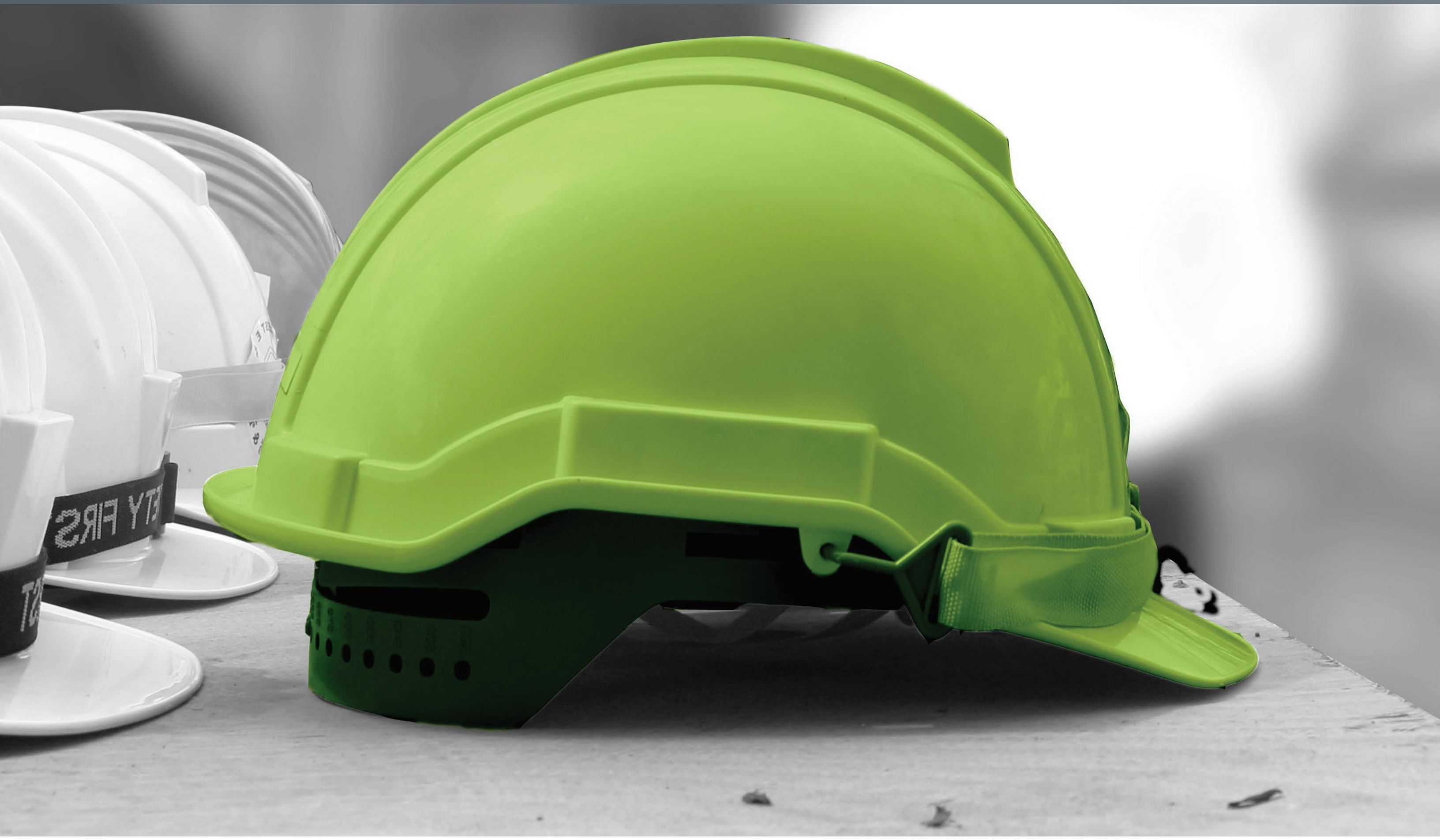
JONESDESLAURIERS INSURANCE MANAGEMENT INC. | NAVACORD

COVID-19 AND CONSTRUCTION

# TOP 10 QUESTIONS ASKED BY JONES DESLAURIERS CLIENTS

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The prevailing pandemic related disruption has given rise to a number of unique challenges for businesses, including the construction business. Our experience gained in attending to the needs of our construction clients during the crisis has given us an informed perspective of the specific issues faced by contractors, and solutions to those issues. Below is a list of the more commonly raised insurance, bonding and general business inquiries from Jones DesLauriers clients, with our answers provided.

## 1 EVERYONE'S TALKING ABOUT FORCE MAJEURE – IS THIS REALLY A PANACEA?

Force Majeure can provide relief in some cases, but it is by no means a cure-all for all contractors. The term "Force Majeure" is actually not used in many construction contracts. CCDC and OPSS contract wordings contain "Delay" provisions that act similar to a Force Majeure, and can provide contractors with a time extension and cost reimbursement due to delays in work caused "by a stop work order issued by a court or other public authority". In cases where these delay provisions exist and where projects are shut down by government order (which has taken place in Ontario and other provinces), the contractor is entitled to contractual relief. However, many sectors and projects have been deemed essential and remain active during the pandemic, and contractors on these projects, while continuing with onsite work, are experiencing schedule delays and associated cost increases due to COVID related disruption. In these cases, where a stop work order has not been issued, the contractor's entitlement to schedule and cost relief is less clear and may be limited.

Contractors are urged to review the particulars of their contracts around Force Majeure and Delay, and of particular importance, to comply with any associated notice provisions in order to preserve their rights. Legal advice should be sought in cases where the contract doesn't contain or isn't clear on relief provisions, in order to properly weigh all options, including the legal principle of 'Frustration of Contract', which may arise in cases where a contract is incapable of being performed due to unforeseen events.

