

2020

COVID-19 Project Suspension Impact Checklist

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Preface

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The growing global health emergency has already had very real impacts on the Canadian economy and the operations of Canadian businesses. Focusing on the construction industry, it is a known that the COVID-19 pandemic will cause and create significant hardship. All industry participants will be called upon to work together in assessing and mitigating operational risk under existing contracts.

In that spirit of cooperation, an emergency meeting of construction industry professionals including the Calgary Constuction Association, global law firm, Dentons, Blake, Cassels & Graydon LLP, the consultants KGC, insurers, and a variety of industry experts was convened. The purpose of the meeting was to compile a list of best practices and considerations for construction professionals' deliberation in the face of unprecedented challenges the industry will experience in the coming months.

The 'Project Suspension Impact Checklist' has been designed to provide industry participants with an accessible resource in order to tackle the range of issues that present and developing circumstances may cause to be addressed. However, this is an evolving document composed in the face of an exceptional crisis. The editors are committed to providing periodic updates and revisions to the checklist which will be available via link <https://www.dentons.com/en/insights/articles/2020/march/25/-/covid-19-project-suspension-impact-checklist>. We welcome your feedback and comments. The application of your skill and experience will also guide the checklist's evolution, and its value will be enhanced through your collaboration with fellow industry participants as present and future challenges are successfully met.

The contributors would like to thank Jeffrey White of the Results Consulting Group for inspiring the format of this document, and all other contributing industry professionals for their experience, insight and hard-work over a very short period of time.

Disclaimer: The content on this document is provided for general information purposes only and does not constitute legal or other professional advice or an opinion of any kind. Users of this document are advised to seek specific legal advice by contacting members of Dentons, Blake, Cassels & Graydon LLP (or their own legal counsel) regarding any specific legal issues, or KGC Consulting (or their own consultant) regarding any construction project management issues.

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Contract Review and Administration

Action	Status (N/A, Red, Yellow, Green)	Who	Resources	By When	Progress Notes
<p>1.1 Assign responsibility for review of all forms of contract relating to each required scope of work. Consider adding “triage contracts by importance and identify at-risk suppliers that cannot be easily be replaced</p>					
<p>1.2 Establish and agree to a communication plan and reporting protocol with all key stakeholders. In particular ensuring that the Owner’s Representative, the Contractor’s Representation, and if applicable, the Owner’s Consultant’s Representative are proactively engaged in a review and determination of the reason(s) for project suspension. Where Owners are a public sector the tone/language of the notice/timeliness are critical considerations. (Manage the facts, stay current, share as required).</p>					
<p>1.3 Review all Notice provision clauses within the contract and determine applicability to the reason(s) for project suspension. Ensure that any required formal written notice is provided in accordance with the terms of the contract and provided to any applicable third party i.e. Insurer or Surety. Notices are often multi-step events add reminders into calendars for any follow-up notices and information requirements. Create and maintain a log of contract issues and the actions initiated which require a timely response.</p>					

Contract Review and Administration

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<p>1.4 Review Dispute Resolution clauses within the contract and determine applicability to the reason for project suspension. Be aware that in some jurisdictions, a claim filed before contractually mandated steps are taken may not be valid and, as a result, all steps should be taken before the expiry of the legal limitation period, if the limitation period has not been suspended by Covid legislation.</p>					
<p>1.5 Review Force Majeure and Material Adverse Effect clauses of the contract and determine applicability to the reason for project suspension. Track & review any public emergency measures clauses, health and safety clauses and change-in-law clauses such as government orders.</p> <p>Consider Relief Events, Compensation Events & Remedial rights (depending on the project) as well as default/termination rights/rights. In some contracts, the contractor has the right to terminate the contract if there is a suspension of more than 90 days required by public authority.</p>					
<p>1.6 Review Warranty and Indemnity clauses of the contract and consider impacts affecting warranty administration and indemnity obligations in the context of project suspension.</p>					

Contract Review and Administration

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<p>1.7 Review all policies of insurance in respect of the place of work, Contractor’s equipment, general liability and course of construction.</p> <p>Ensure that all potential policies of insurance, including those held by others, in which you might be named, or unnamed insured are in hand. Ensure that you have the entirety of the policy and not just the declaration page.</p>					
<p>1.8 Review the terms of any contract security that has been, or need be, provided by the Contractor in respect of the work. Ensure that you have the entire security package and not just the signature declaration page.</p>					
<p>1.9 Review any surety/performance bonds that have been procured in connection with work undertaken on the project. Ensure that you have the entire surety/performance bond package and not just the signature declaration page.</p>					
<p>1.10 Review all financing documentation relative to the project. Ensure that you have the entire financing package and not just the signature declaration page.</p>					
<p>1.11 Revisit communication plan and reporting protocol on a daily basis with all stakeholders.</p>					

Contract Review and Administration

Action	Status (N/A, Red, Yellow, Green)	Who	Resources	By When	Progress Notes
1.12 If essential services orders are in place, determine what, if any, construction activities have been deemed essential.					
1.13 Create a legislative watch for issues affecting construction in general and each project and liaise with internal or external legal team.					

