

INSIGHTS + NEWS

Client Alert: Construction Projects – Preparing for Slowdowns or Project Shutdowns

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The mayors of Boston and Cambridge have ordered a halt to most non-critical construction projects. Somerville now requires contractors to submit a Job Hazard Analysis and Site-Specific Safety Plan (SSSP) for continued operations. Governor Baker's Order of March 23, however, allows other construction projects throughout the Commonwealth to proceed as usual, at least for now.

The COVID-19 emergency will impact every ongoing construction project even if government orders do not intervene. Construction stakeholders should expect issues, at the very least, with vendor defaults, material delivery delays, inspection scheduling, worker shortages, production impacts from implementation of CDC social distancing guidelines, and resequencing costs and delays as stakeholders work around scheduling issues.

Both Owners and Contractors are facing these issues. In a global crisis borne of a viral pandemic, we are all on the same team regardless of what the applicable contracts may offer. If the parties share the goal of completing the project, there is simply no other choice but to work together to weather this storm.

To that end, below you will find a discussion about some of the complications likely to arise on “active” projects along with suggestions for how to mitigate or improve the contractual outcomes:

1. Disruption to the supply chain for materials and labor shortages:
 - Does your contract provide that these conditions will warrant only an extension of time or also an adjustment to cost?
 - When read together with opposing party termination provisions, so-called “time only” delay provisions may become exceedingly weak because the other party can walk away from the project under appropriate conditions.
 - Consider striking a balance. Are some extended general conditions or impact costs equitable or even advisable under the circumstances? How do those costs compare to having a termination on the project?
2. Job shutdowns:
 - Who has the power? Should this really be about power?
 - Does the Contractor have the right to terminate after a certain time period? Will the Owner consider suspending the project and if so, how do these two courses of action work together?
 - Consider agreeing on terms for the job slowdown and/or pause outside of the strict terms of the contract, as a contract modification.

- Consider putting in place an agreement to “toll” convenience or time-based termination rights. For example, a proactive team might consider tolling such time periods for the initial government-imposed shutdown period and revisit the tolling concept as events unfold. This keeps the project team together with all rights reserved during the crisis period rather than forcing people to exercise their rights now to avoid prejudice later for “hanging in there” with the project.

3. Document your problem solving:

- If work can continue on the project, will the social distancing requirements impact productivity? Is there a “measured mile” to which stakeholders can agree and use to quantify a shutdown’s time impact and avoid claims?
- What work must the team undertake to make the jobsite safe and secure? Securing a site for a shutdown is a scope change and the parties should define the scope of work and agree upon the costs.
- Identify with specificity which parts of the job the team plans to officially “demobilize” and what will stay in place.
 - Avoid “demobilization” without agreeing to and documenting what that means, in practical terms and item by item.
 - Stakeholders can simplify this process by agreeing on appropriate delay costs during the shutdown. For example, if the team has agreed to keep the job trailer on-site and incur the related cost, demobilization won’t include removing that trailer.
 - Likewise, removing a crane may not make practical or financial sense, but a demobilization order without definition could inadvertently require its removal.
 - Specify, specify, specify and document the new and different terms to which stakeholders agree.
- What “home office” work will the Contractor continue to perform and what are the daily general conditions costs for that work? It should be some fraction of the active project rate, but it also should not be zero since BIM modeling, clash detection, submittals, follow-on phase procurement and other tasks can continue during this period.
- What efficiencies might a proactive team recognize from creative staffing during this uncertain time? Projects are often behind on documentation, value engineering solutions, accounting and other tasks that do not entail physical building. A team who uses a forced shutdown to catch up will be poised for success when the project comes back on line.
- What procurement activities should the team keep in place so as not to lose its place in the queue?
 - Consider updating and confirming items in the procurement schedule with attention to the current queue and long-lead items where the lead may have changed.
- Agree on how to treat the project team. Will they all be there in 60 days? Is that of value to the project? Are there key players who should remain on the Project while others can be re-assigned?

4. If the project is delayed, but not shutdown:

- The Owner and Contractor can establish and track the schedule delay and agree upon the daily rate if there is resulting delay in completion due to documented supply chain or labor disruptions from the COVID-19 emergency.
- Tracking the delay and establishing a negotiated daily rate of delay costs eliminates the need for a claim under the contract and the required response thereby taking pressure off the team and maintaining job continuity without the distractions claims create.

- Construction stakeholders should expect to see an increase in the number of liens recorded by general contractors, construction managers, design professionals, subcontractors and materials suppliers who want to preserve their lien rights.
 - Such lien recording may not be a response to past payment issues, but rather a reaction to the uncertainty over the suspension or shutdown period and a project's uncertain status after COVID-19 is behind us.
 - Owners and Contractors should work with lenders to obtain flexibility in order to avoid lien bonding costs where appropriate
5. Stoppages extend beyond the project team:
- Owners and Contractors should speak with lenders and finance partners *now* – do not wait until there is an order to shut down construction or COVID-19 causes other project problems. As always, keeping the lines of communication open, active (and documented) helps to avoid future surprises.
 - Review Builders Risk and other applicable insurance policies and consult with the insurer to be sure there is ongoing coverage if there is no activity on the site. Find out what security measures your insurer may require to satisfy insurance agreements.
 - Identify where and how the team plans to store materials including the handling and storage of pending and future material deliveries.
 - Be sure that the Builders Risk and CGL policy schedules include all material storage locations, if required.
 - Determine if Subcontractor Default Insurance (SDI), if applicable, will provide coverage for subcontractors who may default.
 - Consider having discussions with subcontractors to determine how stressed their balance sheet is from this shutdown.
 - A negotiated departure is better than a default termination met with a termination claim because the termination came during a time of crisis over which the subcontractor had no control.
6. Performance Bonds: Are they helpful now?
- Coverage under performance bonds is triggered by a default. If a project is suspended or shutdown, there may be no default that would trigger the bond. This may change when projects restart or as the financial pinch of having Boston and Cambridge projects shutdown starts to squeeze contractors and subcontractors.
 - The remedies available under a performance bond won't be terribly helpful in situations where a job is suspended or shutdown. Supplemental contractors, infusions of cash to the defaulted contractor or paid to the bond beneficiary are all unhelpful if the manpower does not exist or if the project is forbidden from proceeding by government order.
 - Default notices, however, must be sent to preserve rights even if the immediate action by the bonding company is of minimal assistance. Review your bonds for their triggers and notice provisions. Missing a required notice may void the benefits of the bond, which will be of no help to anyone.

We are in the midst of an international crisis which is interfering with one of the busiest and most productive construction markets in the past 30 years. Now is the time to remember that our projects are partnerships that start before groundbreaking, continue through construction, and extend into the warranty period and beyond.

We work in teams and the problems we are facing are more easily resolved as a team. By all means, read your agreements. Just don't stop there. Ask yourself if the agreement, in its current form, still serves your purposes in light of these new and unprecedented challenges. Then re-balance the scale as if you knew this was coming at the time you

signed your contract. To do otherwise is to invite claims, litigation, disruption and relationship issues that will extend for years beyond the current crisis.