We are encouraged to see many owners recognize the reality that the COVID related challenges faced by contractors are largely outside of their control, and are acting reasonably and extending flexibility independent of a strict interpretation of the contract language. To this end, we encourage open, clear and timely dialogue between the parties of any COVID related challenges faced on the project.

## 2 DO CONTRACTORS HAVE ANY COVERAGE FOR BUSINESS INTERRUPTION LOSSES ARISING OUT OF COVID?

Business Interruption insurance ("BI") is a form of coverage predominantly purchased by manufacturers and retail businesses. Its purpose is to pay extra expenses and lost profits associated with the loss of use of the insured's premises if that loss is caused by a covered claim.

Lost profits coverage, the principle form of BI, is not offered to contractors, mostly because the loss of use of their office (or "shop"), due to a fire or other insured peril, would not cause their revenues to cease, as it would a manufacturer – the contractor can manage their business (and jobsites) from temporary facilities, without significant impairment.

Contractors sometimes purchase another form of BI, called "Extra Expense" insurance. If their office were damaged to the point it could not be used, the insurance would pay the extra expenses incurred by the contractor to secure alternate premises and otherwise maintain normal operations. Coverage can also be added to Builders Risk policies for "Extra Expenses" and "Expediting Expenses", which work generally as their titles suggest. If the project were damaged by a covered peril, the policy would pay expenses reasonably incurred by the contractor to continue with work on site, and to catch up to the schedule.

BI coverage extensions in property insurance policies require "physical damage" to the insured location, and by an insured peril (such as fire or water damage) to trigger a claim. On that basis, Insurers will likely not view a business interruption related to a COVID induced business shutdown as a coverable loss – not unless the physical property were injured directly (ie: if the subject property was closed specifically because it was contaminated by the virus).

That said, a recent Ontario Superior Court of Justice released its decision on an legal case, finding that "loss of use", could itself be interpreted to fit the definition of physical damage, and therefore may be sufficient to trigger coverage under the insured's property policy. In light of this new ruling - which is likely to be appealed - coverage for a loss resulting from a virus (COVID) cannot be summarily ruled out.