Contract Documents, Payment, Progress of Work and Schedule

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Action	Status (N/A, Red, Yellow, Green)	Who	Resources	By When	Progress Notes
2.1 Ensure that a copy of current Contract Documents, submittals, reports and records of meetings at the place of work are in good order and available to the Owner, Contractor and Owner's Consultant.					
2.2 Ensure that the Contractor has reviewed all Contract Documents and has reported to the Owner or Owner's Consultant any error, inconsistency or omission contained therein as at the date of project suspension.					
2.3 Review the status of all development approvals, building permits and other necessary approvals and permits in light of project suspension.					
2.4 Assess the status of payments for work pursuant to the contract.					
2.5 If the contract provides for applications for progress payments determine the present status of any such application by having the Owner or Owner's Consultant identify the date of receipt of the application and/or issuance of a Certificate of Payment including the amount determined payable in accordance with the contract.					
2.6 As at the date of project suspension determine if all accounts for labour, subcontracts, products, construction equipment and any other indebtedness which may have been incurred by the Contractor has been paid in full excepting for amounts properly retained as a holdback, or as an identified amount in dispute.					

Contract Documents, Payment, Progress of Work and Schedule

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<p>2.7 Confirm that the proper amount has been held back pursuant to any provisions of the Contract and applicable Builders' Lien legislation.</p> <p>Determine if applicable lien periods have been suspended and, if so, whether the period for release of holdback has been extended.</p>					
<p>2.8 Assess whether any withholding of payment, in addition to required holdbacks, is justified until any remaining portion of the work is performed and Substantial Performance is achieved.</p> <p>Ensure that any delays that have arisen to date on the project have been carefully documented and calculated and the reason for the delay assessed.</p>					
<p>2.9 Ensure that the Contractor updates and submits a construction schedule that indicates the progress of the work as of the date of project suspension.</p>					
<p>2.10 Assess, document, and quantify the value of work in any submitted but unapproved change orders, changes directives or claims for a change in contract price.</p>					
<p>2.11 Identify and memorialize the site manpower count as of the date of project suspension.</p>					

Contract Documents, Payment, Progress of Work and Schedule

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2.12 To the extent possible, review and inspect completed work as at the date of project suspension by arranging any necessary tests, inspections or approvals specified in the Contract Documents.					
2.13 To the extent possible, review and identify any defective work and determine whether the defect is not in conformity with the contract documents, the result of poor workmanship, use of defective products, or damage caused by parties at, or outside of, the place of work.					
2.14 Determine if it is presently possible to correct defective work or alternatively value the cost of correcting any defective work.					
2.15 Assess status and progress of work to date of project suspension and assess impact to critical path to achieving contract completion date using detailed photographs of the place of work, catalogue associated hi-lite drawings or Blue Beam mark-ups.					
2.16 Assess all outstanding scopes of work, required contractor's equipment, materials supply, status of prefabricated elements not yet at site. Carefully assess the wording and implications regarding the full effects associated with the de-scoping of any work.					

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2.22 Consider delay disruption methodology and identify areas of impact as a result of delay. Assess site lost time impacts such as additional H & S orientation procedures, disruption in onboarding new crews having to quarantine. Identify and record manpower impacts to productivity pre-covid-19 vs. post Covid-19. Create specific cost codes in an updated budget via a change order request to track additional incurred costs, such as additional supervision and cleaning.					
2.23 Identify revised completion date for the work and an anticipated date for recommencing the work.					
2.24 Review outstanding or potential claims (and determine strategy and communication protocol in connection thereof) and verify whether limitation periods have been suspended as well as the applicability of any lien/holdback legislation.					
2.25 In consultation with the Owner's representative, the Prime Consultant and government inspectors, confirm the procedure for conducting site inspections, with attention to securing occupancy permits and the Certificate of Substantial Completion.					
2.26 Update the master risk register as required.					
2.27 Be proactive – mitigate risk, document better and take action to prepare or defend an entitlement claim for additional financial relief or requesting an extension in time.					

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2.17 Ensure that the appropriate contracting party has established a communications plan with any suppliers of equipment or materials and any associated direct subcontracts.					
2.18 Record all efforts and measures taken to mitigate the cost associated with deferring remaining scopes of work, the use of contractor's equipment, the use of owner supplied equipment, and remaining materials to be supplied. Including provision for materials and equipment preservation if ordered but not yet at the place of work. It maybe necessary to spend additional money to mitigate risk to the project.					
2.19 Record any extra carrying costs and overhead costs incurred as a result of project suspension and potentially can be eligible for reimbursement by the project.					
2.20 Assess and determine if the circumstances leading to project suspension warrant an extension of the time for performance and completion of the remaining work.					
2.21 Consider any contractual requirements for Notice associated with delays to the performance and completion of the remaining work.					

