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# What's Worse, COVID-19 or its Aftermath? Force Majeure and Disputes Pre and Post-COVID

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# PRESENTERS



**Kirsten Worley**  
*Moderator*

HIGGS FLETCHER & MACK, LLP  
San Diego, CA  
worleyk@higgslaw.com



**Todd Blischke**  
*General Counsel*  
BALLARD MARINE  
CONSTRUCTION

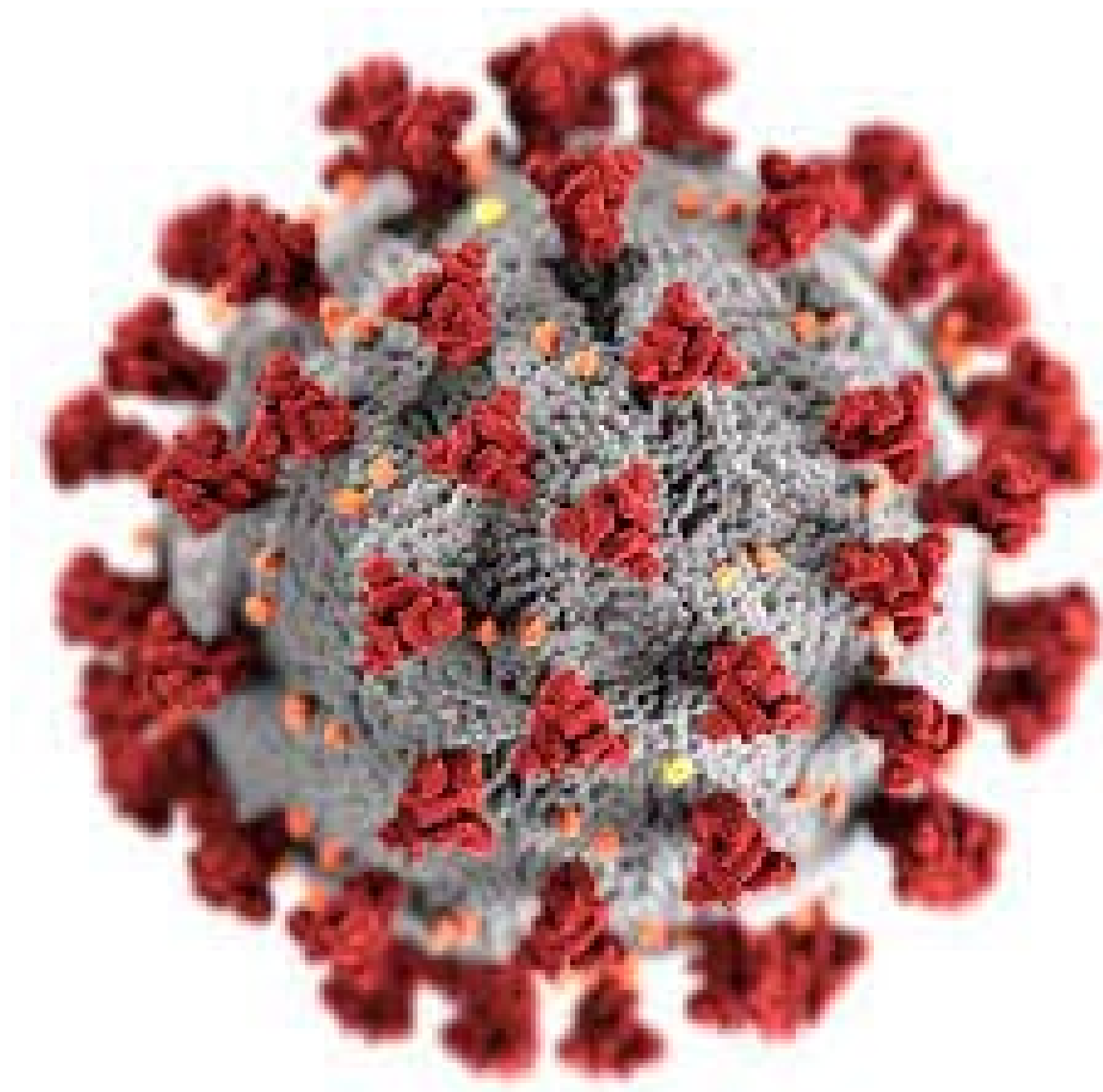
todd.blischke@ballardmc.com



**Adam Cooke**  
FOWLER WHITE BURNETT P.A.  
Fort Lauderdale, FL  
acooke@fowler-white.com

# Covid-19 Problems

- Shutdowns / Partial Shutdowns
- Covid-19 Protocols
- Lost Productivity
- Labor Issues
- Supply Chain Problems
- Material Escalation



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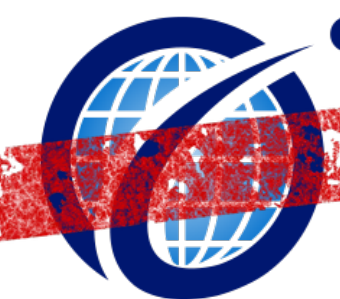
## 2 Polls

- What is your industry role?
  - General Contractor
  - Subcontractor
  - Supplier
  - Surety
  - Other
- Aside from material escalation, is your company currently experiencing Covid-19 impacts or is Covid-19 over?
  - Yes, still experiencing Covid-19 impacts
  - No, Covid-19 is mostly in the past

# Force Majeure: Relief?

- Contract Time / Relief from Liquidated Damages
- Termination?
- Lost Productivity Claims?

