

COVID-19 Resource Package For Contractors 3.0



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With construction sites re-opening and others going out for proposals, it is imperative that everyone in a business, from estimator to project manager to laborer understands the new normal on project sites. Across the board, proper precautions must be taken on job sites in accordance with the requirements and recommendations of the CDC, OSHA, and local and state governments. These regulations, guidelines, and orders will have an impact on both cost and schedule. Questions abound. Who is paying for the necessary PPE? What about the suspension costs? How has the schedule been impacted by the shutdown, and are we getting a new finish date? Unfortunately, owners, construction managers, contractors, and subcontractors are all arriving at different answers.

Cohen Seglias' [Construction Contracts & Risk Management Group](#) prepared sample notice letters for use on jobs where construction has or is about to resume under pre-existing contracts. Also included in this packet is sample language to add to change orders and monthly releases.

Additionally, with many companies still bidding and entering into contracts for new work, sample language to include in your proposal to help protect you in the event of a future shutdown or new guidelines is also included in this package. When bidding, remember that COVID-19 is not likely going to be considered a *force majeure* event due because it should be anticipated when developing your proposal. We suggest that the parties on a project discuss the use of an allowance to cover these costs. A letter to that effect is also enclosed.

These forms may need to be revised to fit particular circumstances. The attorneys of Cohen Seglias stand ready to provide assistance when needed. Please do not hesitate to contact us.

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While the local and state governments are allowing work on construction projects to re-start, they have all couched that permission by requiring project sites to maintain the requirements and recommendations of at least the CDC. Similar restrictions apply in almost every state, and have also been followed by OSHA.

Given those restrictions on working, it is necessary for [Subcontractor] to put [Contractor] on notice of the unsafe practices that are occurring on this jobsite. [Contractor] is scheduling the work in such a way that it is requiring subcontractors to share work spaces as well as elevators in violation of the CDC's recent rules and regulations. [Contractor] cannot simply ignore the reality of the coronavirus, and owes it to its employees and its subcontractors to manage the work in compliance with the CDC's requirements.

If [Contractor] continues to ignore these common-sense rules and regulations, [Subcontractor] will have no choice but to protect the safety of its personnel on its own. Specifically, [Subcontractor] will take one or more of the following steps:

- Decrease its workforce;
- Refuse to work in areas where the 6' social distancing rule cannot be honored;
- At [Contractor]'s direction in accordance with a reasonably revised written schedule, work in areas where the 6' social distancing rule can be honored;
- Limit elevator use to times when a safe number of workers can ride the elevator;
- Suspend work until safe work conditions can be provided; or
- Engage in other reasonable steps after notice to [Contractor].

Obviously, this method of working may create inefficiencies. At this time, [Subcontractor] cannot determine the impact that these work site changes may have on our costs or schedule. As the Project proceeds, [Subcontractor] will continue to keep [Contractor] apprised of these impacts. If there is a specific procedure Contractor would like us to follow to track this Cost Event, please advise us as soon as possible.

[Subcontractor] does not intend to be adversarial, but our contract requires us to notify [Contractor] of any impacts that may lead to extra costs or the need for additional time. Please allow this letter to serve as this notice. Hopefully, [Contractor] will work with the Owner and other subcontractors to address these safety concerns.

Please stay safe and healthy,

[Subcontractor]]

While the local and state governments are allowing work on construction projects to re-start, they have all couched that permission by requiring project sites to maintain the requirements and recommendations of at least the CDC. Similar restrictions apply in almost every state and have also been followed by OSHA.

Given those restrictions on working, it is necessary for [Contractor] to put [Owner] on notice of the unsafe practices that are occurring on this jobsite. [Owner] has required [Contractor] to schedule the work in such a way that it is requiring our employees and subcontractors to share work spaces as well as elevators in violation of the CDC's recent rules and regulations. [Owner] cannot simply ignore the reality of the coronavirus and owes it to its employees, its contractors and our subcontractors to manage the work in compliance with the CDC's requirements.

