KILPATRICK TOWNSEND

5 KEY TAKEAWAYS

Legal Issues: Risk Management in Underground Construction

Kilpatrick Townsend's Randy Hafer recently participated in a panel discussion addressing "Legal Issues" at the 2022 Risk Management in Underground Construction Conference. As tunneling projects get larger and more complicated, the issue of risk becomes more important. The Risk Management in Underground Construction Conference helps stakeholders navigate the latest approaches to risk management. Issues covered during the conference include: contracting practices, geotechnical baseline reports, funding and insurance, risk registers, and guidelines and best practices.

Here are Mr. Hafer's key takeaways from the panel discussion:

1

Economic impacts of the war in Ukraine, including sanctions, and rising inflation on the heels of the COVID pandemic have contributed to very significant and continuing impacts on the global construction market. Escalation of construction costs along with material shortages and supply chain issues can cause project delays and even cancellations, and certainly claims and disputes.

2

With fixed price contracts (including unit prices and even cost reimbursable with a Guaranteed Maximum Price), the contractor typically bears the financial risk of material price increases. In the current economic environment, it is critical for contractors to seek to negotiate material price escalation provisions with the project owner. A typical material price escalation provision will acknowledge that the contract price is based on current pricing for required materials, but certain materials may be subject to price increases. The provision will provide for a price adjustment if the price of the material exceeds an agreed percentage or some other threshold or formula. The best approach is to limit these provisions to certain materials.

3

In the event, there is no price escalation provision in your contract, relief may be found in the form of delay damages (assuming you do not have a no-damage-for-delay provision) and under a "changes in the law" theory where government action (*e.g.* sanctions), rules, regulations, etc. caused the price increase.

4

Another contractual provision highlighted by the current economic environment is the *Force Majeure* clause, which applies to causes or events beyond the reasonable control of the affected party to a contract. *Force Majeure* typically includes such things as war, riot, terrorism, act of vandalism, rebellion, protests, civil disturbances, acts of civil disobedience, epidemic, pandemic, unusually adverse weather, general strikes, fire, explosion. Note that *Force Majeure* provisions are typically a defense to non-performance, and do not provide for affirmative recovery. In construction lingo, you get "time and no money."

5

Interpretation of these provisions is often an issue. For example, is the Russian invasion of Ukraine a "war" such as to fall within the *Force Majeure* provision? The *Force Majeure* provision should be carefully reviewed and tailored to your specific situation. Don't assume the *Force Majeure* clause you have always used is sufficient in today's environment.

For more information, please contact:
Randy Hafer: rhafer@kilpatricktownsend.com