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Construction Work Stoppage - Now What?

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Giving Notice on Lien and Bond Claims

We expect that some of the construction projects which have already been or may be shut down will not resume so quickly. Many construction contracts have provisions in them allowing the general contractor (or owner) to terminate or suspend the contract for convenience. Keep in mind that, although a project may not be terminated now, but rather suspended, consideration for lien or bond claims should be given now, and that the date from which you count how long you are off the job, or last supplied labor or materials, is the date the project was shut down or earlier, depending when labor and materials were last furnished.

Contractors, subcontractors, suppliers, and any other parties that may have rights under the lien statute or a payment bond, will be wise to keep this in mind. We recommend that each project contract, where the foregoing may apply, be reviewed immediately.

Remember that “the squeaky wheel gets the grease.” Keep in touch with the party that owes you the money. Inevitably owners and general contractors may need to decide which contractor(s) get paid first. General contractors, subs and material suppliers are reluctant to file liens, however, the threat of filing a lien, if necessary,

can be persuasive. Experience shows that over 95% of the time, the actual filing of the lien results in payment.

Delays and Extensions of Time

Contractors should read their contracts and look for language describing delays or events beyond the control of the parties. Most contracts have clauses entitled “Force Majeure” or “Delays” that describe what constitutes a delay under the contract, who has to give notice and when, and whether the resulting increase in costs may be added to the contract price.

Many contractors use AIA documents. In AIA’s A-201 2017 General Conditions, section 8.3 covers delays and extensions of time.

§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor’s control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

Also, in Section 9.10.3 of the General Conditions, when the “final completion thereof is materially delayed through no fault of the Contractor” the Contractor may seek payment of the balance due for the work that has been completed without terminating the contract. This language may allow a contractor to be paid for its work to date, even if the work stoppage has interrupted a schedule of values or other predetermined payment schedule.

Contractors should give written notice to the Owner or General Contractor, as applicable, that its work has been stopped on a specific date. Notice should be given in compliance with the contract notice provisions even though we are all aware of what is happening in this Global crisis; this may help to protect the contractor’s rights. Contractors should also keep track of all costs related to the work stoppage. Notice should include the date that work stopped and an Impact Statement given, explaining the actual and potential cost increases and additional time needed to complete the work once the stop work order is lifted.

Force Majeure, Impossibility and Frustration of Purpose

Force majeure is a French phrase meaning “greater force” that describes any event that is unexpected by all parties, not caused by any party, and affects the relationship between them, limits the ability of either to perform a duty, or requires one to intrude on a privilege of the other.

If you can no longer perform your obligations pursuant to the terms of a written contract (business, loan, lease, employment, etc.), you should review contract terms now, as many contracts have strict notice requirements. Generally, force majeure clauses excuse performance and liability where a party cannot carry out its contractual obligations as a result of an event that is beyond that party’s control, but there are exceptions. Likewise, various other contract terms, such as “impossibility of performance”, “impracticability” and “frustration of purpose” may serve to help excuse performance of obligations pursuant to the terms of a written contract. Although it is unclear at this time how the Coronavirus may trigger these terms, we are advising all clients to comply with contractual notice requirements on a timely basis.

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