



CURTIS W. MARTIN



PATRICK J. GREENE, JR.



LEVI W. BARRETT

For More Information Please Contact

Curtis W. Martin
cmartin@pecklaw.com
 713.568.1500

Patrick J. Greene, Jr.
pgreene@pecklaw.com
 201.343.3434

Levi W. Barrett
lbarrett@pecklaw.com
 212.382.0909

You've Been Suspended – Were You Ready?

“Effective tomorrow ... the City is suspending all regular activity at construction sites in Boston.” This was just one of the surprises that greeted contractors last week. Contractors and owners with projects across the country are scrambling to comply with mandated governmental suspensions. Project participants should begin contingency planning for possible project shutdowns.

Reacting to Suspension

Your legal rights and remedies will be largely determined by your contract and the laws applicable to it. But some basic principles will be applicable depending on the source of the suspension.

Suspension by the Owner: An owner work suspension suggests review of the contract's suspension of work clause. Federal contractors would look to the FAR Suspension of Work clause, FAR 52.242-14, but that is applicable if the suspension is by the Contracting Officer; the US would argue that a systemic suspension was a sovereign act and outside the FAR clause.

Contractors for private work and state or municipal work may have contractual suspension of work clauses. At least some suspension clauses provide relief for time and money.

For example, AIA A201, §14.3.2 provides for adjustment “of the cost and time caused by suspension.” §14.11 of the A201 allows the contractor to terminate if the project has been suspended for more than 30 days for various reasons, including governmental order.

Suspension by Government: A contract suspended by governmental order may present a different situation entirely. The first step is to understand the nature of the order. These may muddy your rights and remedies with ambiguities that occur in hastily drafted government directives which do not consider the unique requirements of a construction project.

After you understand the order and have evaluated whether the shutdown is authorized by law, consult the project owner. Do the parties agree on the scope and effect of the order? Document the owner's acknowledgment of the suspension. That conversation affords a chance to discuss security and the costs and benefits of protective work before or during the shutdown.

We have seen much written recently about the doctrines of force majeure and impossibility of performance. Keep in mind that these doctrines may only allow relief in the form of a time extension.

Suspension by the Contractor: Depending on the contract terms, there may be unusual circumstances in which a contractor thinks that the work should be suspended. Your contract may provide that right. The AIA's “Emergencies” provision (§10.4 of the A201) allows the contractor to act at its discretion “in an emergency affecting safety of persons or property.” It also allows for the possibility of compensation along with a time extension, but think carefully before exercising such an option.



CLIENT ALERT

Planning for Shutdown

We don't know how much time you'll have. Contractors in San Francisco had less than a day. The Boston order allowed a week to secure the site, and "skeleton crews" could remain to ensure safety. In either case, contractors would have been better prepared if they did some contingency planning. Here are some considerations for your planning.

Notice: A contractor should immediately give notice to the owner reserving the right to additional time and money. Be careful that the notice is not so narrow as to focus on clauses or theories of relief that provide time without compensation. The notice should also include a suggestion of planning for mitigation of damages in line with the planning points discussed below. Contractors should use this notice as an opportunity to educate owners on the risks of suspension. Warranties may be voided. Damage can occur to the work during the suspension requiring expensive remediation.

Contractors will also need to notify subcontractors and vendors about the suspension. If there is time and the opportunity to take protective actions, each trade should be consulted about their contribution and their suggestions.

Securing the Site: Review the relevant provisions of your contract governing suspensions of the work (whether by the owner, contractor or government entity). Take reasonable steps under the circumstances to secure the site and protect and preserve stored materials, equipment and work-in-place. Review insurance policies and consult with your insurance advisors to confirm that any materials, equipment, etc., are stored and secured in conformance with all insurance requirements. Plan how construction equipment might be quickly removed from the site and consider whether stored materials might be better protected on the site or elsewhere.

Protecting the Work in Place and the Project: Consider presenting the owner with a mitigation plan that will show how areas of work might be protected. Protection done at suspension may lessen restoration dollars spent when construction resumes and may assist in preserving warranty rights. The risk mitigation plan should lead to an agreement as to responsibility for security at the site during the shutdown, as well as maintenance of protection at the site. Can compensable work be done off-site during the suspension to mitigate delays to the project schedule? Will you get paid for that off-site work?

Document: Contractors know how to document the costs of a shutdown, including idle equipment and extended job site costs. But don't forget that comprehensive documentation of the project's status before a shutdown, including photographs, also provides several benefits. It benchmarks the security of the project and stored materials, confirms your efforts to protect the site itself, and supports your interim application for payment when a normal progress inspection may be impractical or illegal.

Conclusion

As Yogi Berra said, "the future just ain't what it used to be." In these uncertain times, construction participants would be well served to spend some time planning for the contingency of a project shutdown. That planning may serve to avoid or at least limit the costs of one.

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.

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