

# CONSEQUENCES OF STOPPING CONSTRUCTION: DELAYS AND DISRUPTIONS RESULTING FROM CATASTROPHES



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Construction projects stop for many reasons. Disputes might arise between an owner and the prime contractor or between the contractor and a key subcontractor over money, access, or design issues. A contractor might default as a result of bad work, slow processes, or safety problems. Work might be suspended because contractors cannot find enough labor. Material costs might unexpectedly become prohibitive, threatening the ability of a contractor to perform. A necessary party to the construction process might file for bankruptcy.

Then there are catastrophes and causes beyond the parties' control. There may be adverse weather conditions, epidemics, orders of governmental authorities, and acts of nature such as earthquakes. What guidance do the industry form contracts provide to the parties? What rights and remedies belong to the owner or contractor in the event of an act of God?

Suspension of a project has serious consequences for an owner, prime contractor, subcontractor, surety, and lender. Protection of the parties to the construction project begins with defining the parameters of suspension in the contract. The standard industry form contracts contain provisions governing the rights of a party to suspend work under the contract as well as the obligations of a party upon suspension. These suspension clauses differ depending on whether the contract is public or private.

## SUSPENSION DEFINED

What is suspension? Suspension is a pause, delay, or interruption of all or part of the work called for under the contract which typically occurs when an owner directs a contractor to stop working. Suspension can be either for a defined or undefined or known or unknown period of time. Suspensions can affect all or only a portion of the work.

Suspension has been defined as a contractually allowable delay during the course of construction of a project.<sup>1</sup> According to construction law scholars Philip L. Bruner and Patrick J. O'Connor, Jr., "the modern 'suspension of work clause' is nothing more than a compensable delay authorized and addressed by the contract."<sup>2</sup> Its purposes are:

1. Authorization by contract of, and creation of a contractual remedy for, owner-caused compensable delays that otherwise would constitute a breach of the owner's implied duty of cooperation;
2. Definition and limitation of the contractor's compensatory damages recoverable as a result of the owner's authorized suspension;
3. Referral of disputes regarding the owner's suspension to the forum designated in the contractual dispute resolution provisions; and

4. Waiver of the contractor's utilization of traditional breach of contract "self-help" remedies, such as abandonment of the contract.<sup>3</sup>

Federal cases addressing government contracts address both directed and constructive suspensions. A directed suspension of work arises out of a written or verbal directive from an owner or their representative to a contractor to suspend all or a portion of the work. A constructive suspension occurs when work is stopped absent an explicit order, determined by a four-part test: "(1) contract performance was delayed; (2) the government directly caused the delay; (3) the delay was for an unreasonable period of time; and (4) the delay injured the contractor in the form of an additional expense or loss."<sup>4</sup> Examples of constructive suspensions are delays resulting from the unavailability of the site, delays caused by interference with the contractor's work, delays in issuance of notices to proceed or change orders, or delays in inspection of work. The constructive suspension doctrine is followed in many jurisdictions.

Suspension is different from termination and is treated differently by the standard industry form contracts. Suspension may, however, ripen into termination if it lasts for an extended period. Suspension is also different from delay, although delay is a consequence of suspension.

## **INDUSTRY CONTRACT PROVISIONS GOVERNING SUSPENSION**

The standard industry contracts each have provisions governing suspension of work. There are similarities and differences among the form contracts. A common thread among the contracts is the broad right of the owner to suspend the contract for convenience.

### **AIA A201**

The American Institute of Architects A201-2017 General Conditions of the Contract for Construction (AIA A201) contains suspension clauses found at section 14.3.1 and section 14.3.2. These provisions allow an owner to order the contractor to suspend, delay, or interrupt the work in whole or part "without cause"

for such period as the owner determines.<sup>5</sup> The AIA A201 suspension clause allows for an adjustment of the contract sum and increases in the time and cost arising out of an owner-imposed suspension. A price adjustment shall include profit (which is not defined), but double recovery is not allowed.<sup>6</sup> While there is no limitation of suspension to a reasonable amount of time in the AIA A201, the Federal Acquisition Regulations (FAR), which govern federal government suspensions, limit suspensions to a reasonable amount of time.<sup>7</sup>

Under the AIA A201, a contractor may recover the costs of delay under another contract provision.<sup>8</sup> The contract time and contract price are to be equitably adjusted by a change order for the cost and delay resulting from the suspension.

