

# Guidelines for Contractors Responding to COVID-19

You've read the qualifying language before: across the country, construction projects are being impacted by the COVID-19 pandemic. We thought it important to prepare guidelines to assist contractors in navigating the situation from a risk management perspective. The situation is dynamic and will change quickly. A one-size-fits-all solution does not exist, and this global challenge continues to evolve. What works today may not address tomorrow's needs. Appropriate measures for one location or project may not suit another. Through the following guidelines we provide a systematic approach for contractors to use when determining the best course of action to take on projects suspended by the pandemic.

## Analyze Your Contractual and Legal Obligations and Remedies

- Undertake a project by project assessment of the contractual provisions of all parties, including termination and suspension rights, force majeure, notice requirements, change request requirements, entitlement to time extensions and cost increases, the effect of refused extensions, liability limitations including exclusion or waiver of delay and consequential damages, escalation clauses, changes in law clauses, flow down provisions, and clauses related to emergencies and safety.
- Pay attention to the current state and local orders impacting work. States are issuing unique shelter-in-place and business closure orders that treat construction operations differently. Some ban construction altogether, while some permit certain types of construction to proceed, such as infrastructure and affordable housing. And, in some states, such as California, local governments are also publishing orders that are not entirely consistent with their state's order.
- Review your professional obligations under your local jurisdiction as some may be relevant to your response to the pandemic. For example, in some states, contractor's licensing laws include provisions requiring contractors to ensure their projects are performed in a safe, competent, and professional manner and authorize the governing body to suspend or revoke the licenses of contractors who fail to do so. Similarly, consider whether you can continue the project and comply with the OSHA General Duty Clause or more specific safety

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regulations.

- Carefully assess your company's rights and obligations in the event that the project owner or local orders require a suspension of work, or otherwise limit access to the site. Even if your state has generally banned construction, applicable orders may permit you to access the site to properly secure it. Your contract might have similar requirements.
- Review your state's mechanic's lien laws.
  - An extended cessation of work may trigger lien filing deadlines.
  - For example, in some states, such as California, if all labor ceases on a private project for 60 consecutive days, it is a completion equivalent, triggering deadlines to file liens.
  - Make sure to calendar all major events for the site, such as work cessation, and any lien or contract deadlines they may trigger.
- If you use union labor, review the applicable collective bargaining agreements and relevant federal and state labor laws. And keep abreast of union positions on the pandemic. In some cities and states, such as Massachusetts, unions have unilaterally called for a construction shutdown despite state orders to the contrary. Consider contacting local union leaders to discuss work and pay issues and their view on whether construction can safely continue.
  - What health and safety requirements exist in applicable laws and your agreements?
  - Is there a force majeure clause in the agreements that permits you to take unilateral action over working arrangements?
  - What paid sick leave and wage requirements are in play?
  - Are union members permitted to walk off the job if they fear for their safety, or the safety of their families?

## Develop a Plan for Your People

- Assess whether your employees and subcontractors may to continue work under relevant government orders based on project type, work, or trade.
  - Decide whether to require or allow employees to continue to work.
    - An employer's responsibility to an employee who becomes ill after being directed to return to work is currently unclear. With that in mind, it is advisable to allow employees to work rather than to direct them to work.
  - Consider contacting your insurance broker for an assessment of whether workers' compensation or employer liability insurance may cover claims relating to COVID-19.
- Direct employees to maintain social distancing, but develop a plan for scenarios where the work does not allow for it.
  - Can you suspend or resequence the task to occur later without schedule impact or with minimal impact? Do you need to provide notice to the owner if these efforts may impact the project schedule?
  - Can you supply additional protective equipment that will reduce the risk? When should the additional protective equipment be required to be worn and how will it be stored and/or cleaned?
  - Track and provide notice of activities where distancing is not possible and the individuals involved.
  - Stagger lunches and breaks to limit group size if possible.
- Undertake additional sanitation measures for your employees.
  - Limit shared equipment including iPads, radios, phones, and vehicles. Provide gloves, masks, hand sanitizer, hand and boot washing stations, no touch trash cans, and individual water bottles.
- Shift meetings to phone or video conferences.
- Shift support personnel or on-staff design professionals to remote work.
- Create a text and/or email group to provide simultaneous updates to all employees.

