

July 13, 2020

Best Practices for Coping With Project Modifications, Suspension and Termination During the Age of COVID-19



Richard Reizen



Eric Sparks

Construction

As the COVID-19 pandemic continues, owners and developers find themselves facing the prospect of continued project disruptions. While almost every governmental shutdown order has allowed construction activities to continue as long as safety and health guidelines are followed, COVID-19 cases continue to rise to the highest levels ever seen in various hotspots throughout the country. As a result, owners and developers again face the possibility of project disruption or even project shutdown.

Possible Causes of Disruption

Among the many factors that may cause such disruptions, consider the following:

- Temporary project shutdowns due to illness or governmental actions.
- Temporary project shutdowns or slowdowns due to supply chain disruptions.
- Temporary project shutdowns or slowdowns due to worker shortages.
- Project suspension or termination because of termination of project financing or the degrading of owner's financial condition.
- Modification of project size or scope because of decreased space demands or the need for more disease-resilient design changes.
- Project disruptions resulting from increased insurance costs or the unavailability of certain coverages.

Best Practices

These events may be avoided or their impact might be mitigated by engaging in the following best practices:

A Robust Pre-Construction Process is Key

- Plan for and discuss contingencies in the event of supply chain interruptions (alternative materials and alternative suppliers or design);
- Plan for and discuss possible worker shortages;
- Understand and account for impacts that social distancing and other health requirements may have on project schedules;
- Commit to continued design modification to reflect changing circumstances and customer preferences, including the use of more disease-resilient materials and designs;
- Candidly discuss project financing; and

- Discuss all possible obstacles upfront and how they can best be addressed early on.

Contract Terms That Provide Project Flexibility and Clarity in the Event of Suspension or Termination

- Consider project phasing to account for future uncertainty (do the project in “bite-size pieces”);
- Given today’s uncertainty, consider project pricing models (e.g., Cost Plus);
- Draft clear and specific suspension and termination provisions understandable to all parties;
- Clear demobilization and remobilization procedures;
- Clearly delineate the categories and amounts of costs and fees permitted as a result of demobilization/remobilization and suspension/termination;
- Draft a clear and detailed force majeure provision that specifically defines what a force majeure event includes and what the remedy is for such an event (limited to time extension);
- Understand notice requirements in the event of force majeure, delay, suspension or termination, as your remedies may be impacted;
- Consider specific language particularly relating to excusable delays, cost increases and notice requirements in the event of a coronavirus occurrence;
- Ensure remedies are adequate in event of project delays; and
- Establish change order procedures for future project scope modifications (i.e. fixing permitted general conditions, overhead and fees, and establishing pricing parameters).

Frequent Project Scheduling and Budget Meetings

- Ensure all parties are involved;
- Anticipate likelihood of delays and cost increases ahead of time, and frequently update budgets and schedules; and
- Consider virtual meetings.

Enhanced Site Safety and Site Security Protocols

- Implement additional project safety and sanitation procedures;
- Be flexible to adapt to future changes in governmental requirements or guidelines;
- Consider enhanced monitoring of the site and employees (i.e. temperature checks, logs of tasks performed and/or deliveries, etc.);
- A dedicated safety employee may be beneficial in monitoring and documenting on site health and safety issues;
- Prominently post safety and sanitary notices at the site;
- Consider staggering workforce (more shifts);
- Utilize virtual meetings when possible;
- Require a response plan in the event of an outbreak on the project site to limit disruption impacts; and
- Require a security plan in the event of a shutdown that considers: (i) fencing or barriers, (ii) electronic security (making certain that systems are working, including wi-fi and cellular), (iii) guard services, (iv) security of equipment and materials onsite from weather; and (v) future deliveries to the extent they cannot be rescheduled.
- Include builder’s risk carrier in discussions of site security and obtain advance approval from the carrier for security plans.

Collaboration and Communication (We are all in this together)

- Address concerns early to limit future impacts;
- Prompt notice is key;

- Stress the “if you see something, say something” policy;
- Remind the team that a smaller, slower project is better than no project; and
- Teamwork: Be reasonable with requests, as everyone on the project is likely to be impacted by COVID-19 issues.

If you have any questions or would like more information, please do not hesitate to contact a member of our [Construction Practice](#).