

# Understanding Contractual Suspension Terms: A Risk Management Tool for Owners and Contractors

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## Introduction

Once the owner of a construction project chooses to suspend work, contractors on the project are left with many questions, among them:

- Who is responsible for the extra costs associated with the suspension?
- Is the contractor obligated to continue performing under the contract once the suspension is lifted?
- Can the contractor terminate the contract if the suspension lasts for an unreasonable period of time?

The answers to these questions are not clear. Contractors who do not fully understand their contractual and legal obligations in the face of suspension could subject themselves to further liability. The first place a contractor should look to understand its legal obligation is the construction contract.

Most modern construction contracts give the owner the right to “suspend” all or part of the work on the project for the owner’s convenience. However, the implications of the suspension, how long the suspension may last, and which party bears the responsibility for costs of the delay depend on the language of each specific contract suspension provision. This language may vary from contract to contract and should be addressed in pre-contract negotiations between the parties. Note that many construction contracts are based on form contracts created by construction associations or the federal government. The Construction Management Association of America (CMAA) (<http://cmaanet.org>), the Design-Build Institute of America (DBIA) (<http://www.dbia.org>), the Construction Owners Association of America (COAA) (<http://www.coaa.org>), and the National Association of Attorneys General (NAAG) (<http://www.naag.org>) are just a few of the organizations that have developed standard form contracts to be used on construction projects. See Bruner & O’Connor on Construction Law §5:1 (2002). To evaluate each party’s legal rights and obligations in the event of a suspension, this article will address four of the most common form contracts and their suspension provisions in the realm of both public and private construction projects.

## Standard Contract Provisions on Private Projects

Every provision of the construction contract can have a serious impact on the duties and obligations of all of the parties on the project. However, in the world of private construction projects, the construction contract is rarely uniform. Compounding this lack of uniformity, unfortunately, most contractors do not take the time to read every provision of the contract to determine how certain provisions might affect them and their performance. Even if they did, an attempt to negotiate those provisions, depending on the circumstances, may lose that contractor the job.

In the hopes of addressing—and perhaps doing away with—this issue, certain construction industry organizations have drafted and published standard contract forms to be used in the construction industry. While there are several organizations with a specialized focus that have drafted documents for their particular fragment of the industry, the two most common general standard contracts are products of the American Institute of Architects (AIA) (<http://www.aia.org>) and the Associated General Contractors of America (AGC) (<http://www.agc.org>).

### **The AIA Contract**

The AIA was founded in New York City in 1857. AIA, *History of the American Institute of Architects*, available at <http://www.aia.org/about/history/index.htm>. The purpose of the AIA was to “promote the scientific and practical perfection of its members” and “elevate the standing of the profession.” AIA, *History*. As a part of this mission, the AIA later developed standard form contract documents that have since served as models for the design and construction industry. Many private construction projects use the standard AIA specifications as a part of their project contracts. As such, when dealing with suspension on a private project, it is likely that most contractors and subcontractors will be dealing with a provision similar to that found in the AIA documents.

The suspension sections in the AIA General Conditions (AIA Form A201–2007 General Conditions) state:

14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by the suspension, delay or interruption as described in Subparagraph 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent

.1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or

.2 that an equitable adjustment is made or denied under another provision of the Contract.

Through this language, the AIA contract documents allow the owner to suspend the construction of a project for “such a period of time as the Owner may determine.” Unlike the federal government suspension provisions (48 CFR §52.242–14(b)), the AIA General Conditions do not limit the owner’s suspension to one for a reasonable period of time. In fact, it appears from a reading of this provision that the owner’s suspension could last for as long as the owner wishes, as long as the contractor is compensated for the delay in accordance with subparagraph 14.3.2. Nevertheless, the contractor may be entitled to terminate the contract under subparagraph 14.1.2 if the suspension were to last beyond the lesser of 120 days in any 365-day period or 100 percent of the total number of days scheduled for completion. AIA General Conditions A201 states in subparagraph 14.1.2 that:

The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Section 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

There is also an argument that the contractor would be entitled to terminate the contract under subparagraph 14.1.4 if the suspension lasted for more than 60 consecutive days. See AIA General Conditions A201 §14.1.4 (with 7 days’ notice, contractor may terminate contract if work is stopped “through no act or fault” of contractor, subcontractors, or other such parties). The owner may work around these provisions and prevent the contractor from terminating, however, by agreeing to change orders and time adjustments whenever such a suspension occurs. See Sabo, *Legal Guide To AIA Documents* at 506 (5th ed 2008).