*Time, but not Money?*



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# 4 Polls

- Has your company recovered additional compensation for Covid-19/lost productivity?
  - Yes
  - No
- For those who have successfully recovered compensation, has it been through litigation/claims or negotiations with owners?
  - Litigation/pursuit of claims
  - Negotiations with owners (non-court solution)
- For those who have successfully recovered compensation, have you used specifically force majeure or other contract terms?
  - Force majeure
  - Other contract terms
- Are you currently still pursuing claims for Covid-19 impacts related to past events?
  - Yes
  - No

# Force Majeure Court Opinions

- Force majeure provisions narrowly construed
- Force majeure does not mean less profitable; it means impossible or illegal
- Unlikely to be resolved pre-trial
- Covid-19 may not be a force majeure event anymore



# Construction Opinions on Covid-19

- Base Closure Due to Covid-19
  - *Appeal of APTIM Federal Services, LLC*, ASBCA No. 62982 (April 28, 2022)
    - Free availability to base during construction work was a basic assumption of underlying contract
    - Nevertheless, contractor on fixed price contract accepted the risk of pandemic delay

# Construction Opinions on Covid-19

- On-site health and cleaning changes increased costs of performance and caused delays
  - *Appeal of JE Dunn Construction Co.*, ASBCA No. 62936 (April 25, 2022)
    - Contractor on fixed price contract accepted the risk of pandemic delay
    - Delays and costs would have been incurred due to New York restrictions regardless of owner's actions
    - Claim were barred by sovereign acts doctrine

# Construction Opinions on Covid-19

- No Price Adjustment for Price Escalation
  - *Appeal of Heart & Core, LLC*, ASBCA No. 63403 (January 11, 2023)
    - Price escalation of goods due to passage of time and due to Covid-19
    - Acts of God, epidemics and quarantines did not excuse contractor's default
    - Even assuming Covid-19 caused cost escalation, risk of performance cost increases by unforeseen pandemic was not shifted from the contractor to the government owner

# Construction Opinions on Covid-19

- Pre-Shift Screenings & Waiting in Line, Gathering & Donning Equipment = Lost Productivity?
  - *Medrano v. U.S.*, 159 Fed. Cl. 537 (April 29, 2022)
    - Non-Covid-19-related (prison security screenings and gear case)
    - “[T]he bulk of authority holding as a matter of law (either at the pleadings or at summary judgment) that pre-shift security screenings generally are not compensable. [citing cases]”
    - Waiting in line is not compensable
    - **Gathering & Donning Gear:** “Special protective gear” is potentially compensable, versus “generic protective gear” (helmet, safety glasses and steel-toed boots)
    - Walking to/from post, and pre-shift briefings may be compensable if integral and indispensable

# Construction Opinions on Covid-19

- Contractor Terminated for Default Due To Covid-19 Delay (Supply Contracts)
  - *American Medical Equipment, Inc.*, 160 Fed. Cl. 344 (June 30, 2022)
    - Excusable delay rejected (global and industry-wide shipping delays)
    - Implied covenant of good faith and fair dealing rejected
  - *Servant Health, LLC v. U.S.*, 2022 WL 3149817 (August 5, 2022)
    - Excusable delay rejected
    - Implied covenant of good faith and fair dealing rejected
    - Substitute products not allowed