If [Owner] continues to ignore these common-sense rules and regulations, [Contractor] will have no choice but to protect the safety of its personnel on its own. Specifically, [Contractor] will take one or more of the following steps:

- Decrease its workforce;
- Refuse to work in areas where the 6' social distancing rule cannot be honored;
- Work in areas where the 6' social distancing rule can be honored in accordance with a reasonably revised written schedule;
- Limit elevator use to times when a safe number of workers can ride the elevator;
- Suspend work until safe work conditions can be provided; or
- Engage in other reasonable steps after notice to [Owner].

Obviously, this method of working may create inefficiencies. At this time, [Contractor] cannot determine the impact that these work site changes may have on our costs or schedule. As the Project proceeds, [Contractor] will continue to keep [Owner] apprised of these impacts. If there is a specific procedure Owner would like us to follow to track this Cost Event, please advise us as soon as possible.

[Contractor] does not intend to be adversarial, but our contract requires us to notify [Owner] of any impacts that may lead to extra costs or the need for additional time. Please allow this letter to serve as this notice. Hopefully, [Owner] will work with [Contractor] and its subcontractors to address these safety concerns.

Please stay safe and healthy,

[Contractor]

Pursuant to the change order provisions of our contract, I write to provide notice to [Owner/Contractor] (“[Owner/Contractor]”) of the impacts to [Contractor/Subcontractor]’s (“[Contractor/Subcontractor]”) work on the above-referenced construction project (the “Project”) due to the coronavirus pandemic. As set forth below, [Contractor/Subcontractor] has incurred or will be incurring substantial added costs due to:

- The government shutdown of the Project until _____;
- The requirement to comply with the present local, state and federal guidelines relating to coronavirus (the “Guidelines”);
- The inefficiencies due to these Guidelines;
- Escalation relating to the shortage of materials; and
- The additional changes to the construction schedule and completion dates.

Accordingly, [Contractor/Subcontractor] hereby submits its Change Order Request No. _____ in the amount of \$_____ as well as a time extension of _____ days.

As you know, the coronavirus and the resulting government ordered suspension and Guidelines were not anticipatable at the time we entered into our contract for the Project. These Guidelines presently require many safety protocols, including personal protection equipment (“PPE”), handwashing stations, systems for temperature monitoring, social distancing and the like (the “Safety Protocols”) that were not included in [Contractor/Subcontractor]’s contract price or work plan. The Safety Protocols are causing [Contractor/Subcontractor] to incur additional costs and inefficiencies, resulting in the need for this Change Order Request and time extension. A breakdown of the additional costs is attached.

As for the schedule, [Contractor/Subcontractor] is entitled to a day for day extension of time due to the suspension which lasted from _____, 2020 to _____, 2020. In addition, the Guidelines and Safety Protocols have required or will require [Contractor/Subcontractor] to perform its work in an inefficient manner, which has resulted or will result in further time impacts to the critical path. Consequently, it is necessary to extend the project substantial completion date to _____. If [Owner/Contractor] refuses to extend the completion date, [Contractor/Subcontractor] shall consider that rejection as a constructive directive to accelerate the work, which will lead to additional inefficiencies and costs.

If you should have any questions or concerns with regard to the above, please contact me at your earliest convenience. It may make sense to have a meeting to discuss how best to deal with both the cost and time repercussions arising from the coronavirus pandemic. It is our goal to work with [Owner/Contractor] to come up with the best path forward for all of the Project participants.

[Contractor/Subcontractor] reserves all of its rights relating to the Project, at law, and in equity, and this letter shall not waive any such rights, claims, and/or defenses. In addition, to the extent that the Guidelines later require additional Safety Protocols, we reserve the right to seek any associated additional costs.

We look forward to [Owner/Contractor]’s response.