### **The AGC Contract**

The Associated General Contractors of America (AGC) has also developed standard form contract documents for use in the construction industry. However, it is important to note that the AIA contract documents are more widely used and more easily interpreted due to frequent litigation over their terms.

The suspension sections of the AGC General Conditions state (AGC Document No. 200):

11.1.1 Owner Suspension. Should the Owner order the Contractor in writing to suspend, delay, or interrupt the performance of the Work for such period of time as may be determined to be appropriate for the convenience of

the Owner and not due to any act or omission of the Contractor or any person or entity for whose acts or omissions the Contractor may be liable, then the Contractor shall immediately suspend, delay or interrupt that portion of the Work as ordered by the Owner. The Contract Price and the Contract Time shall be equitably adjusted by Change Order for the cost and delay resulting from any such suspension.

11.1.2 Any action taken by the Owner that is permitted by any other provisions of the Contract Documents and that results in a suspension of part or all of the Work does not constitute a suspension of Work under this Paragraph 11.1.

The language of the AGC provisions allows a project owner to suspend the construction project for an appropriate period of time for the owner's convenience. Similar to the AIA General Conditions, it appears that the owner's suspension could last for as long the owner wishes, as long as the contract price and time are equitably adjusted. However, if the owner takes any action permitted under the contract that results in suspension, it appears from a strict reading of these provisions that the contractor would not be entitled to any adjustment of the contract, even if the resulting suspension lasted for an unreasonable period of time. AGC Document No. 200 §11.1.2. Nevertheless, the contractor likely would be able to argue for delay damages in such a situation.

### **Damages for Suspension**

In the midst of so much speculation and interpretation, one thing is clear: The price of suspension is not cheap. Not only does the suspended contractor continue to sustain overhead costs as a result of the delay, but if the suspension is long enough, the contractor could be prevented from taking future projects that might overlap with the extended schedule. What if, during the course of the delay, the cost of materials or labor rates change substantially? Each of these increased costs would have been unforeseeable at the time of contracting; it is highly unlikely that the contractor has prepared for them. The question then becomes: Who is responsible for these damages?

As anyone who has ever litigated a construction case knows, it is difficult to calculate the damages sustained by parties after any type of delay has occurred. See, *e.g.*, Unruh & Worden, *Liquidated Damages for Delay in Completion of Commercial Construction Projects: Are They Recoverable by the Owner When the Owner Contributes to the Delay?*, 34 Santa Clara L Rev 1 (1993); Aaen, *The Total Cost Method of Calculating Damages in Construction Cases*, 22 Pac LJ 1185, 1186 (July 1991). Thus, it is fair to say that this process takes on new complications when the underlying cause of the suspension was of no direct fault of any contracting party. The legal approach to answering this question depends largely on the project's status as public or private, and again on the terms of the contract documents.

Unfortunately, this issue has not been as heavily litigated in the realm of private construction projects. While there are many cases focusing on damages related to terminations for convenience by the owner, there are no published cases interpreting the AIA or the AGC suspension provisions. See, *e.g.*, *Torncello v U.S.* (Ct Cl 1982) 681 F2d 756, 763 (interpreting and discussing government's termination for convenience clause). As such, the best guidance for how a court might interpret these contract provisions is the way termination clauses and the more heavily litigated federal government suspension provisions have been construed. Although this section focuses largely on public construction contracts and cases, the same principles and interpretation of language may be used to interpret suspension of work provisions in private contracts. Thus, for purposes of this section, the availability of the following damages applies to both private and public contracts. However, it will be noted when deviations occur or recovery of a specific damage is limited or unavailable.

