



Supply Chain Disruptions – Here to Stay?

It's like a bad joke. The root of nearly all problems in the construction industry can be traced back to supply chain issues. Delayed project? Lack of materials caused by the supply chain. Bidding disputes? Estimates and prices increasing due to the supply chain. Customer satisfaction? Quality and delivery of materials subpar due to the supply chain. On and on it goes. That explains the sigh of relief when many economists and industry experts predicted some relief in the supply chain issues by the end of the first quarter in 2022. But, can we count on this prediction? The short answers are who knows and no.

The pandemic resulted in people purchasing more and accelerated online buying. These changes created a sudden spike in demand. However, while the demand was increasing, the pandemic prevented the economy from adapting accordingly. Not only did labor shortages cause order fulfillment problems, it resulted in a number of key manufacturing facilities being improperly maintained, which resulted in fires, mechanical breakdowns, or other complications that shut those facilities down. All of this created serious difficulties on the supply side. Together, the increase in demand and lack of ability to meet demand resulted in what we have heard about for months now, bottleneck in shipping, increased pricing, delays in fulfillment.

There has been growing concern that the issues will not end by the first quarter of 2022 and could continue through 2023. This has become such a concern that the Federal Trade Commission is deciding whether it will launch a study into the causes of these issues. To conduct this study, the FTC will in essence compel companies that have a significant impact on the supply chain operations to provide data for analysis. Without getting into the nuanced details, the bottom line is that companies that are risk adverse should expect supply chain issues to continue through the end of 2023.

With this in mind, contractors and suppliers in the construction industry need to continue to take steps to avoid liability exposure caused by supply chain issues. The single best way to do this is to address the issue upfront in the contracts. Echoing our previous discussions in the [spring](#) and [summer](#), contractors and suppliers need to stop and review their existing contracts as well as what's in their contract templates going forward.

Some key clauses that should be considered include: (1) change order procedures; (2) termination clauses; (3) delay clauses; (4) time is of the essence clauses; (5) representations regarding familiarity with costs and availability; (5) substitution of materials clauses; and (6) damages clauses.

When looking at each of the above provisions, contractors and suppliers need to consider whether they can be held liable for something outside of their control. A well-written contract will exonerate parties for delays or price increases caused by external factors they had no control over.

Another key way to avoid liability exposure is communication and documentation. Communicating early about potential problems caused by supply chain issues provides more time for the parties to find a solution for the problem. Note, this may be something discussed in the notice provisions of a contract. With the uptick in schedule delay disputes, it's a best practice to document these communications. Inevitably, someone is will claim there was no notice of the problem. To streamline the issue and reduce costs, document all communications.

In the end, we should expect to face supply chain breakdowns for the next year and beyond. This will allow us to plan for the worst, hope for the best and be prepared to handle what comes our way.

For more information, please contact [Adam Robertson](#).