

COVID-19 Resources

Real Estate Owner/Developers: Active Construction Loss Mitigation Checklist

Real estate developers have been impacted by the Coronavirus (Covid-19) in an unprecedented fashion. Owner-Developers with projects under construction are faced with uncertainty caused by wide-spread project shut downs and delays, labor and material shortages, contractor performance issues and defaults, and questions about financing, contract, and insurance language. While understanding these problems is a prerequisite to defining solutions, there are several best practices that Owner/Developers should consider now to prepare for a recovery that will happen.

Imperium has prepared the following checklist for Owner/Developers to consider. The objective is to provide a framework to evaluate project risk and then focus on steps to manage, quantify, and document delays and cost increases.

1. Develop a strategy for different impact-period scenarios by assessing internal and external risks, and then defining and prioritizing actions. Update the strategy frequently.

- » Consider the financial viability of equity partners, general contractors, subcontractors, and their supply chain.
 - Consider who can withstand a severe impact and for how long as a basis for go-forward decision making and communication tones.
- » Assess your organization and project teams.
 - Project team retention, based on project "history" knowledge and expertise. (Including contractor's team).
 - Redundancy of project personnel; ability to backfill staffing in the event of virus exposure among project team member(s). (Critical in leadership roles.)
 - Ability to relocate staff to active projects.
 - Added staffing needs as project(s) re-start.
- » Evaluate each project.
 - Develop a spectrum from financially strong to potentially insolvent for all projects.
 - Determine where each project fits along that spectrum.
 - Consider risks to project financing.
 - Consider the potential availability of financial recovery sources, such as insurance.
- » For projects that may encounter financial challenges or become impractical to continue, either due to funding or general contractor viability – consider alternate measures.
 - Begin to seek alternate or supplemental funding mechanisms.

- Consider assistance with interim or advanced payments for general contractors, major subcontractors, and vendors with cash-flow concerns.
 - Balance against additional security, possible bonding, or funds control.
- Consider replacement or supplemental forces.
- Ensure timely and proper notices are provided based on contract and insurance requirements.
- » For those that are financially strong – promptly discuss potential alternatives to recover time impacts, depending upon the outcome, duration, and impact of the event.
 - Consider some or all of the actions noted for higher risk projects noted directly above.
- » Evaluate and prioritize decision making within the context of the project and corporate exposure.
 - If your resources are limited – put the necessary resources where they are needed the most and where they will make a difference.
 - Ensure adequate resources are dedicated to address immediate concerns, document schedule and cost impacts, respond to general contractors, and proactively consult with legal and risk management advisors.

2. Activity at the Project Site

- » Make sure your contractors follow proper and recommended health and safety practices to ensure worker and public safety.
- » Strictly follow all government restrictions and instructions.
- » If faced with a possible project shutdown:
 - Comply with and enforce government restrictions.
 - Seek legal counsel if you or your general contractor are considering shutting down a project.
 - Thoroughly understand your rights and responsibilities.
 - Ensure that your general contractor makes-safe all ongoing operations and conditions.
 - Consult a Certified Safety Professional (CSP), if needed, to evaluate any safety concerns.
 - Make certain that the current project status is thoroughly and accurately documented.
 - Do not just rely upon your general contractor. Conduct physical inspections and focused progress reviews or audits.
 - Video / Photographs / Aerial Photographs.
 - Annotated progress plans.
 - Secure the project administration trailer/office.
 - Safeguard all computers, IT, and confidential documents.
 - Assume you will not be able to return to your project office for an unknown length of time.
 - Make sure you have possession of, or access to, critical documents and items, such as:
 - Insurance policies,
 - General Contracts,
 - Subcontracts,
 - Project diaries,
 - Project directories and key contacts, and
 - Other critical documents.

3. Notice Requirements

- » Review contracts, finance agreements, and insurance policies and understand applicable provisions.
 - Seek guidance and assistance from counsel, insurance brokers, and consultants as may be necessary.
- » Submit all necessary notices to applicable parties.
 - Understand and strictly comply with format, recipients, and requirements.
- » Verify whether one notice or multiple notices may be required.
 - Often best to note that your notice will 'remain as a standing notice'.
- » Typically best to note situation is evolving and that impacts are yet unknown and unable to be currently or fully identified or quantified.
 - This is applicable especially in cases where a contractual term may require quantification of impacts within a certain timeframe.

4. Cash Flow and Funding Considerations

- » Preserve and conserve cash.
 - Prepare cash flow forecasts with various levels of payment timing assumptions.
- » Communicate with all customers regarding status of currently due and overdue progress payments.
- » Communicate with vendors regarding the potential for delayed payments.
- » Maximize billings as of the project suspension date.
- » Communicate with Owner/GC regarding current payment application approval process and timing.
- » Communicate with banks and other creditors.
- » Discuss current state of projects, financials, and cash flow at a high level.
- » Discuss upcoming debt service payments that will be due and the status and feasibility of meeting the payment requirements.
- » Discuss bank covenants and prospects of covenant compliance vs. potential breach.

