

EXECUTIVE SOURCING GUIDE FOR THE
COMPANIES THAT BUILD NORTH AMERICA

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CONSTRUCTION

TODAY

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INTEGRITY BUILDERS

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of putting customers first. → **p. 28**

CENTERS OF ATTENTION
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COMMUNITY LIVING
McCormick Construction nears
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workforce housing development.





» Companies face a number of insurance and legal issues following disasters.

THE AFTERMATH

Hurricanes shouldn't be the end for your projects. BY DANIEL A. KAPNER

This year's hurricane season – which saw hurricanes Harvey, Irma, and Maria causing widespread destruction in Texas, Florida, Puerto Rico and the U.S. Virgin Islands – has caused unprecedented damage and economic loss. According to some estimates, the damage may reach as high as \$375 billion. Owners of construction projects and their contractors should carefully consider certain legal and insurance-related issues as part of their recovery strategies.

Insurance Issues

Project participants should review all property, casualty, builders risk, and other policies as early as possible and determine the availability and scope of insurance coverage; identify the causes of

all potentially covered property damage, for example whether damage was caused by wind-driven rain, wind, storm surge, a breakdown of flood protection systems, and/or flooding from rain; and identify issues that may affect a policyholder's ability to collect on a claim.

Insurance-related questions that project participants should address include whether the project owner maintains coverage for flood damage, for example through the National Flood Insurance Program, and/or for wind storm damage. The policyholder will likely need to review how the policies define key terms such as "flood," "wind," etc., to determine whether the language is sufficiently broad to cover property damage caused by these elements.

Other concerns should include whether

builder's risk policies are in place that cover natural disasters; whether policies cover any expected business interruption losses caused by delays, or "contingent" business interruption losses, which are losses suffered because a supplier or subcontractor was delayed; and how project participants will collect and preserve materials necessary to substantiate claims.

In addition, companies should determine whether it is necessary to engage a forensic accountant or other consultant – the cost of whose services may be covered in a policy – because specific specialized information may be needed to develop a claim for business interruption or other types of loss. Project participants must also know how to comply with notice requirements of the relevant policies – which is generally a



mandatory condition precedent to a claim – and provide timely notice to all carriers whose policies potentially provide coverage.

Contract Concerns

Project participants should also understand their contractual rights and obligations following a severe weather event. These include:

Delays: Under many construction contracts, delays caused by hurricanes and other severe weather events may be treated as “excusable delays,” i.e. the contractor is entitled to additional time to complete the work but not additional compensation. Delays are generally compensable only if they would not have occurred but for the action or inaction of the owner, or where the delays arose as a result of a condition that the owner was originally responsible for, such as differing site conditions. However, some contracts do contain provisions expressly addressing extreme or catastrophic weather events, so project participants should carefully review the particular terms of the agreement.

Increases to costs of the work: In many jurisdictions, contractors are entitled only to time and not additional compensation as a result of adverse

weather events. Because of this, contractors performing under fixed price contracts assume significant risk for increased costs such as the costs of cleanup, correcting and/or replacing damaged work, and increases in the cost of construction materials. Depending on the terms of the contract, these risks may apply equally to catastrophic weather events, underscoring the importance of obtaining appropriate insurance coverage.

Claim submission requirements: Most construction contracts require the submission of claims and notice of claims within mandatory established time periods. Because many jurisdictions strictly enforce such provisions, it is critical that project participants strictly comply with the procedure for asserting claims and all associated notice requirements. Parties should also ensure that claim notices are properly submitted to sureties, if applicable.

Termination: Whether a contractor is contractually entitled to terminate a contract is complicated and depends on the particular terms of the agreement. Even if a project has become significantly delayed, the contractor is responsible for a substantial increase in costs. If it appears unlikely that the project can achieve completion, the contractor should not assume it is contractually entitled to terminate. If a contractor is considering termination it should exercise the utmost care and caution because terminating a contract regularly leads to disputes.

Project participants should carefully review their construction contracts following an extreme weather event and understand their rights and responsibilities so they are best equipped to get the project back on track. ♦

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