## 3 HOW CAN I SAVE INSURANCE PREMIUM EXPENSES WHILE WORK IS SUSPENDED?

Canadian automobile insurers continue to be at the forefront of media headlines for making promises to provide relief on their auto insurance rates. While in a lot of cases this is true, in particular where individuals who are now working from home and driving less, this premium relief is modest and mostly intended for personal lines customers.

On the commercial auto insurance side, the same holds true for smaller fleets where insurers are open to providing flexible options for clients where vehicles are "parked" due to non-use from the business downturn. Removing road liability coverage during these times can provide some premium savings. For contractors with larger commercial auto fleets (known as "OPCF 21B"), insurers are less flexible, and we recommend consulting with your broker about an effective strategy for your particular insurer and circumstances.

Premium relief may also be provided on Liability Insurance policies and a premium credit may be applicable in cases where revenues have dropped below the policy estimate.  The premium adjustment is typically effected at the end of the policy, but some insurers will be receptive to a mid-term adjustment in cases where the revenue drop is significant.

In addition, and not new to this environment, is the option of increasing deductibles or retention levels which provides premium savings. We always recommend looking at your business's loss history across all lines to be able to get a good understanding of the impact of increasing deducible levels which helps in making a fully informed decision.

## 4 WHAT IMPACT IS THE HEALTH CRISIS HAVING ON THE BONDING INDUSTRY AND SHOULD I EXPECT ANY CHANGES FROM MY SURETY?

After an unprofitable year for Canadian surety in 2018, the industry rebounded in 2019 with profitable results posted by most individual sureties and the industry overall. The surety industry was in a healthy state as we entered the crisis, however, the resultant economic disruption has had an immediate impact and imparted a more cautious approach from bonding companies. Most sureties are asking more questions of existing clients and being more selective in the new clients they take on. For well performing and financially sound construction companies, things should be more or less "business as usual" with their surety, aside from perhaps a little extra scrutiny and questions around how the contractor is managing the disruption. For contractors who have struggled to generate consistent profits, or are weighed down with high debt levels, or who have historically struggled to get adequate bond support, dealings with your surety are likely to become more difficult in the current environment. Some may even face restrictions in bond support. For these contractors, having an experienced bond broker in your corner who can offer creative solutions and privileged surety market relationships will be a difference maker.

## 5 WHAT CAN WE DO TO ENSURE NO ADVERSE CHANGES TO OUR BOND PROGRAM?

As we suggest above, it's critical to have the right broker advisor in your corner. A specialized surety broker with exposure to numerous bonding companies can provide perspective as to how the different markets are behaving

– and how they would act in the exact situation the contractor finds themselves. Your broker should also be in direct and consistent contact with your surety and your underwriter specifically, gauging their comfort not just on your business, but the surety's overall approach and temperament in the current marketplace. We can tell you definitively that they are not all the same.

There are tried and true strategies to maximize bond support in any environment (consult with PWA to learn more), however, the current disrupted business environment presents new issues which require a different plan to maximize your bonding. Sureties will be looking for a thoughtful strategy around how you will manage any project delays or shutdowns, supply-chain issues, reduced productivity, and payment delays and reduced cashflows. These are concrete items, and include an analysis of your existing contracts for relief measures; a stress test of your liquidity; a realistic re-evaluation of your opportunity pipeline; discussions with new or existing lenders to ensure credit facilities remain adequate (including tapping into the right loan program - something PWA can assist with).

PWA can help you ask the right questions and develop the answers, and help you maximize your bonding and maintain seamless support when you need it most.

## 6 WHAT HAPPENS WITH MY BUILDERS RISK POLICY IF THE PROJECT GETS TEMPORARILY SHUT DOWN?

Builders Risk policies cover the project against physical damage during the course of construction. Such policies contain important conditions, including some limitations of coverage.