5. Collaboration with General Contractors, Subcontractors and Vendors

- » Evaluate each project and project team.
 - In other words – "If this pandemic does not end quickly, who will be cooperative moving forward and who are we likely to end up in a dispute with?"
- » Expect to receive claims from general contractors and pass-through claims from their subcontractors and suppliers.
- » Review and understand your contract provisions.
 - Discuss with external advisors such as legal, insurance, and claims consulting, as may be needed.
- » Develop a spectrum from collaborative to potentially adversarial/hostile for all pending projects.
 - Determine where each project fits along that spectrum.
- » Develop a separate spectrum for each project in order to evaluate project team participants.
 - Determine where each/critical project team participant fits along that spectrum.

- » For those that are collaborative – promptly discuss potential alternatives depending upon the outcome, duration, and impact of the pandemic.
- » For those that may be hostile or adversarial – consider more aggressive actions to protect your rights and assets and strictly comply with all of your obligations.
- » Consider dispute avoidance and early dispute resolution procedures. Discuss with counsel as appropriate.

6. Documenting Costs During Period of Impact/Disruption

- » Work with your project team and the general contractor to make certain all costs are properly and accurately monitored and documented, and agreed upon.
- » Review suggested guidelines such as:
 - Segregate costs related to impacts/disruptions in the job cost report.
 - Require all employees (including those working onsite, in corporate office or working from home) to keep detailed time cards with specific descriptions of all activities.
 - Document costs related to temporary measures taken on-site (testing/monitoring equipment, additional cleaning products, aerial/drone photographs, locks/security, etc.).
 - Store invoices, receipts, and pay applications along with proof of payment in file for related impact costs.
 - Compile a detailed narrative of all costs and measures taken during impact/disruption.
 - Do not, to the extent possible, track impact-related costs in generic codes, or make unsupported assumptions in assigning costs and delays to issues. For larger cost and delay exposures, begin to do the analysis and investigation as soon as possible.

7. Applications for Payment

- » Promptly evaluate all outstanding payment applications so that they are up to date.
 - Do not wait until progress at the site resumes.
 - To the greatest extent possible, make sure they comply with project requirements.
- » Verify that progress reflected in the pay application is consistent with the progress at the site.
- » Scrutinize all potential overbillings.
- » Scrutinize requests for payments for onsite and offsite stored materials or those being procured.
 - If necessary to mitigate potential future supply chain impacts, make certain to obtain adequate security and guarantees.
- » Depending upon the outcome of the pandemic and how a project may or may not resume, this current pay application may be the critical measure of the value of the project when construction ceased.
 - Consider your evaluation of the general contractor's progress, as well as the general contractor's evaluation of the subcontractors' and suppliers' progress.
- » Request verification of payment from all of the general contractor's subcontractors, sub-tier subcontractors, and material suppliers/vendors.
- » Insure proper insurance is in place for any materials paid for and stored offsite.

8. Schedule Status


- » Review and verify understanding of all applicable contract provisions relating to scheduling and updates.
- » Ensure that your general contractor is in compliance with project schedule requirements.
- » Ensure that the schedule status is completely and thoroughly updated.
 - Accurately evaluate incomplete and pending work at the site.
 - Accurately evaluate incomplete and pending deliveries.
 - Accurately evaluate incomplete and pending submittals and approvals.
 - Do not blindly rely upon an update provided by your general contractor.
- » Evaluate the impact of changes to the work.
- » Prepare your own narrative regarding the schedule status.
- » Compare current photographs, videos, and other substantiating documents validating progress to the status of the schedule.
- » Ensure that the schedule status update is consistent with the current application for payment.
- » Assemble and maintain contemporaneous issue file documents (emails, meeting minutes, schedule updates, etc.) to support positions on delay causation, entitlement, and quantification.

9. Supply Chain, Procurement, and Deliveries Evaluation

- » Communicate with your general contractor and have them accurately advise you on the status of the supply chain and deliveries.
- » Evaluate the current status and potential disruptions to the supply chain, including availability, current lead time, location (in warehouse or in transit), estimated delivery dates, etc.
- » Expedite all pending approvals and outstanding procurement matters.
- » Determine ability for current vendors to meet future demand.
- » Consider evaluation with your general contractor regarding potential time and cost impacts due to disruptions.
- » Consider possible alternatives to overcome supply chain disruptions.
 - Be prepared to make prompt decisions to identify and determine acceptable alternatives.

10. Project Management Status

- » Make sure your “house is in order”, current, and complete.
- » Assess operations that can be maintained remotely; continue to process submittals, RFIs, change orders, etc.
 - Prioritize un-submitted submittals with longer lead times.
- » Analyze all pending and un-submitted changes and requests.
 - Focus on bringing all outstanding and time-critical matters up-to-date.
- » Communicate with the construction and design team to resolve pending RFIs, shop drawings and approvals and prioritize now based upon need at project re-start.
- » Prioritize action items.



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