

Minimizing Construction Disputes During A Pandemic

By **Jonathan Taunton, Meagan Bachman and Lily Geyer** (April 30, 2020)

It has now been several months since the World Health Organization declared COVID-19 a pandemic. Both the pandemic and government measures to combat it are affecting construction projects the world over.

Some projects are experiencing slowdowns or suspensions, and others are in danger of termination in the face of continuing force majeure or for convenience. Some projects are even simultaneously suspending works that cannot be performed while accelerating others to take advantage of improved access, labor or subcontractors that were previously unavailable.

COVID-19 is the largest disruption the construction industry has faced in living memory. Disruptions inevitably cause friction and this one is doing so on a scale that we are only now beginning to appreciate. The changes affecting project completion will, in many cases, be far outside what was contemplated when contracts were signed. Many parties cannot, or will not, accept the changed costs and risks COVID-19 has brought to their projects. These may be the first indications that a wave of disputes is forming.

Knowledge of this approaching wave gives parties time to prepare and perhaps even find safe haven. Helpfully, there are steps parties can take to avoid or minimize disputes for COVID-19 suspensions and terminations.

Confirming the Status of the Works

First, parties facing COVID-19 suspensions or terminations must identify and confirm the actual physical state of the works. Parties often have different views as to the progress of the work. These differences are exacerbated in a scenario where work is suspended or terminated and payment must be calculated. Reliably establishing the physical state of the works at the date of suspension or termination can remove at least one potentially expensive area of dispute.

In a termination scenario, at a minimum, contractors will seek payment for the progress achieved, materials purchased and other direct costs incurred. In most cases, the contractor will also seek payment for partial progress towards unachieved milestones as well as possibly contribution toward its overheads and profits on work it did not have an opportunity to complete. Owners will be trying to validate costs that are legitimately due to contractors and potentially reconcile them against any advance payments made.

Joint Evaluation

The best way to establish the state of the works and costs is to agree on them. A joint survey of the physical works and materials inventory is invaluable in avoiding or minimizing disputes.

In addition to a physical survey of progress achieved and materials delivered to site, a



Jonathan Taunton



Meagan Bachman



Lily Geyer

termination scenario also necessitates inventory of any materials at a contractor's lay down yards and any off-site fabrication yards awaiting transfer to the owner, and a review of purchase orders to agree on payment for materials that have been ordered but cannot be returned.

Regular, minuted meetings work to record parties' agreement where possible and narrow the scope of differences where it is not. Similarly, agreeing a common repository for tracking ongoing suspension costs assures transparency and reduces miscommunications.

Objective Assessment of Status of the Work

If parties cannot agree on the project's actual status, then an independent assessment is the next best way forward. A credible independent assessment will often put parties on a path to an agreed position. Though costly and time consuming, an independent assessment will cost much less than the dispute it prevents. This is particularly true if one party cannot, or will not, cooperate in quantifying the progress made at suspension or termination.

Ideally, the parties should agree in advance on the surveyor and assessment methodology. If this is not possible, the owner should engage an independent engineer with no conflicts of interest. While the engineer or project manager will be indispensable in the process, the independence of engineers and project managers employed by the owner will often be questioned in a dispute. If an existing engineer or project manager must be used, having an independent surveyor or expert certify the methodology applied will help assure the assessment's objectivity.

Parties can also use an independent assessment to check for and manage any deterioration of the works during a suspension period. In a termination scenario, this assessment can also be useful in preparing new tender documents to complete the works and for validation when handing the partially completed work over to a new contractor.

Demobilization, Idle Time, Anticipated Profits and Other Costs

Suspended or terminated contractors will incur a wide range of costs. These include costs for site overheads, cancellation fees for services, materials, equipment rentals, separation costs for employees and subcontractors made redundant, and home office costs for managing the demobilization and other overheads.

Such costs also include preservation measures, which can become complicated and expensive, especially where projects include expensive mechanical equipment or systems requiring storage maintenance plans and ongoing attendance. Additionally, partial suspension amplifies the complexities of which costs will be recoverable and which will not, as all or some portion of each category of cost remains the contractors' risk for work that is continuing during the suspension.

Owners, on the other hand, will be facing costs that they, and their banks and investors, never contemplated. They will want to mitigate suspension or termination costs and compensate only costs that are legitimately reimbursable under the contract. Owners will also be concerned with protecting the investments made to date and protecting the in-progress works until they can be resumed.

During a suspension in particular, there can be tension between a contractor's continuing obligation to care for the works until handover and any changes to the nature and type of care resulting from the suspension.

Who owes what in a termination or suspension will depend on the contract terms and applicable law, but in almost every case, costs must be quantified and substantiated in order to be recoverable. Cooperation, transparency and joint efforts in respect of documentation will help parties make timely decisions about what costs to incur, quickly confirm costs that are owed and avoid or minimize disputes about substantiation or quantification.

Excellent Documentation

On any construction project, the importance of clear, comprehensive and accessible project documentation in reducing disputes cannot be overstated. Its significance is particularly acute in suspension and termination scenarios. A practical and methodical documentation procedure for costs and progress — preferably agreed between the parties — puts parties in the best position to track and, if necessary, defend the amounts owed in a suspension or termination scenario.

Similarly, clear identification and documentation of the nature of the force majeure event and its impacts or of the reasons for termination can assist in reducing the strength of an allegation that a termination is outside the bounds of the contract or applicable law.

Good documentation will prevent many disputes, and, where a dispute is unavoidable, good documentation can give the party having it a significant advantage.

False Economy

All of the measures suggested here require time and money during a period when both are in critically short supply. Parties will be tempted to forgo these measures for that reason. Each situation is unique, but these are axiomatic principles that apply to all construction projects and disputes. The cost of good record keeping, and even independent assessments, is minuscule compared to the cost of delayed payment, recreating records or engaging in a formal dispute.

Jonathan Taunton and Meagan Bachman are partners, and Lily Geyer is an associate at Squire Patton Boggs LLP.

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