DEALING WITH NATURAL DISASTERS
Here Comes The Flood (Of Legal Issues)

2019 Annual Meeting | ABA Forum on Construction Law
APRIL 24-27, 2019
The Diplomat Beach Resort | Hollywood, Florida
AGENDA

• Topic Overview
• Scenario 1 – Addressing Labor Shortage Conditions After Natural Disasters
• Scenario 2 – Planning for Labor Shortage Conditions
Perception of Labor Status In Clear Skies

- 80% contractors report difficulty finding skilled labor workers
- Result of: (i) mass exodus of construction employees following the Great Recession, heightened immigration policies/enforcement; lower unemployment; pursuit in white collar v. blue collar fields; opioid crisis
- Results in: higher contract prices, extended schedules, and overall additional costs; increase safety risk; increased litigation resulting from schedule disruption and delays; additional defects
- All is compounded following a weather event
Reality of Labor Status In Clear Skies

- Indicators of actual labor shortage:
  - increased demand for labor,
  - decreased supply,
  - restriction on prices (wages),
  - qualifications mismatch,
  - movement to higher paying industries,
  - geographic trends,
  - retirement ages
  - natural disasters

- Ways to analyze labor: static vs. dynamic scenarios
Labor Shortage Condition

- Labor availability = Number of Unemployed People
  Number of Job Openings

- General construction v. specific subcontractor
- Recession v. Current
- Federal v. state
Scenario 1: Addressing Labor Shortage Conditions During a Project
Scenario Introduction

- **Project Description:**
  - Four-story university hospital and adjacent parking lot
  - Contract Value: $24M GMP
  - Contract Duration: 500 calendar days
- **Location:** Northern California
- **Planned peak manpower:** February – April 2019
Challenges

Problem statement: Wildfires suspended the project pushing electrical work to the summer when electricians are the least available due to school work and newer tech project.

How should the General Contractor (GC) address the electricians labor shortage?
Solutions

1. Notify Owner & describe labor shortage impacts
2. Develop risk scenarios & resulting project cost/schedule changes
3. Submit a recovery plan describing Contractor’s mitigation efforts
4. Perform a trade-specific labor availability analysis
5. Continuously communicate updated project completion date & cost at completion
6. Contact local and regional unions & trade organizations
7. Document Contractor’s good faith efforts
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## Solutions – Risk Adjustments

<table>
<thead>
<tr>
<th>Craft Labor Staffing Difficulty</th>
<th>OHSA Number of Recordable Incident Cases per 200,000 Work Hours</th>
<th>Average Cost Change (%) (95% Confidence Interval)</th>
<th>Average Schedule Change (%) (95% Confidence Interval)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Moderate/Severe</td>
<td>0.94 (0, 2.84)</td>
<td>17.3% (8.4%, 26.2%)</td>
<td>22.5% (11.5%, 33.4%)</td>
</tr>
<tr>
<td>Slight</td>
<td>0.43 (0, 1.72)</td>
<td>3.2% (−0.9%, 7.3%)</td>
<td>12.8% (7.7%, 17.9%)</td>
</tr>
<tr>
<td>No Difficulty</td>
<td>0.26 (0, 1.25)</td>
<td>−6.2% (−10.7%, −1.8%)</td>
<td>6.4% (1%, 11.8%)</td>
</tr>
</tbody>
</table>

Source: CII Implementation Resource 318-2 “Is There a Demographic Craft Labor Cliff That Will Affect Project Performance?”
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Labor Availability Analysis

1. Define the location and periods of time
2. Estimate labor availability before, during and after event
3. Identify the impacted trades
4. Obtain labor market data
5. Re-estimate labor availability for specific trade
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Solutions

- Trade unions in local/nearby markets
  - International Brotherhood of Electrical Workers (IBEW)
  - Out of state hiring
- Cross-training programs
- Workforce stability
- Labor sourcing
- Student outreach
- Perceptions change
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Scenario 2: Addressing Labor Shortage Conditions Before a Project Starts
Scenario Introduction

- Project Description:
  - Large mixed-use development that will include a 20-story office building, a 10-story, 30-unit condominium complex, a 15-story, 150-key hotel tower, various retail spaces, and a large underground parking deck.
  - Contract Value: $175M GMP
  - Contract Duration: 30 months
- Location: Oklahoma City, OK
- Planned peak manpower: 20 months into the project (May 2021)
Challenges

Problem statement: During Owner/GC contract negotiations, both parties are particularly concerned about weather driven labor shortages given (i) the Project location which typically experiences increased instances of severe weather, and (ii) the project’s peak labor will occur during the peak of tornado season.

What should the parties include in the Contract to address potential labor shortages resulting from severe weather impacts?
Potential Labor Impact 1 – Project Shutdown

1. Major damage to project (i.e. tower crane damaged beyond repair) – shut down for extended period of time (min. of 3-4 weeks)

2. Materials are destroyed, and require extended lead time to replace

Subcontractors move workers to new locations/workers leave area for new work and do not return.
Potential Labor Impact 2 – Lucrative Recovery Work

1. Many homes, and businesses are damaged or destroyed following tornado. Recovery contractors able to pay premium wages.

2. Contractors flood the market given the increased recovery construction work.

Increased competition, increased wages, and great opportunity lead to labor shortage as skilled workers leave for higher wages (perhaps short term).
Potential Labor Impact 3 – Personal Loss

1. After storm destroys their homes, skilled workers leave the area to stay with family.

2. Following devastating loss, workers leave to start new life.

The impact on the workers’ personal lives affects their continuation on the Project.
Identify Negative Outcomes

1. Delayed Schedule.
2. Increased Project Costs.
3. More inexperienced workers on site.
5. Reputational damage.
Solutions to Address Labor Shortage

- Cost and Schedule Adjustments
- Workforce Training
- Workforce Stability
- Higher Wages and Benefits
- Regional Labor Sourcing
- Re-engage at the Student Level
- Change perceptions of the Construction Worker and Construction Industry
- General Framework for Labor Shortage Condition ID
Contractual Legal Remedies

- Force Majeure
  - Proper notice
  - Document facts for supporting noticed force majeure event
  - Determine if contract allows receipt of additional time and money, or just time
- Other Contract Language
  - Escalation clauses
The Future …

- Lackluster Population growth, aging population, wages indicate labor at national level will decrease in two years.
- Natural disasters will only further impact labor availability.
  - 2018: 1.07 (actual)
  - 2019: 0.57 (forecast)
  - 2020: 0.3 (forecast)
- Take the precautions mentioned above to protect and prevent damages resulting from a labor shortage.
Post-Disaster Labor Force Issues
What Practitioners Need to Understand About Labor Availability and the Impacts of Natural Disasters

Anthony J. Gonzales
Spire Consulting Group, LLC
Telephone: (512) 637-0845
www.SpireConsultingGroup.com
Email: anthonyg@spirecg.com

Jodi D. Taylor
BRASFIELD & GORRIE, L.L.C.
Telephone: 770-423-3793
www.brasfieldgorrie.com
Email: jotaylor@brasfieldgorrie.com