



## AGC Legal Operating Committee

### **COVID-19: Preparing for a Slowdown/Shutdown**

This document is solely intended to provide guidance to contractors on the steps that they should be considering when evaluating impacts related to the COVID-19 pandemic. **THIS IS NOT LEGAL ADVICE.** Contractors must continually evaluate projects on a case-by-case basis to determine the best way to proceed in light of the circumstances.

#### **□ Document current snap shot of the project (daily)**

- Take photos/video to show actual % complete
  - Consider installing webcams onto the jobsite, which can serve for both documentation of progress, but also for security
- Continually update project schedule to show actual % completion
- Continually update budget to reflect actual job costing to date

#### **□ Evaluate current and potential impacts**

- Expand daily reports (include detailed activities of work performed, delays to materials, inspections performed/not performed, employee or subcontractor workforce issues and productivity issues)
- Consider modifying timing for Owner meetings by requiring more frequent meetings, and modifying attendance to electronic meetings to ensure connections/communications in the event of a shutdown

#### **□ Review prime contract and evaluate provisions that are applicable to delays and impacts, including:**

- Force majeure, change-in-law provision, delays/change order provisions, suspension and termination provisions
  - Pay specific attention to notice requirements to ensure compliance
    - One letter notifying the owner of delay may be insufficient
    - Be diligent about providing timely and sufficient notice (as required by contracts)
      - Update notice as needed to address new/changing impacts
  - Contemporaneously document *all* impacts, including government orders, supplier notifications of delay, subcontractor workforce issues (*i.e.*, daily reports showing manpower), etc.

- Document connection of actual delay/loss to actual cause. Is the delay caused by the epidemic or by the order of a public official?
  - Claims will be argued to have value only to the extent that the actual cause was unforeseeable and only to the extent that the contractor could not (1) avoid the cause or (2) mitigate the losses from the cause.
- Contractor may be able to suspend performance because of X (usually 30) consecutive days of delay caused by a national emergency or the like. Watch termination provisions.
- Contractors may have a contractual basis to ask owners for reasonable assurance of continued project funding resources.

□ **Consider impacts related to financing and payment delays**

- Review prime contracts for payment, default, and termination for convenience/termination for cause provisions
  - Consider all notice and cure requirements in the event an owner is not paying
  - If a suspension order in place; determine if/when you have a right to terminate
- Consider who bears the payment obligations for cost increases or delays related to force majeure events
- Consider asking Owner to provide assurances of adequate construction funding and/or arrange teleconference with construction partners to discuss strategy for funding
- Consider lien and bond claim deadlines
  - Liens (private projects): 90 days – Washington; 75 days – Oregon
  - Bonds (public projects): 30 days – Washington; 180 days – Oregon
    - Pre-claim notice requirements also apply to lower-tier subcontractors and suppliers for lien and bond claims

□ **Review existing subcontracts, purchase orders, and supplier agreements**

- Notify (and provide opportunity to cure) subcontractors of impacts if they are failing to supply enough manpower
- Notify suppliers of impacts if materials not supplied
- Direct subcontractors and suppliers to contemporaneously document all impacts



- In some cases, ask for reasonable assurances of performance from upstream or downstream parties to avoid claims or to set up a basis for anticipatory breach.
- Voluntary negotiated agreements to suspend or delay are better than claims
  - Parties can always agree on how to address issues, *e.g.*, suspension, delay, conditions, etc., and avoid claims later
    - But remember insurance triggers if a covered claim is likely

□ **Review applicable insurance policies**

- Many policies contain business-loss interruption insurance (but specific policies should be reviewed with your broker and you should not assume all business-loss policies cover the impact of COVID-19)
- Contact your broker and review any notice provisions related to insurance; provide timely notice if you believe you have a covered claim

□ **Evaluate labor issues related to work slowdown/shutdown**

- Review (project) labor agreements, if applicable, and contact business agents
- COVID-19 leave is in addition to state mandated paid sick and family leave
  - Employers will need to notify their employees (via email) about the additional leave available to them
    - They do not need to front load this into employees accounts—it can be situational as needed
  - Understand post-leave obligations
    - For Emergency Family Leave, employers are required to reinstate the employee at the end of the leave period; there is an exemption for employers with less than 25 employees if the job no longer exists
  - Evaluate whether an exemption is applicable and, if applicable, preserve ability to seek exemption
    - Employers with fewer than 50 employees may apply for a hardship exemption; however, DOL has not yet announced procedure for claiming an exemption
  - Carefully track who is on leave (for future tax credits and possible reinstatement obligations)

- Evaluate whether layoffs or furloughs are appropriate
  - If taking this step, properly document the decision to protect against potential claims in the future

□ **Evaluate security needs in the event of a temporary shutdown**

- On most projects, contractors are responsible to secure their job sites
- Evaluate insurance policies to determine minimum policy requirements
- Consider all security risks to fully evaluate security needs, including looting, fire, weather, attractive nuisances, etc.
  - Remove ladders and other tools or equipment that could be used to break in or remove materials and equipment from the site
  - Post 24-hour emergency contact information on gates and fences
  - Backfill or cover open trenches and protect them from collapse
  - Remove all keys, disconnect batteries, board up tower crane ladders, lock cab doors, and otherwise disable all construction equipment so that it cannot be operated by looters and vandals
  - Lockout and tagout all live electrical equipment
  - Leave tower crane in free slew mode (to allow weather-vaning)

□ **Create an emergency contact list for employees, subcontractor, and suppliers**

- In the event of a shutdown, subcontractors suppliers will need to be able to contact personnel to deliver materials/access the site for emergencies
  - Determine whether suppliers can deliver onsite or coordinate delivery to a new location
- Create a phone tree to be able to communicate with key employees

□ **Evaluate demobilization and re-mobilization issues in the event of a shutdown**

- Review equipment leases and evaluate stand-by time issues
- Consider existing permit expiration dates, including in-water-work permits for marine construction
- Develop a plan to re-mobilize and resume construction after the shutdown

**Stay Informed**

- Keep apprised of the latest guidance from the CDC and local health authorities; develop plan to communicate changes and action items
- Federal, state, and local laws are changing at a rapid pace; continue to seek professional guidance on how to comply with any changes
  - Contract and common law have provided guidance for allocating risk and responsibility for impacts we are seeing, nevertheless, we do not know how government intervention/aid is going to impact these issues
- In new contracts, include language to address pandemics and consult with insurance broker to ensure that policies for new projects would cover a pandemic

**The Legal Operating Committee Consists of the following AGC Member Attorneys:**

Paige Spratt (Chair) – Schwabe Williamson & Wyatt	Gary Christiansen – Miller Nash
Angie Otto – Ball Janik	Dan Reynolds – Saalfeld Griggs
Peter Willcox-Jones – Ball Janik	Tom Larkin – Stewart Sokol & Larkin
Traci Ray – Barran Liebman	Tyler Storti – Stewart Sokol & Larkin
Edwin Harnden – Barran Liebman	Mario Nicholas – Stoel Rives
Scott Jensen – Brownstein Rask	Sean Gay – Stoel Rives
George Goodman – Cummins, Goodman, Denley & Vickers	Andrew Gibson – Stoel Rives
Marcus Eyth – Davis Wright Tremaine	Darien Loiselle – Schwabe Williamson & Wyatt
William Joseph – Dunn Carney	Stephanie Holmberg – Schwabe Williamson & Wyatt
Tim Jackle – Foster Denham	Jeremy Vermilyea – Vermilyea Law