***Lessons Learned and Applied: 2022 and Beyond***

***By Vanessa S. Werden, Construction Lawyer, Jenkins Marzban Logan LLP***

*Vanessa is a Partner at British Columbia’s leading construction law boutique firm, Jenkins Marzban Logan LLP. With a decade of experience serving the industry, Vanessa advises general contractors, construction managers, developers, suppliers, subcontractors, trades, and material manufacturers during all phases of construction. Named one of the “Top 40 Under 40 in Canadian Construction” in 2020 by On-Site Magazine, she is licensed to practice in British Columbia, Alberta and the Northwest Territories. Her experience includes the arbitration of delay, extra work and deficiency claims following the construction of hydroelectric power facilities, telecommunications infrastructure, and stadium construction litigation. She is Past President of Canadian Construction Women and the current Chair of the Canadian Bar Association BC Branch Construction Law Section.*

From material cost escalation to labour shortages, to sustainability mandates and advancements in technology, there are many factors that have impacted construction over the last 18 months and continue to send ripples through the industry in British Columbia. While some changes are the natural consequence of adoption of new technology and social policy, many are also necessary responses to climate change, natural disasters and the pandemic. The following are some of the most common issues that have come across my desk over the past year.

**Price Escalation & Supply Chain Disruption**

Supply chain disruption claims have been cascading onto my desk for the last two years. The default basis for claims has become COVID-19. The pandemic has unquestionably put additional pressure on mature costs, labour supply, and shipping costs and delays.

Generally, Force Majeure clauses will not entitle a contractor to additional compensation due to increased material costs post-contracting. There has been much discussion among construction lawyers about whether COVID-19 is a Force Majeure event. The overwhelming consensus is that it is not. In any event, to recover on a Force Majeure claim, a claimant is required to demonstrate that the escalation made it impossible to perform the work. Most of the issues encountered arising from supply chain disruption and cost escalation will not meet that threshold. Even if the claimant can meet this test, the remedy is not an increase in the price to perform that work, but rather an extension of time to complete proportionate to the time impact.

The industry has learned some hard lessons from the pandemic. Contractors may now consider negotiating contract terms to include a clause that reallocates supply chain disruption – both time and cost – back to the owner. While owners and head contractors are generally resistant to what might be an unusual reallocation of risk, one way to make this more appealing is to provide a corresponding benefit for material cost decreases or lower shipping costs. Other alternatives are to impose time limits on material cost certainty, specify early delivery with storage to be provided and paid for by the owner, or including “not to exceed” prices over which the other party will be obligated to pay the difference. The challenge is making sure these clauses are clear, not open to multiple interpretations, and can be used as intended if incorporated into a tender or head contract.

Long story short: do not rely on traditional or standard form contracts to provide relief in extraordinary circumstances. At least as pandemics are concerned, consider negotiating provisions that provide specific or calculable relief in the event of a declaration of a state of emergency, including climate, weather or public health events.

**Anticipating impacts of future pandemics and public health orders – and transferring the risk**

During the first year of the pandemic, the bulk of the advice sought by contractors and trades related to whether there was any recourse for time and cost impacts related to public health orders or the pandemic generally in existing contracts. In 2021, the emphasis shifted to new projects. Contractors are looking for ways to negotiate risk transfer so that the language of the contracts contains a clear formula or method to determine which party is responsible for pandemic-related time and cost impacts, and how they will be calculated. I have drafted provisions relating to liability and compensation arising from:

* The cost of worker isolation upon a positive test in a remote location;
* The time impacts of a pandemic-related worker shortages;
* The time and cost impacts of social distancing, PPE or other measures required by public health orders not in place at the time of contracting; and
* The method of calculating costs and the extent to which and in what circumstances the costs will be paid by each party or shared.

As the pandemic has evolved, so have the concerns of each project participant. Contractors should carefully consider the nature of each new project, its schedule and the potential impacts of the construction landscape, including the pandemic and environmental considerations. Be wary of supplementary conditions, and always consider negotiating alternative and more favourable terms.

**Alternative Contracting Models**

As a result of COVID-19, there has been a noteable acceleration of innovative practices across the construction sector. Project owners, design professionals, and contractors are becoming open to the use of alternate materials and sourcing options, and create contract provisions that allow for the same. For example, if lumber supply is too uncertain and the cost is too high, they should consider the relative stability of supply and cost differential of alternative materials such as bamboo or concrete, assuming such alternative materials satisfy code requirements and performance specifications for your project.

Disputes among project participants are often protracted as a result of inconsistencies and gaps between the intentions of one or more parties, without clear and comprehensive contract terms that define rights and obligations in the event of changes, extras or delays. Collaborative construction and design methods incorporating BIM and other technologies have sought to close these gaps by requiring, or at least encouraging, discourse and contributions to design and planning from all interested parties, including the owner, the prime or major contractors, trades, and design consultants, into one model or design platform. With the rapid and ever-increasing adoption of collaborative contracting and design, some project participants have failed to change or adequately revise the traditional or standard form contracts to which they are accustomed, or to understand how the changed dynamics may impact certain rights and obligations.

If you are considering engaging in a form of collaborative design or build project delivery method it is critical to consider the potential shift in duties and responsibilities and reallocation of risks that may arise and to take the steps necessary to address these changes in the form of contract. Successful collaborative project delivery depends on great partnerships, open communication, and transparency. Maintaining these relationships and protecting each stakeholder’s individual interests in the event of inevitable challenges depends on clear roles, responsibilities, rights, and obligations.

From a risk and change management perspective, the keys to successful collaborative contracting and design are agreement on clear and detailed terms in respect of design liability, risk sharing provisions, and a formula or process to address changes to the design and scopes of work. When challenges arise and project participants can ground their expectations in the contract, a well-drafted contract can go a long way to assist in early resolution of disputes, or prevent disputes altogether.