# Construction Opinions on Covid-19

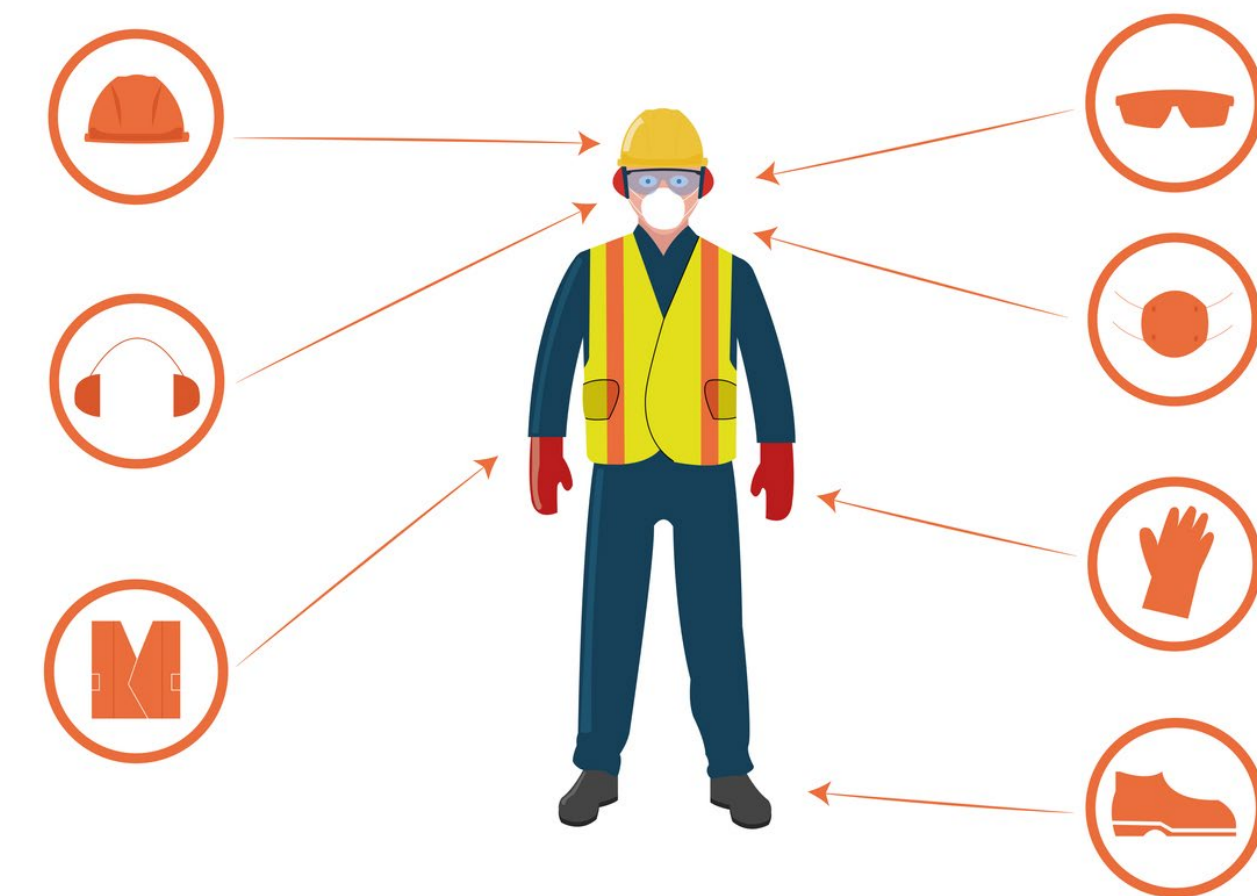
- Contractor Who Was Already Delayed Is Unable to Blame Covid-19
  - *Appeal of Central Company*, ASBCA No. 62624 (February 2, 2022)
    - Contractor's performance already delayed at month four of 6-month contract, and consistently slow pre-Covid-19
    - Sequencing and scheduling problems during Covid-19
    - Covid-19 did not excuse contractor's lack of progress

# Construction Opinions on Covid-19

- Government instructed Contractor to discontinue services due to Covid-19, resulting in constructive termination for convenience
  - *Appeal of Heartland Energy Partners LLC*, ASBCA no. 62979 (September 12, 2022)
    - Termination for convenience converted fixed price contract to cost contract
    - Contractor's compensation was not limited to firm-fixed price contract

# Lost Productivity Claims: Practical Tips

- Emergency/Acceleration Provisions
- Work Directives
- Change Order Provisions
- Suspension
- Termination



# Material Cost Escalation: Practical Tips

- Still Ongoing – Steel, Cement, Electrical
- Pricing the Risk
- Risk-Sharing Agreements with Owners
- Locking in Subcontractors/Suppliers – Purchase Orders
- Supply Bonds



**COST ESCALATION**



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# Poll

- Is your company still experiencing price escalation?
  - Yes
  - No

# Delayed Projects & Project Delays: Practical Tips

- Subcontractor Flow-Down Provisions (LD's)
- Contracts with LD's and Consequential Damages?
- Caps on Extended General Conditions
- Shelved & Later Revived Projects
  - Duty to Keep Bids Open?
  - Claims Based Upon Late Notice to Proceed

# Conclusions

- Early decisions of Federal Claims Courts are not favorable to the contractor, with exceptions
- Framing the issue in terms of owner actions as opposed to Covid-19 impacts may be the key to relief
- Contractors may be better off negotiating with owners rather than pursuing litigation solutions
- Claims are still making their way through Federal and State Courts

# Pop Quiz

- Which of the following are possibly compensable in federal contracting?
  - A: Pre-shift screenings
  - B: Waiting in line
  - C: Gathering & donning special protective gear
  - D: Walking to and from a post on work breaks

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**Kirsten Worley**  
*Moderator*  
HIGGS FLETCHER & MACK, LLP  
San Diego, CA  
worleyk@higgslaw.com



**Todd Blischke**  
*General Counsel*  
BALLARD MARINE  
CONSTRUCTION  
todd.blischke@ballardmc.com



**Adam Cooke**  
FOWLER WHITE BURNETT P.A.  
Fort Lauderdale, FL  
acooke@fowler-white.com