A contractor has certain rights in the face of a suspension or repeated suspensions. A contractor, upon seven-days' notice to the owner and architect, may terminate the contract if, through no act or fault of the contractor, the aggregate of repeated suspensions of the work by the owner constitutes more than 100 percent of the total number of days scheduled for completion, or 120 or more days in any 365-day period.<sup>9</sup>

Additionally, the contractor may, upon an additional seven-days' notice, terminate the contract if the work is stopped for a period of 60 consecutive days through no act or fault of the contractor because the owner has failed to fulfill the owner's obligations under the contract with respect to matters important to the progress of the work.<sup>10</sup>

The contractor has certain rights in the event of an emergency. Under section 10.4, "[i]n an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury, or loss." Furthermore, additional compensation or extension of time claimed by the contractor on account of an emergency shall be determined as provided by other provisions of the general conditions.<sup>11</sup> The word emergency is not defined by the AIA A201.

## ConsensusDocs Agreement

The ConsensusDocs Agreement and General Conditions Between Owner and Constructor (Lump Sum Price) (ConsensusDocs Agreement) also contains a suspension provision allowing the owner to suspend performance at any time and for any amount of time for the “owner’s convenience.”<sup>12</sup> However, the contract price and contract time shall be equitably adjusted by change order for the cost and delay resulting from the suspension. The provision specifically mentions that adjustment is to be made by a change order.<sup>13</sup> The document also appears to provide for an unlimited suspension subject to an equitable adjustment of contract time and price.

The ConsensusDocs Agreement (which refers to the contractor as the “constructor”) also has an emergency provision which allows the constructor to act in a reasonable manner to prevent threatened damage, injury, or loss. Any change in the contract price and time resulting from the actions of the constructor in an emergency situation are to be determined by a change order.

## EJCDC Contract

The Engineers Joint Contract Documents Committee also addresses suspensions. Article 15 of the EJCDC Standard Conditions of the Construction Contract, C-700 (EJCDC Contract) states that, at any time and without cause, the owner may suspend the work or any portions thereof for a period of not more than 90 days with written notice to the contractor and engineer. The notice must fix the date on which work will resume. The contractor is granted an adjustment in the contract price or an extension of time, or both, directly attributable to any final suspension if the contractor makes a claim. However, the EJCDC Contract does not allow an adjustment of price for unforeseeable and unavoidable delays.

## DBIA Form

The Design Build Institute of America’s Standard Form of General Conditions of Contract Between Owner and Design-Builder (DBIA Form) permits the owner, without cause and for its convenience,

to order the design-builder in writing to stop and suspend the work.<sup>14</sup> The period of suspension shall not be more than 60 consecutive days or more than 90 days in the aggregate during the duration of the project. As with other contracts, the design-builder is entitled to seek an adjustment of the contract price and or contract times if its cost or time to perform the work has been adversely affected by any suspensions or stoppage of the work by the owner.

With regard to federal projects, a standard suspension of work clause provides that if the contracting officer orders the suspension, delay, or interruption of the contract for an unreasonable period of time, an adjustment will be made.<sup>15</sup> The clause is intended to allow the contractor to be compensated for delays or suspensions, without profit, so long as the contractor did not cause the delay. The suspension clauses in government contracts do not permit profit.

## CLAUSES ADDRESSING CATASTROPHES

There are clauses in industry form contracts addressing catastrophe, force majeure, acts of God, and other issues related to suspension of work. In particular AIA A201 section 8.3.1 states that “[i]f the Contractor is delayed ... by changes ordered in the work, by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, documented adverse weather conditions or other causes beyond the contractor’s control then the contract time shall be extended for such reasonable time as the architect may determine.” The AIA A201 does not expressly allow for an increase in the contract amount as a result of a force majeure event. However, recovery of damages for delay is not precluded under other provisions of the contract.<sup>16</sup> Section 14.1.1 allows the contractor to terminate the contract if the work is stopped for a period of 30 consecutive days in the event of issuance of an order of a court or other public authority or an act of government such as a declaration of national emergency that requires all work to be stopped.

On the other hand, section 6.3.1 of the ConsensusDocs Agreement provides that if the constructor is

delayed beyond the control of the constructor, it shall be entitled to an equitable extension of the contract time. Examples of causes beyond the control of the constructor include epidemics, adverse governmental action, and unavoidable accidents or circumstances.