Most Builders Risk policies have a "cessation of work" provision, which voids coverage if work is stopped for an extended period of time, for the reasons identified above. The popular IBC 4042 version of the policy (the form referenced and prescribed by CCDC contracts), reads as follows, under the provision entitled 'CESSATION OF COVERAGE': "This Form ceases to insure any part or section of the project.......when left unattended for more than thirty (30) consecutive days or when construction activity has ceased for more than thirty (30) consecutive days."

Therefore if your project is temporarily shut down for over 30 days, you should advise us immediately, so that we may ensure Builders Risk coverage is not interrupted.

We will be looking for general information, the least of which will include:

1. Status of the site from a fencing / hoarding point of view.
2. Any site security or monitored video surveillance being maintained.
3. Description of lighting and signage proposed.
4. How often does the contractor propose to visit the jobsite, while construction activities have been suspended (recommendation is daily, weekly at a minimum).
5. Any other relevant detail the contractor feels considers relevant to share.
6. Contractor's sense of timing. This will be difficult, however if the Owner or Governmental Authority has outlined a likely, or minimum period for the shut down, that will be useful.

## 7 WILL MY CYBER INSURANCE POLICY RESPOND TO A BREACH CAUSED BY AN EMPLOYEE WORKING FROM HOME?

Sadly, there has been an increase in online 'phishing' scams and cyber-hacking during the pandemic, no doubt due to the increased reliance on technology and 'working from home' during this time, which has gotten the attention of cyber criminals. When more people are working from home, the potential for a cyber breach increases in different ways. Cyber criminals know that not only are more people communicating online, but in many cases, they're using devices and software for the first time, and are therefore more susceptible to letting their guard down and being deceived. The risk of a cyber-breach and the associated costs and business disruption have never been higher.

When looking to your cyber policy for protection due to a "loss of data" or "interruption of system" breach, it is important to understand that for the policy to be triggered and coverage consideration provided, the individual (principal, employee, temporary employee) must be performing work on behalf of the insured at the time of the breach. Ie: Logged in to the company network, VPN, email server etc. and engaged in company business. The intent of your cyber policy is not to pick up disruptions to individuals' personal computer devices while being used for personal reasons.

Like all risk, an effective risk management strategy starts with loss prevention, and cyber is no different. Businesses are encouraged to implement and/or review their cyber security policies and best practices to ensure they're up to date and consistently applied by all employees. Please contact PWA with any questions specific to your circumstances or to learn more about the value and cost-effectiveness of Cyber Insurance.

## 8 HOW WILL MY PERFORMANCE BOND RESPOND TO CLAIMS MADE FOR COVID RELATED DELAYS OR INTERRUPTIONS IN WORK?

It is important to remember that the Performance Bond will only respond if the principal (contractor) defaults in their obligations under the contract. If work is interrupted and the contractor is delayed, and the contract provides relief for the delay, then the contractor is not in default and the Bond will not respond. In other words, a Bond can't be enforced to fulfill an obligation that does not contractually exist. A precise review and interpretation of the contract wording is required, with particular focus on Delay and/or Force Majeure provisions, and the associated notice requirements. If in doubt, we recommend engaging an experienced construction lawyer to assist. Please contact PWA for qualified referrals.

That having been said, the best way to deal with Bond claims is to avoid them. During these uncertain times, we recommend contractors take a proactive approach to anticipate and manage issues and delays, and to actively engage the owner and consultant to keep them informed of any challenges and collaborate on solutions. We are pleased to see a great many success stories of owners and contractors working together to overcome adversity on their projects.

## 9 AS A SUBCONTRACTOR, CAN WE MAKE A CLAIM UNDER THE L&M PAYMENT BOND IF WE ARE NOT BEING PAID BY THE GENERAL CONTRACTOR AS A RESULT OF A COVID WORK STOPPAGE?

