

FORUM on COVID-19 CONSTRUCTION IMPACTS

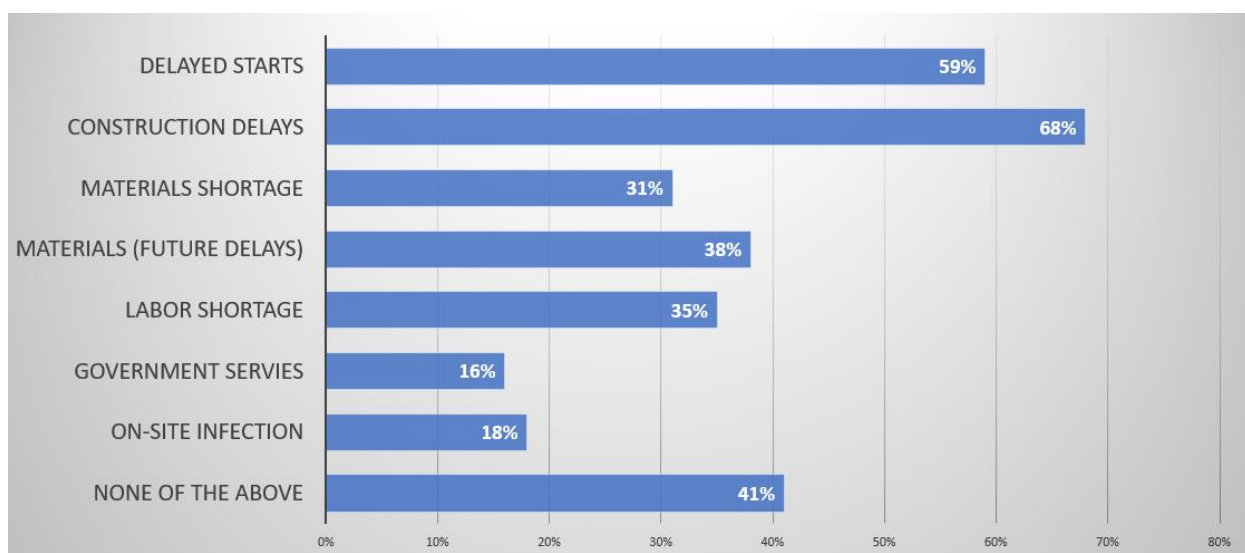
Thursday, April 9, 2020

Summary of Discussion

As the country settles into coronavirus-related limitations on construction, developers and investors are saddled with management of additional risks. The parts of the country that are on the road to recovery have experienced construction project impacts ranging from the disruption of material deliveries, availability of staff and changed workplace rules up to complete shutdown.

Construction has been limited to essential construction or shut down entirely in some regions but continues with little impact in most areas. Since regional orders concerning construction vary widely, it is important to review specific orders affecting your site. When shelter in place orders were issued in the San Francisco area, for example, some contractors suspended operations only to resume construction after examining the order more closely. Some jurisdictions will also allow exceptions to published orders for construction at specific sites. Since building permits are typically issued to the developer, not the contractor, the owner may be responsible to initiate these conversations, but working as a team can be better since contractors often have more established relationships with city officials.

In recent surveys, the [Associated General Contractors](#) (AGC) and [National Multifamily Housing Council](#) (NMHC) found that approximately 30% of construction projects nationwide have been affected by regulatory orders and approximately 55% have reported related delays, while 40% have reported delay or cancellation of pending orders for materials, and 35% reported related labor shortages.



According to the NMHC Survey, contractors have implemented alternative jobsite strategies including staggering shifts to reduce onsite exposures; sourcing materials from alternative locations or replacing materials with alternative products; the use of technology to facilitate inspections and approvals; and offering incentives for workers to stay on the job. AGC has [published guidance](#) for worksite practices to minimize risks.

Sourcing materials from alternative locations	43%
Sourcing alternative building materials	16%
Using technology to replace in-person transactions like inspections and approvals	67%
Staggering shifts to reduce on-site exposure	52%
Offering workforce incentives or other benefits	14%
Other	14%

Building department inspections have also proven to be problematic where departments are shut down or working from home. The use of video technology to view improvements in place or acceptance of observations by a third-party inspector have been implemented in many areas to allow projects to move forward.

According to our contacts most projects continue to run smoothly, and subcontractors have been cooperating with new workplace rules, but problems are beginning to surface as contractors and developers work through the responsibility for increased costs. Where projects have been or are expected to be shut down, developers and contractors can plan for an orderly process to minimize complications as work resumes.

Standstill Agreements - According to Lisa Glahn and Jeff Blease, co-chairs of Foley & Lardner's construction practice, the negotiation of standstill agreements can help developers and contractors to allocate and share risks soon they can get back to work as smoothly as possible. Key components of the standstill agreement include:

1. Arrangements to make the site secure and safe
2. Agreement on a detailed picture of the state of construction, costs, and schedule to date, as well as payments for construction completed to date and collection of lien waivers
3. Creating a detailed list of contractors and suppliers
4. Agreement to suspend any rights to terminate the dormant project
5. Agreement on demobilization and remobilization fees as well as the handling of General Conditions while the site is idle.

Suspension of rights to terminate the dormant project is particularly important since the duration of shutdown orders is impossible to predict, and termination may be allowed even where not directly related to shutdown orders.

Construction Status Review - Agreeing on and documenting the current status of construction and key documents is also important in order to minimize impacts to the property and evaluate future change requests. This process typically involves third party observation of the property, review of related documentation, and interview of key stakeholders. The Construction Status Report can range from simple documentation of the construction status through collection and review of contracts, subcontracts, lien releases, plans, specifications, submittals, inventory of materials stored on- and off-site, project weatherization and more.

Construction Status Review	
<ul style="list-style-type: none"> • Collect and review key documents <ul style="list-style-type: none"> ◦ Contract ◦ Subcontracts ◦ Schedule ◦ Pay application ◦ Insurance ◦ Inventory of on-site and off-site stored materials <ul style="list-style-type: none"> ▪ Inspection, UCC-1, other assurance ◦ Lien releases • Interview Key Stakeholders - GC, major subs and suppliers 	<ul style="list-style-type: none"> • Review and Document Site Conditions <ul style="list-style-type: none"> ◦ Access ◦ Security ◦ Completion status with copious phot documentation ◦ On- and Off-site Stored materials <ul style="list-style-type: none"> ▪ Rough inventory ▪ Security ▪ Protection from elements ◦ Project Weatherization ◦ Excavations ◦ Manpower ◦ SWPPP

This is also the perfect time to agree on payments due for work completed to date. In some cases, contractors have aggressively estimated the value of work in place in order to establish working capital since it is impossible to know when work will resume. Carefully vetting pay applications at this point can be critical.

Insurance may provide additional relief. Since Builder's Risk policies can sometimes cover “physical losses” in addition to damage, it can be important to file notice under Builder’s Risk policies carefully to avoid self-defining exclusion of claims. A simple notification of claim is often preferable to extensive detail.

The reopening of construction sites and the economy in general is under discussion at Federal, state and local levels, but additional sites could be affected in states in which COVID-19 is still on the rise. For sites that have already been shut down, it’s a good idea to plan for resumption of the work. Considerations of the standstill agreement are likely to come into play in addition to the financial capacity of the general contractor, subcontractors, and suppliers as well as personnel and workforce changes that may impact resumption of the work.