Section 11.5.1 of the ConsensusDocs Agreement provides that the constructor may terminate the contract upon seven-days' written notice to the owner if work has been stopped for a 30-day period through no fault of the constructor for any of the following reasons:

- Under court order or order of other governmental authorities having jurisdiction;<sup>17</sup>
- As a result of the declaration of a national emergency or other governmental act during which, through no act or fault of the constructor, materials are not available;<sup>18</sup> and
- Suspension by the owner for convenience pursuant to section 11.1.<sup>19</sup>

The EJCDC Contract expressly references epidemics as a basis for excusable delay. Paragraph 4.05C includes as bases for excusable delays: severe and unavoidable natural catastrophes such as fires, floods, epidemics, and earthquakes and abnormal weather conditions, entitling a contractor to an equitable adjustment in contract times conditioned on such adjustment being essential to the contractor's ability to complete the work within the contract times.

The DBIA Form defines Force Majeure Events as:

[t]hose events that are beyond the control of both Design-Builder and Owner, including the events of fire, flood, earthquake, hurricane, elements of nature or acts of God, acts of war, terrorism, riots, civil disorders, rebellions or revolutions or court order as set forth in Section 8.3 [Force Majeure].

With regard to federal projects, the FAR provide that the contractor shall not be in default because of any failure to perform its contract within the contract

time if the failure arises from causes beyond the control and without the fault or negligence of the contractor.<sup>20</sup> Examples of such excusable delays include acts of God, acts of the public enemy, acts of government, epidemics and quarantine restrictions, as well as floods and unusually severe weather. Of significance, the FAR specifically exclude profit from recovery by the contractor.

## DELAY AND DISRUPTION

Consequences of suspension are delay and disruption. A delay claim redresses a contractor's loss from being unable to work. On the other hand, a disruption claim compensates a contractor for damages it suffers from actions that make its work more difficult or expensive than anticipated.<sup>21</sup> Delay and disruption claims often arise together in the same project.

There are multiple classifications of delays. There are critical or non-critical, excusable or inexcusable, and compensable or non-compensable delays resulting from suspensions. A critical delay affects the critical path of the project, the project completion, or an important milestone event of the project. An excusable delay is one resulting from factors outside of the owner's or contractor's control such as acts of God, strikes, and weather or natural disasters. On the other hand, inexcusable delays are within the contractor's control. Examples include improper scheduling, equipment failure, or insufficient labor. A compensable delay is one caused by, or under the control of, the owner such as failure to make the site ready, delayed mobilization, late submission, or quality issues. Disruption claims often arise from permissible events of delay that impact the sequence of work and capture the inefficiencies resulting from adverse impacts, such as changes to work, acceleration, scheduling, and trade stacking.

Damages recoverable under a suspension of work clause depend upon the language of the contract. There are differences between private and government contracts. Usually, but not always, the contractor is entitled to a time extension. The contractor may have to demonstrate a project or critical path delay.

The 2018 version of the EJCDC Contract distinguishes between: (i) instances where the owner, engineer, or anyone the owner controls is responsible for delays or disruptions; and (ii) unanticipated causes of delay and disruption which are not the fault or are beyond the control of the owner, contractor, and those for which they are responsible. In the former situation, the contractor shall be entitled to an equitable adjustment in the contract price or contract times.<sup>22</sup> In the latter situation, the contractor shall be entitled to only an adjustment in contract times.<sup>23</sup> A contractor is not entitled to an equitable adjustment for delay or disruption attributable to a subcontractor or supplier within its control.<sup>24</sup>

There are direct and indirect costs resulting from delay. There are impact damages due to the indirect results from suspension or delay, including lost labor productivity, idle labor and equipment, material escalation cost, increased wage rate costs, and increased cost of winter construction.<sup>25</sup>

There are also overhead costs and the cost of demobilization and remobilization. Overhead costs may include field overhead and office overhead. Meanwhile there may be equipment standby costs which arise because equipment may be idle but it is not practical to move the equipment to another job.

It is critical that the contractor document the condition of the site at the time of demobilization. It needs to take videos and photographs of the site and document in detail the damages that are the consequence of suspension.

“No damage for delay” clauses are often added to the contract. These provisions are enforceable but strictly construed against those who seek their benefit. Exceptions to no damage for delay provisions include delay caused by bad faith, delay not within the contemplation of the parties, delay of unreasonable duration, or delay attributable to the inexcusable ignorance or incompetence of the engineers.<sup>26</sup>

## CLAIMS

It is imperative that a contractor follow the contract in order to recover for additional time or costs

resulting from a suspension. Failure to timely submit a claim will prejudice the contractor’s right to recover. Section 15 of the AIA A201 defines a “Claim” as “a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the contract time, or other relief with respect to the contract.”<sup>27</sup> Section 15.1.1 additionally states that “the term ‘Claim’ also includes other disputes and matters in question between Owner and Contractor arising out of or relating to the Contract.” Notice of a claim arising prior to or during construction of the work period must be submitted within 21 days after occurrence of the event giving rise to such claim or within 21 days after the claimant first recognizes the condition giving rise to the claim, whichever is later.