Similar to a Performance Bond, the obligation of the Surety under a Labour and Material Payment Bond (the "Payment Bond") is based on the payment terms of the underlying subcontract, in conjunction with the terms of the Bond. Generally speaking, if a subcontractor or supplier has not been paid in accordance with their contract terms, they are entitled to make a claim on any Payment Bond posted on the project. It is important to note that the Payment Bond will not respond to a claim for payment that is not due under the subcontract.

With the financial stress that many owners and general contractors are facing as a result of COVID, subcontractors should pay particular attention to their subcontract payment terms, including any 'pay when paid' provisions, which may dictate whether payment is actually due under the subcontract, and, in turn, whether the Payment Bond will respond.

If a project has been shut down due to the pandemic, and a subcontractor has not received payment for work performed prior to the shutdown which is properly due under the subcontract, the subcontractor may look to the Payment Bond for relief and make a claim thereunder.

To bring a claim against a Payment Bond, claimants should obtain a copy of the executed Payment Bond, and submit it along with a copy of their subcontract, all invoices rendered to date, and all communication requesting payment from the general contractor. Ontario "Construction Act" Payment Bonds include a "Schedule A" attachment for making a claim that details the process and information required.

Note: Payment Bonds generally all have specified time limits for making a claim – please pay special attention to these. Generally speaking, Payment Bond claims must be filed within 120 days after the claimant last performed labour or provided materials on the project.

The Surety should acknowledge your claim in a timely fashion and, after investigating the facts, will respond to the claim and confirm any liability under the Bond. Once liability is accepted, payment typically follows promptly.

The Ontario Construction Act Payment Bond form contains specific timelines under which a surety must respond.

The advocacy and guidance of an experienced surety broker to aid in this process is critical. Contact PWA for more details.

## 10 WHAT ADVICE DO YOU HAVE TO HELP US MANAGE AND MINIMIZE COVID RELATED RISK?

In the near term – SAFETY and LEGAL considerations:

1. Address the health and safety of your employees and colleagues: improved sanitation and PPE measures; remote work.
2. Review the current legislative environment in your province or region with respect to essential services, and the status of construction projects.
3. For projects that are ordered or forced to shut down, review our publication on Managing Temporary Project Shutdowns and consult with us for additional material/advice.

Next, contractors should turn their sights to their FINANCIAL and OPERATIONAL realities:

4. Determine the financial resiliency of your company. Revenues and productivity are going to be greatly reduced, costs are going to escalate, receivables may be harder to collect and payables are going to be called on. Manage your cash prudently.
5. Talk to your bank to ensure no changes in your credit program. What assistance programs are available for your business, and for your employees?
6. Arrange a call with your surety broker to ensure your bonding company is up to date on the actions you are taking. Do you have the surety support you need?
7. You may have to look at your internal cost structures – footprint, rent deferrals, staffing and compensation levels, and "discretionary" overhead. Difficult decisions are being made across the industry

Finally, look to the horizon, and begin to think STRATEGICALLY – not just on what your company must do to emerge, but how it might take advantage:

8. Review your opportunity pipeline. How likely are private owners (think retail, hospitality, REITs, etc.) to come out of this wanting to spend money on construction? How will that impact your business?
9. Where is construction money likely to be spent? Infrastructure always benefits during recessions; hospital and healthcare related work is ongoing and may have a renewed long-term focus.
10. And critically, when bid opportunities do begin to return in force - and they will - remember the truism from our friends at FMI: contractors rarely starve to death, instead they die of gluttony. Build your backlog back up slowly and strategically, remembering that most contractor defaults occur when contractors don't have the cash to finance heavy backlogs.

All the questions on this list are designed to offer advice to construction contractors on how to manage one aspect of COVID related risk. Jones DesLauriers has dedicated resources and detailed position papers on a vast array of COVID related topics and issues, which are constantly being updated. We are committed to helping contractors manage the disruption and position themselves for success in the new environment. We are a phone call away and ready to assist.

Stay safe.



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