Sincerely,

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COVID-19 ACKNOWLEDGMENT TO PROVIDE SUBCONTRACTORS OR SUB-SUBCONTRACTORS



[Subcontractor/Sub-Subcontractor] acknowledges that, even if recommended and prudent industry worksite practices and personal protective equipment (PPE) precautions are utilized to mitigate the risk of COVID-19 infection, there remains an inherent risk of infection, which cannot be fully mitigated. Accordingly, and notwithstanding the protections afforded by any worker's compensation insurance provided to [Subcontractor/Sub-Subcontractor]'s employees and/or the employees of its subcontractors, [Subcontractor/Sub-Subcontractor] agrees that it shall indemnify, defend and hold harmless the [Owner/Contractor/Subcontractor] (and any employees of the [Owner/Contractor/Subcontractor]) from and against the risk of claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from an employee or agent of [Subcontractor/Sub-Subcontractor] and/or any of its subcontractors or suppliers, alleging that he or she contracted COVID-19 at the Project site, to the extent required by the indemnification provision of the parties' Agreement. As a condition of performing construction work on the Project site, [Subcontractor/Sub-Subcontractor] shall inform their employees and shall advise its subcontractors and suppliers that they are presumed to have knowledge of the inherent risk of infection associated with working on a construction site.

This Change Order specifically excludes all delays, disruptions and inefficiencies experienced by [Contractor/Subcontractor] to date, or associated with this particular increased scope of Work, arising from compliance with the present local, state and federal guidelines relating to coronavirus (the “Guidelines”).

LANGUAGE FOR MONTHLY RELEASES IN EXCHANGE FOR PAYMENT

By executing this Release, [Contractor/Subcontractor] is in no way releasing, and is expressly preserving, its rights to any additional costs submitted in pending and/or disputed change order requests as well as to its rights to an extension of time and/or additional costs for delays, re-sequencing of work, inefficiencies, disruptions, stacking of trades, compression and acceleration or other impact costs which [Contractor/Subcontractor] has experienced to date, including those caused by the coronavirus and resulting requirements to satisfy the Center for Disease Control and Prevention's safety/social distancing protocols, as well as the present local, state and federal guidelines

NOTICE: THIS PROPOSAL IS CONTINGENT ON A LACK OF FUTURE IMPACT BY THE CURRENT HEALTH CRISIS, FUTURE PANDEMICS AND FURTHER SHUTDOWNS. Given the continuing existence of the coronavirus pandemic, and the possibility of a recurrence of the coronavirus pandemic, [Contractor/Subcontractor] cannot anticipate the impact of the current health crisis, future pandemics or further shutdowns. As such, [Contractor/Subcontractor] will use its best efforts to staff and supply this project to be able to meet the scheduled completion date. In doing so, it has based its proposal on compliance with the present local, state and federal guidelines (the “Guidelines”). However, [Contractor/Subcontractor] reserves its right to seek an excusable extension of time if [Contractor/Subcontractor] or its subcontractors and suppliers are unable to maintain planned crew sizes due to future illness, supply shortages or additional governmental restraints on business, travel and/or assembly. To the extent that the project is suspended after commencement of the Work, we intend to seek additional costs associated with the suspension pursuant to the terms of the proposed [Contract/Subcontract]. Further, while [Contractor/Subcontractor] has included the presently required personal protection equipment (“PPE”) as well as handwashing stations, systems for temperature monitoring and the like in its proposal, to the extent that the Guidelines later require additional PPE or other safety protocols, we reserve our right to seek any associated additional costs.

LETTER TO BE SENT PRIOR TO PRIVATE BID TO ADDRESS PPE ALLOWANCE



Given the uncertainties with the coronavirus, as well as continuing changes associated with the guidelines, rules and regulations issued by the local, state and federal governments (the “Guidelines”), [Contractor/Subcontractor] requests that the [Owner/Contractor] consider the use of an allowance to cover the costs of compliance with the Guidelines. An allowance will give the [Owner/Contractor] transparency on [Contractor/Subcontractor]’s costs associated with personal protection equipment (“PPE”), handwashing stations, systems for temperature monitoring, and the like. Also, as the Guidelines change, an allowance will give both parties flexibility in addressing any increased or decreased costs. After review of [Owner/Contractor]’s site safety plan in conjunction with our own, we suggest an allowance of \$_____.

Please advise if this allowance concept is acceptable and whether the allowance amount set forth above is sufficient. If not, we intend to include these costs in our general conditions number. We simply believe that this allowance model will give [Owner/Contractor] and [Contractor/Subcontractor] the ability to better work together to keep the project safe.

Thank you for your consideration.