Like delay damages, damages for suspension of work may include extended overhead costs, jobsite costs, equipment standby costs, financing costs, wage escalation, material cost increases, and extended supervision. However, unlike delay damages that are determined by the court, because suspension is provided for in the construction contract, the contractor's recovery is governed by the contract language in the suspension of work provision. Anything not covered by this provision or explicitly excluded would not be recoverable by the contractor.

### **Time Extensions**

First and foremost, almost all suspension of work provisions provide for some extension of time to complete the work. The AIA and AGC contracts specifically provide for an adjustment to the “Contract Time.” See AIA A201–2007 General Conditions §14.3.2; AGC Document No. 200 §11.1.1. Most construction practitioners should understand that such a time extension should be, at a minimum, equal to the length of the suspension and could be done by change order or construction change directive. The contractor may also be entitled to additional time caused by demobilization and remobilization (once the project resumes).

### **Overhead Costs**

One of the largest and most highly litigated issues in the realm of government contracts is the contractor’s ability to recover overhead costs after suspension of a government project. As mentioned previously, this issue has not been addressed with regard to the AIA or AGC suspension provisions or private contracts. However, this issue is an important one because, in many cases, the contractor will claim that it is forced to stand by for an extended period of time and therefore is unable to take on additional work due to the uncertainty of the present contract. Courts have determined that to recover, the contractor must prove the following three elements:

- There was a delay, and the delay was caused by the government.
- The contractor was required to wait and be on standby.
- The contractor could not have taken on other work.

*West v All State Boiler, Inc.* (Fed Cir 1998) 146 F3d 1368, 1372 (interpreting and applying *Eichleay* formula (used to estimate proportionate home office overhead that may be unabsorbed due to suspension), requiring that obtaining other work be impractical, not impossible).

### **Profits**

The AIA contract specifically provides for the recovery of profits. AIA A201–2007 General Conditions §14.3.2. While the AGC contract does not specifically provide for recovery of profits, the AGC’s reference to an adjustment to the “Contract Price” makes their recovery likely. AGC Document No. 200 §11.1.1.

When profits are recoverable, and if the percentage allowed is not specifically set forth in the provision, the best guide for calculation of profits for suspension purposes would be the calculation of profits on costs incurred due to delays. In case law addressing delay damages, recovery is limited to a reasonable profit. Wickwire, Driscoll, Hurlbut, & Groff, *Construction Scheduling: Preparation, Liability, and Claims* at 674 (3d ed 2010) (hereafter *Construction Scheduling*). The amount of profit recoverable after a suspension may not be the same amount reflected in the original contract or bid amount. *Appeal of Itek Corp.*, ASBCA No. 13528, 71–1 BCA P 8906, 1971 ASBCA Lexis 46 (May 26, 1971). See also Wittbrodt & Eaton, *Project Suspension: What Owners and Contractors Need To Know* — *NOW!* (Summer 2009) (available at <http://www.ggl.com/CM/Publications/CMAA%20SC%20Legislative%20Article%20Summer%202009%20Project%20Suspension.pdf>) (*Project Suspension*). In contrast, a risk assessment is made and is used to calculate profits, so that the higher the risk, the higher the profit margin. *Appeal of Aerojet Gen. Corp.*, ASBCA No. 17171, 74–2 BCA P 10863, 1974 ASBCA Lexis 388 (Sept. 11, 1974). See also *Project Suspension*. Generally, a contractor may expect approximately 10 percent as an accepted rate of profit. *Appeal of Carvel Walker*, ENGBCA No. 3744, 78–1 BCA P 13005, 1977 Eng. BCA Lexis 1 (Dec. 15, 1977). See also *Project Suspension*.

### **Material Escalation**

When a contractor is unable to order material due to a delay in the critical path under the contract, the contractor is often faced with a situation in which it may not be able to take advantage of the prices on which it based its bid. If the contractor is unable to order the material at the time originally contemplated due to a suspension, and the cost for that material rises, then the contractor should be

able to recover for this escalation in price. See *Green Constr. Co. v Department of Transp.* (Pa 1994) 643 A2d 1129, 1137 (increased material costs not recovered because state not responsible for many delays, despite suspension). See also Construction Scheduling at 619. The difference between the contemplated price and the actual expense constitutes a legitimate and compensable element of these damages. Construction Scheduling at 619.

