance Challenges in light of the COVID 19 situation

- Contractor’s Pollution and other pollution legal liability policies that may be in place.
  - General scope of coverage vs.
  - Typical exclusions that may apply

- Contractor’s Professional Liability Insurance
  - Potential claims due to cost overruns, and schedule slippage
  - Other exposures and limitations
Specific Insurance Challenges in light of the COVID 19 situation

- Workers’ Compensation and Employer’s Liability
  - Potential for additional losses due to COVID 19 infections on the job site
  - High burden of proof to establish illness was job related
  - Trends in NY and other states towards a “rebuttable presumption” that COVID 19 losses were job related
  - Potential for companion employer’s Liability claims
Likely Future Insurance and Claims Related Problems

- Potential for imposition of specific virus or communicable disease related exclusions on most, if not all, future insurance policy renewals.

- Risk of liability insurance company denial of COVID 19 related claims based on resumption of construction contrary to State mandated stop work directives or in violation of published safety requirements.

- Similar risk for potential denial of coverage for employer’s liability claims based on alleged gross negligence involving violation of safety guidelines.
Polling Question #5