## Create a Plan for Project Closure, or Partial Closure

- Advise clients to implement directives to prevent people who are ill or who have been exposed to a person with COVID-19 to stay home.
- Interview the affected employee or subcontractor to identify who they worked with and where they worked.
- Prepare a notice, ensuring the individual is not identified, to communicate the details of the possible exposure event.
- Assess and request or perform needed sanitation activities.
- Public Safety is always the primary concern. Assess and undertake safety and security measures.
  - Secure the entire project site and equipment against unauthorized access and provide appropriate warning signage.
  - Assess lighting needs.
  - Maintain a copy of your February 2020 and latest construction schedules including critical path and overall project progress and planning views.
- Understand your project site's specific risks.
  - Prevent damage from wind, rain, flooding, heat, erosion, and subsidence.
  - Install shoring or bracing.
  - Identify site monitoring needs including additional cameras, security personnel, and use of drones.
- Identify need for inspections.
- Put documentation of the work in order:
  - Photograph or video the site and prepare as-builts of conditions at the time of notice of suspension and after securing the site.
  - File, manage, back-up, and store all project records.
    - Consider an interim transfer to the owner or architect of documents, manuals, warranties, and instructions.
    - Update all invoicing and paperwork.
- 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.
  - Inquire about returning rented or borrowed tools, equipment, or materials.
  - Ensure effective sanitation of equipment.
  - Review materials orders and permits, including any timing considerations.
- Label, store, and log materials.
  - The returning workforce may be different than those at suspension of activities.
- Request walkthroughs with owner and subcontractors.
- Track all critical dates including the suspension date.
- Consider separate cost codes to track all added costs and maintenance.
  - Instruct subcontractors to take similar measures.
- For many of the efforts listed above, conferring with the owner may be required under the terms of your contract or otherwise advisable so that you can determine together the most cost effective way to secure the site during suspension.
- Review your contract rights in the event of an extended suspension ordered by the owner or a government order.
  - You may be able to terminate your contract after a certain period of time.
  - Assess what your work force looks like now and what it may look like in a month or two. You may have to decrease your work force during the pandemic.
  - What projects are the most lucrative and/or reputation bolstering? If you have to cut projects after the pandemic, those are the ones you want to keep.

## Communications

- Post a notice at the jobsite advising the public you are complying with all applicable orders.
  - If applicable, consider indicating that only operations promoting site safety and security are continuing.
- Prepare a general notice letter to the owner.
  - Reserve the right to seek additional time and compensation.
  - Identify potential delays.
  - Indicate warranties that may be impacted or voided.
  - Remind that damage may occur despite mitigation planning.
  - State the issues contained in the notice letter are not exhaustive.
- Document the owner's acknowledgement of the suspension, including the scope and effect.
  - Include whether skeleton crews are permitted to maintain the site, contemplated timing and duration of suspension, and the basis for return to operations.
  - Provide insight as to how long the status quo can be maintained without further action.
- Contact any lenders early.
- Prepare a written risk mitigation plan including:
  - Dangerous or precarious conditions presently known.
  - Mitigation actions to protect identified areas.
    - Temporary measures with time and cost for enactment.
    - Identify resources and workforce needed for enactment.
- Determine whether any work can proceed off-site, whether it is compensable, and whether the owner wants it to proceed.
- Consult subcontractors and suppliers.
  - Provide notification.
  - Empower collaboration to assess suspension needs and protective actions.
- Prepare a suspension report of all steps taken, steps recommended but not authorized, portions of the job completed before suspension, remaining concerns, suggestions for continued site improvement and remobilization.
- Consider negotiating a suspension deal with the owner. The owner may want to ensure you return to the project once the pandemic passes and may be willing to pay limited general conditions or overhead during the suspension or make other concessions to keep you committed to the project or to prevent the commencement of lien deadlines.

## Education and Preparation

- Enact incremental mitigation measures now in case of shutdown.
  - This may include a greater focus on debris collection, security, signage, or barriers.
  - Identify and provide notice of how these measures will impact contract performance and compensation.
- Assess possibilities to redistribute workforce either from or to the jobsite.
  - Control demobilization to maintain enough people immediately before closure to complete tasks properly, safely, and with requisite quality.
- Consult insurance advisors to confirm that any materials, equipment, etc., are stored and secured in conformance with all policy requirements.

## Steps to Take if an Exposure is Possible or Occurred

- Direct any employee or subcontractor employee who is ill, or who has been in contact with someone

who is ill, to stay home.

- Send home any individuals who becomes ill while onsite.
- Advise clients to implement directives to prevent people who are ill or who have been exposed to a person with COVID-19 to stay home.
- Interview the affected employee or subcontractor to identify who they worked with and where they worked.
- Prepare a notice, ensuring the individual is not identified, to communicate the details of the possible exposure event.
- Assess and request or perform needed sanitation activities.

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