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Avoiding the Storm After the Storm—10 Things the Construction Industry Should Do Right Now to Move Projects Forward After Harvey and Irma

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Hurricanes Harvey and Irma once again have forced the construction industry to focus on best practices for responding to force majeure events.

Now is the time to put into action an effective recovery plan with the aim of minimizing, to the extent possible, out-of-pocket costs related to hurricane damage and subsequent recovery efforts, and maximizing the ability to transfer risk of the hurricane damage and subsequent recovery efforts to others. To that end, below is a 10-point checklist of items construction participants—from owners and contractors to subcontractors, suppliers, and vendors—should consider when implementing post-hurricane recovery and damage mitigation efforts.

1. **Crisis Management Mode**: If you have a crisis management plan, now is the time to implement and follow it.
2. **Speak With An Informed and Unified Voice**: Designate key individuals/consultants for specific tasks. It will be important to speak with one coordinated voice to various project constituents, including owners/general contractors, subcontractors, suppliers, vendors, sureties, lenders, insurers, and employees. Consider identifying specific individuals or consultants who are subject matter experts to serve as your company's voice for a particular subject (for example, identifying one or two people to understand the potential insurance coverage and to be the point of contact for claims adjusters). For all participants, accurate, consistent, coordinated, and timely communication is essential to further the best interests of the project.
3. **Contractual Rights and Responsibilities**: Review the project contracts, with a particular focus on any force majeure clause, to determine potential rights and responsibilities. In assessing the force majeure clause, pay particular attention to what type of recovery the clause provides (*e.g.*, schedule relief only or schedule and monetary relief) and any notice requirements. Contractual notice requirements for force majeure events are often short, so do not delay – even if you can only provide a basic notice. Also, do not rely upon oral notice; put it in writing.
4. **Insurance**: Review your insurance portfolio. The most likely sources for insurance coverage for construction projects damaged by Harvey and Irma will be builder's risk insurance, property insurance, and marine cargo insurance. Other potential sources of insurance coverage, depending on the circumstances, include professional errors

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and omissions insurance, commercial general liability insurance, and subcontractor default insurance. Of course, the existence and extent of coverage will depend on the language of the policy, so it is important to gather the policies together and review the terms of each in order to maximize potential recovery. And, in order to effectively use the insurance your company has purchased, it is critical to comply with all notice requirements and to keep the insurers informed throughout the recovery process (especially when it comes to having the opportunity to view damage prior to mitigation or recovery efforts). Here in particular, having one or two (coordinated) point persons to deal with insurance issues, claims adjusters, and investigations will reduce potential issues and the inefficient use of people's time and efforts.

5. **(More) Notice**: Provide notice to sureties or lenders, if needed. This will avoid late notice, waiver, or similar defenses down the road.
6. **Document, Document, Document**: Document the costs and schedule delays you have incurred. For both force majeure and insurance claims, this is critical. Good documentation maximizes claim recovery, and minimizes costly after-the-fact reconstruction of costs. Consider creating hurricane specific cost codes, including cost codes that correlate to any sublimited categories of insurance recovery. (For example, most business risk and property policies have categories of costs that, while covered, are subject to sublimits, such as business interruption, debris removal, expediting expenses, off site storage, pollution clean-up and removal, soft costs/delay-in-completion costs, etc.) But, if you create such cost codes, use them accurately or the effort might do more harm than good.
7. **Consider Your Subs and Suppliers**: Check-in with subcontractors, suppliers, and vendors to determine the extent they have been impacted by the hurricane – and coordinate force majeure or insurance claims as appropriate (considering whether a subcontractor in particular has a back-to-back force majeure clause with the upstream contractor) – and to address any supply chain issues that may arise due to the hurricane, including delay claims and inability of suppliers to satisfy delivery deadlines or changes in quantities of supplies.
8. **Interim or Fast Funding**: Consider whether there may be the potential to negotiate a funding agreement or interim payment with affected project participants/insurers to provide an immediate source of funds to commence hurricane recovery and avoid, at least in the short term, disputes regarding what damage/delay was caused by the hurricane and the recovery efforts. If you are looking to negotiate such an arrangement with an insurer, you need to keep the deductible in mind (as it is often a big cost, especially on a builders risk claim), as well as whether there is any contractual provision as to which party is responsible for the deductible.
9. **After-Effects**: Consider the after-effects of Harvey and Irma on things such as manpower and licensing. You will not be the only company looking for construction workers and the cost of the job is likely going to rise because of higher wages and per diem expenses. Communication about this issue between owners, contractors, suppliers, etc., will be critical to laying the foundation to work together to effectively address the problem. And, the delay in construction that will likely be felt may require extension of professional licenses to be in compliance with applicable laws and regulations through the end of your work on a project.
10. **Words Matter**: Although you are working in crisis mode, with the ultimate goal of getting back up and running as quickly as possible, the fact is that what you say now, in the heat of getting work done with perhaps not enough information, matters a lot. Project participants and other interested parties (such as insurers) are listening to what you say now about issues such as what has been damaged, how it was damaged, how much it is going to cost to get back up and running, and how long you are going to be delayed. What you say now will set certain expectations at all levels of the project, and those expectations might be difficult to overcome if, down the road,

your estimates prove to be low. And, particularly with respect to insurance recovery, how you frame an issue or a particular cost can effect whether there is full coverage, partial coverage, or no coverage at all. Take care in what you are saying and whether you have the knowledge at a particular point in time to say anything. Communication is key, but accurate as well as timely and consistent communication is what is going to be most effective in recovery and damage mitigation efforts.

The next 30 days will be decisive—for successful project completion, for claims made or avoided, and for the availability of insurance coverage and materials to finish the project. Effective project management, coordination with experts, and quick action will go a long way toward avoiding or mitigating the storm after the storm.

As we have written previously, significant weather events are changing—and will continue to change—the construction landscape, giving new vigor to the force majeure clause and requiring new approaches to project completion. *See* Jocelyn L. Knoll and Shannon L. Bjorklund, *Force Majeure and Climate Change: What is the New Normal?*, 8 JOURNAL OF THE AMERICAN COLLEGE OF CONSTRUCTION LAWYERS 29 (Winter 2014).