

# One Minute Memo®



## Practical Tips for Owners and Contractors Impacted By Hurricanes Harvey and Irma

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Anyone watching what has happened in Houston, and what is predicted to happen in Florida, immediately thinks about the safety and well-being of those affected by Hurricanes Harvey and Irma. Once the rain stops, the water recedes, and the aftermath of destruction is assessed, both areas and their residents will be looking at a long road to recovery, much in the same way as New Orleans in 2005 (Hurricane Katrina) and New York/New Jersey in 2012 (SuperStorm Sandy). Among the many challenges that lie ahead, owners and contractors of existing projects, whether in Houston, Florida, or in other parts of the country, as well as those involved in new projects to rebuild, must take steps to assess the impacts and identify their contractual rights and obligations. For those in Houston and Florida, this will no doubt mean working closely with their insurance carriers to recover project related losses. For those in other parts of the country, contracting parties need to assess the impact, if any, on the projects and ascertain their available remedies.

### Potential Hurricane-Related Impacts

Hurricanes can cause supply side and demand side issues with raw materials, supplies, and equipment, especially at critical junctures such as ports and warehouses due to their location on or near the coast. Natural disasters often affect the construction industry in the form of price increases and material scarcity. For example, oil shortages during a hurricane can greatly affect commercial contractors who rely upon diesel-powered machinery. Similarly, natural gas shortages cause prices to spike, which increases the cost of producing asphalt, paints, and tires for heavy machinery.

Hurricanes can also impact the timely flow of materials, supplies, and equipment. In 2005, Hurricane Katrina created shortages of resins produced from oil that manufacturers needed to create polyvinylchloride (PVC) and other vinyl products. Damage caused by Katrina in the Gulf of Mexico disrupted supplies of ethylene and natural gas during the second half of 2005. In the aftermath of Katrina, repair efforts along the Gulf Coast quickly consumed many building materials, creating short term shortages and further price hikes. If equipment, materials, and supplies, are coming from the impacted areas, projects run the risk of delay. Moreover, supplies, equipment, materials and labor may be diverted to Houston and Florida, which could further impact your project.

### Remedies Contractors May Seek From Hurricane Impacts

The general rule under most construction contracts is that the contractor is required to perform and see the work through to completion, or else run the risk of default, termination, and/or damages. However, external events beyond anyone's control or anticipation often disrupt this contractual equilibrium. With that in mind, it is critical for owners and contractors

to understand the impacts that flow from such events, as the fallout from these unforeseeable acts can greatly impact a contractor's ability to perform under its contract.

To accommodate for the unknown, most contracts provide a force majeure clause to limit and allocate risk. Force majeure (which is French for "greater force") refers to events that are beyond the control of the contractor and generally wreak havoc on jobsites in the form of physical damage, in addition to cost and time impacts. Force majeure events typically include most natural disasters—fire, flood, earthquake, hurricane, drought, and other "Acts of God"—each of which are characterized by their complete unforeseeability at the time of contract drafting. Notably, many construction contracts do not even use the term "force majeure," but rather employ broad language addressing a variety of causes beyond the control of the party seeking to invoke the provision. See, e.g., AIA A201-2007, § 8.3.1 ("If the contractor is delayed ... by ... other causes beyond contractor's control.").

In most standard contracts, both the owner and contractor will generally share the risk of loss for force majeure events, where contractors are entitled to a time extension, but not compensation. Thus, a contractor can rely on the force majeure clause to seek a time extension and avoid an assessment of liquidated damages by the owner. While a contractor will likely be entitled to additional time, contractors (unless the contract expressly provides otherwise) will not be allowed to recover delay damages as a result of the unforeseen event. Thus, contractors need to assess whether their projects will be impacted by Harvey and Irma, and determine what remedies their contracts provide.

As far as recovery for price escalation, most contracts place the risk of price escalation on the contractor. The AIA documents, for example, do not include an escalation clause. If a contract does contain such escalation clause, the clause will typically provide a time period after which the escalation applies.

## Disaster Relief

Finally, the House of Representatives recently passed a \$7.9 billion aid package for Hurricane Harvey victims, and the Senate has approved an overall package valued that adds \$7.4 billion, for a total of \$15.3 billion. Undoubtedly, money will be made available in Florida as well. Both House and Senate bills have \$7.4 billion going to the Federal Emergency Management Agency's ("FEMA") disaster relief fund. Because federal money is involved, those contractors coming to the aid of a disaster relief area need to be aware of issues arising out of federal contracts issued through FEMA. Contractors working primarily in the commercial world may not be aware of the multitude of regulations they are subject to under the Federal Acquisition Regulations ("FAR") and should take steps to familiarize themselves with the rules. While most of the contracts would likely be firm-fixed price, contractors working under a cost reimbursement contract may not be familiar with the regulations surrounding time-keeping and accounting practices. Mistakes in this area could open up contractors to issues involving false claims. Contractors working with federal money would also be subject to Davis-Bacon Act requirements, which establish the requirement for paying the local prevailing wages on public works projects for laborers and mechanics. Prudent contractors should familiarize themselves with any red tape issues prior to pursuing or accepting contracts involving federal funds.

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