Securing the Construction Worksite

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Action	Status (N/A, Red, Yellow, Green)	Who	Resources	By When	Progress Notes
3.1 Consider and detail site access, compromised work fronts, and incomplete work as at the date of project suspension.					
3.2 Coordinate with all stakeholders and compose a lockdown and preservation plan for the place of work that ensures the protection of persons and property.					
3.3 Identify any toxic or hazardous substances present at the place of work and ensure all necessary steps are taken to dispose of, safely store or otherwise render harmless any toxic or hazardous substances.					
3.4 Determine responsibility for any disposal, storage, or other necessary means of handling toxic or hazardous substances. The responsible party will then be accountable for taking the steps outlined in 3.3 above.					
3.5 Ensure that any stakeholders that are responsible for the place of work following project suspension are aware of, and understand, applicable Provincial legislation in force at the place of work.					
3.6 Establish a demobilization plan to be put into effect following project suspension, and ensure that all costs, not otherwise determined pursuant to the contract, are memorialized.					

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3.7 Establish a close out meeting with the Owner or the Owner's Consultant with respect to the place of work following demobilization.					
3.8 Ensure that all permits, and insurance are in order and appropriate for the place of work following project suspension.					
3.9 Ensure that the place of work is appropriately secured and monitored so as to prevent any unauthorized access to the site.					
3.10 Prepare a management and emergency communications plan for the place of work and revise periodically. This plan includes identification of key contacts (with back-ups), chain of communications (including suppliers and Owner), platforms for communication (email chat groups, in person, etc.), and processes for tracking and communicating business and employee status.					
3.11 Ensure that the place of work is appropriately secured and monitored so as to prevent any unauthorized access to the site.					
3.12 In the event of a shut down, suspension or abandonment consider an Execution Plan for re-opening the site and the issues with remobilization.					

Surety / Bonding / Course of Construction Insurance

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4.1 Review policy for delay condition language and options for securing time extensions.					
4.2 Provide notice to surety and insurance providers of material changes to project schedule. Secure/negotiate an extension of time as may be required.					
4.3 Watch for increased hazard clause wording which could void coverage if not reported to carrier.					
4.4 Report any suspensions shifts in schedule, scope or occupancy dates as soon as possible with your carrier.					
4.5 Review the policy for any Escalation Clause and look for terms that may expose a risk regarding insufficient insurable limits.					
4.6 Review policy bound programs for amendments in coverage and extension. Provide reporting standards to the carrier covering items 2.6 – 2.27 above					
4.7 Be mindful of any terminated projects and cancelled policies that might trigger short rate penalties.					
4.8 Review coverage extensions for scope and definition. Seek appropriate legal counsel or expert review, regarding the wording and impacts of COVID-19 on risks relating to exceptions, exclusions, force majeure, schedules, delays, liquidated damages, cost overruns / escalation, substantial performance etc.					

Action	Status (N/A, Red, Yellow, Green)	Who	Resources	By When	Progress Notes
<p>5.1 Ensure compliance with all public health orders including but not limited to physical distancing, regular hand washing and mandating workers to refrain from coming to work if Covid - 19 symptoms present or the worker has recently been exposed to persons who have presented Covid-19 symptoms.</p>					
<p>5.2 Establish procedures to reduce the spread of infection. Recommended procedures may include staggering shifts for workers, staggering work breaks for workers, avoiding unnecessary sharing of tools, unessential comingling, encouraging workers to eat lunches in private vehicles and implementing regular disinfection/sanitation of work sites.</p>					
<p>5.3 Notify the Authority Having Jurisdiction of instances where work has been suspended or stopped indefinitely.</p>					
<p>5.4 Reinforce with workers the necessity to comply with all public health guidelines including posting policies, for reporting illnesses, frequent handwashing, physical distancing and disinfection/sanitation of the work site. Instruct the site Superintendent or designate to routinely monitor compliance with Covid-19 public health guidelines.</p>					

Health & Safety Worksite Protocol

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Action	Status (N/A, Red, Yellow, Green)	Who	Resources	By When	Progress Notes
5.5 Designate a Covid-19 Safety Coordinator who will assume responsibility for planning and managing the firm's Covid-19 response. The Covid-19 Safety Coordinator may also be accountable for worker training and preparing training materials.					
5.6 Adopt enhanced methods for performing the final construction clean.					
5.7 Establish an isolation plan for workmen in accordance with evolving H & S guidelines, best practices and jurisdictional compliance requirements.					
5.8 Consider any necessary changes in access, egress points such as hoisting elevators and spreading out work crews across a number of work fronts.					
5.9 If necessary to consider lay-offs or terminations of employment, ensure that applicable federal and provincial legislation is reviewed together with any Ministerial Orders affecting that legislation.					
5.10 Prepare a template of questions to ask Workers and Visitors regarding their travel or health in the last 14 days, which may determine if Access is denied for 14 days or as mandated by the authority having jurisdiction.					

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5.11 Establish a work refusal plan flow chart with graduated stepped process for resolution.					
5.12 Look at incident response planning scenarios with regard to document compliance and efficacy.					

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