

3 Things You Need to Do Now to Recover Construction Stoppage Costs

Owners and contractors facing work stoppages at the direction of state and local stay-at-home or shelter-in-place orders are struggling with the question of how much the work stoppage is going to cost. The COVID-19 pandemic is causing disruption to a wide range of industries and construction is no exception, as many projects deemed “non-essential” have been suspended for the near term by state and local authorities. In addition, many “essential” projects are also being suspended at the discretion of project owners. These delays not only affect the scheduled milestones of a project but can significantly impact the project’s financial health. Contractors could seek relief under various contract provisions or theories of recovery:

- **Force Majeure:** In many contracts that contain Force Majeure provisions, Force Majeure claims are considered excusable but non-compensable. Generally, the contractor is entitled to additional project completion time, but is not entitled to additional compensation for these delays.
- **Suspension of Work (Stop Work Order):** In many public works contracts, Suspension of Work or Stop Work Orders (SWO) issued by the owner are considered excusable, compensable delays. It is therefore favorable for the contractor to have owner-issued SWOs for project shutdowns.
- **Change Orders:** Some owners might want to maintain the original completion date. In this case, contractors could recover acceleration and mitigation costs under the change order clause of the contract.
- **Constructive Acceleration:** If the owner fails to address schedule impacts and hold the contractor to the original contract completion date, the contractor might be able to recover its additional costs under a constructive acceleration theory.

While the specifics of your contract will outline legal entitlement considerations and possible governmental programs associated with the potential relief for any added costs, there are practical steps to take now to assist with identifying, isolating, and quantifying the financial impacts of a delay. Ultimately, the more rigor put into record keeping now, the easier it will be for a contractor to substantiate its increased costs, and the easier it will be for contractors and owners to understand and resolve these additional costs.

The following are considerations that may assist in this endeavor.

Identify Potential Areas of Impact

Untangling and identifying the costs resulting from a work stoppage from those incurred as a regular course of business may be easier said than done, but consider the following as potential areas to investigate:

- Additional project demobilization/remobilization activities
- Temporary storage of materials and equipment

- Owned/rented equipment standby costs
- Crane rental
- Lost productivity
- Labor rate escalation
- Field office (i.e. general conditions costs) and home office overhead

The contract may limit what types of costs are recoverable so be sure to review the relevant clauses for applicability. Direct costs may be more easily segregated and tracked, but home office overhead and productivity impacts may also be applicable.

Organize Your Documentation

Maintaining a clear record of costs associated with a work stoppage will be of fundamental importance. If a future Change Order Request or claim does not clearly substantiate its financial quantification, the probability of success will decrease and the likelihood of it turning into a dispute will increase. The following steps may be of assistance in this effort.

- Set up a new (or a series of new) cost/phase codes within the project accounting system. Any costs (labor, equipment, materials, subcontractor, etc.) which would not have been incurred but-for the work stoppage should be recorded to the new code(s).
- Begin organizing the documentation that will accompany any future Change Order Request or claim by area of impact. Set up a document repository where copies of

support documents such as project correspondence, vendor invoices, payroll records, etc., can be easily saved and retrieved.

Establish the Project Status Prior to the Work Stoppage

It is important to have an accurate assessment of the status of the work prior to any work stoppage or disruption impact. A clear reference point will be essential in evaluating work status, suspension impact, possible cost recovery, and related extensions of time, delay claims or milestone adjustments.

Document the schedule, percentage complete, and financial status of the project by discipline, and project area prior to the disruption or work stoppage. General contractors will often already be tracking and communicating this information on a periodic basis (e.g., weekly or monthly), but be sure this information is also communicated to the owner. In addition to reviewing the contractor's records and assertions of project status, it is important for owners to also conduct an independent assessment of project status to the extent possible. This may include a photographed site walk with both the owner and contractor, since conducting a joint or independent assessment of the status of the work will mitigate any disagreement about the work completed to date at suspension.

Taking these steps now will help streamline the process of evaluating, substantiating, reviewing and resolving Change Order Requests and/or claims related to construction work stoppages and will benefit all parties involved.

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