There are some potential traps in the AIA A201 documents in asserting a claim. Since claims now are expressly within the ambit of the new section 15.1.1, there is a potential ambiguity between section 15.1.1 and section 8.3.1 relating to delays. Section 8.3.1 suggests that, in certain circumstances, the architect alone can decide issues involving time extensions while section 15.1.1 suggests that all requests for extensions would be governed by section 15. The parties need to clear up any ambiguity between the two sections in negotiating an AIA contract.

Under the AIA scheme, the contractor’s claim shall include an estimate of cost and of the probable effect of delay on the progress of the work.<sup>28</sup> Claims for additional costs require notice to be given before proceeding to execute the portion of the work that is the subject of the claim. However, prior notice is not required for claims relating to an emergency endangering life or property.<sup>29</sup>

## CONCLUSION

Suspension of a project creates myriad issues relating to the project. Primarily, the parties are encountering delay and disruption impacting the timeliness and cost of the project. The responsibilities of the owner, contractor, subcontractor, and surety for the consequences of suspension can be addressed

in the drafting of the underlying contract(s). It is upon the contractor to comply with all conditions precedent entitling it to additional time or money and to document the condition of the project at the time of suspension and any costs resulting from suspension of the project. 🍷

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## Notes

- 1 Richard J. Wittbrodt and Lynsey M. Eaton, Project Suspension: What Owners and Contractors Need to Know – NOW, CMAA Southern Cal. Chapter (Summer 2009), available at [www.cmaa.org](http://www.cmaa.org).
- 2 5 Bruner & O'Connor Construction Law section 15.84 (West, 2020).
- 3 *Id.*
- 4 *W.M. Schlosser, Inc. v. United States*, 50 Fed. Cl. 147, 152 (2002).
- 5 AIA A201-2017 General Conditions of the Contract for Construction § 14.3.1, available at [https://content.aia.org/sites/default/files/2017-04/A201\\_2017%20sample%20%28002%29.pdf](https://content.aia.org/sites/default/files/2017-04/A201_2017%20sample%20%28002%29.pdf).
- 6 *Id.* at §14.3.2.
- 7 Fed. Acquisitions Reg. § 52.242-14(b).
- 8 AIA A201-2017 § 8.3.3.
- 9 AIA A201-2017 §§ 14.1.2-14.1.3.
- 10 *Id.* at § 14.1.4.
- 11 See *id.* at Art. 7 (Changes in Work) and Art. 15 (Claims).
- 12 Consensus Docs, Agreement and General Conditions Between Owner and Constructor (Lump Sum Price), 2016 ed., Art. 11.1.1, available at [https://www.consensusdocs.org/wp-content/uploads/2017/05/200\\_Guidebook\\_12\\_07\\_2016.pdf](https://www.consensusdocs.org/wp-content/uploads/2017/05/200_Guidebook_12_07_2016.pdf).
- 13 See *id.* at Art. 8.
- 14 Available at <https://store.dbia.org/wp-content/uploads/2019/08/DBIA-Contracts-535-Sample.pdf>.
- 15 Fed. Acquisitions Reg. § 52.242-14.
- 16 AIA A201-2017 § 8.3.3.
- 17 ConsensusDocs Agreement, Art. 11.5.1.1.
- 18 *Id.* at Art. 11.5.1.2.
- 19 *Id.* at Art. 11.5.1.3.
- 20 48 CFR § 52.249-14.
- 21 *US Industries, Inc. v. Blake Construction Co., Inc.* 671 F.2d 539, 546 (1982).
- 22 EJCDC C-700 Standard General Conditions of the Construction Contract (2018), Para. 405A.
- 23 *Id.* at Para. 405C.
- 24 *Id.* at Para. 405B.
- 25 James Zack, Suspend Work "...Remain on Standby..."— Three Key Words, Construction Mgmt. Assoc. of Am., available at <http://www.cmaanet.org>.
- 26 *Asset Recovery Contracting, Walsh LLC v. Construction Co. of Illinois*, 980 N.E.2d 708 (Ill. App. 2012).
- 27 AIA 201-2017 § 15.1.1.
- 28 *Id.* at § 15.1.3.
- 29 *Id.* at § 15.1.5.