### **Labor Costs**

Labor costs include the basic wages for employees of the contractor who perform work on the project. Owners should be prepared to compensate the contractor for labor costs directly associated with the suspension. For example, owners should pay costs to protect the property during the time of suspension (*e.g.*, if the envelope is not complete, plywood over window and door openings, roof openings, protection of material stored on site) or labor costs to demobilize. In addition, the contractor is likely to incur wage-escalation as well as idle-labor costs, both of which are recoverable. Construction Scheduling at 617.

Most contract bids are predicated on a calculation of hourly labor rates. These rates account for rates existing at bid time, the number of hours expected to be billed in a given period, and foreseeable increases. Construction Scheduling at 618. If the contractor is forced to stay on the project for longer than originally expected due to a suspension, and the cost for labor increases beyond the contractor's original calculation, then the contractor should be able to recover for this escalation in wages. Thus, the contractor would be entitled to wage escalation costs, *i.e.*, the difference between the actual expenditure and the planned expenditure. See Construction Scheduling at 618.

Moreover, during periods of delay or suspension, it might be necessary for the contractor to retain workers or supervisors even though no work is being performed because it is not feasible to dismiss them. Certain employees may be irreplaceable, given their construction experience and knowledge—even knowledge of the particular project. In such cases, contractors have been permitted to recover these idle-labor costs. *Appeal of Barnet Brezner*, ASBCA No. 6194, 1962 BCA P 3381 (Apr. 30, 1962). See also Construction Scheduling at 620; *Project Suspension*.

### **Equipment Standby Costs**

When a suspended contractor has equipment that is idle, but it is impractical to transport it and use it on another job, the contractor may recover costs incurred. Construction Scheduling at 619. For contractor-owned equipment, courts frequently allow the contractor to recover only 50 percent of the AGC Schedule rate because idle equipment does not suffer any wear and tear. See, *e.g.*, *L.L. Hall Const. Co. v U.S.* (Ct Cl 1966) 379 F2d 559, 568 (approving use of AGC Schedule rates). See also Construction Scheduling at 619. Conversely, courts allow the contractor to recover the actual costs of rented equipment. However, the contractor must mitigate its damages and return rented equipment during the suspension if it is feasible and economical to do so under the circumstances. Construction Scheduling at 620.

### **Prompt Payment Penalties and Release of Retention**

Under CC §3260(c), an owner of a private work of improvement must release retention funds withheld from the contractor within 45 days of the date of completion. A cessation of labor for 60 continuous days qualifies as actual completion under the statute. CC §§3260(c)(3), 3086(c). Thus, if a project has been suspended and there has been a cessation of labor for 60 continuous days, an owner must release retention funds within 45 days, regardless of whether the project is to resume in the near future. If the owner or general contractor wrongfully fails to make payment in accordance with statutory provisions, the owner or general contractor will be assessed a statutory penalty of 2 percent per month on the amount due “in lieu of any interest otherwise due.” CC §3260(g).

### **Release of the Surety**

The potential release of the surety on a project due to a suspension is a valid concern for the owner. However, cases addressing situations in which the surety is released from its obligation to pay on the

bond require that the surety show that the bonded contract was materially altered without the surety's consent. *U.S. ex rel Army Athletic Ass'n v Reliance Ins. Co.* (9th Cir 1986) 799 F2d 1382, 1385. A material alteration is one that works a change in the meaning or legal effect of the contract. *Hill & Morton, Inc. v Coughlan* (1963) 214 CA2d 545, 549, 29 CR 550. The bond and the contract must be construed together because the bond incorporates the terms of the contract into the bond, "so that the scope of the bond is determined by the limits of the [] contract." *Verdugo Highlands, Inc. v Security Ins. Co.* (1966) 240 CA2d 527, 530, 49 CR 736. The terms of the performance bonds for the project more than likely will specifically incorporate the contract (which may provide for suspension). Thus, the surety most likely cannot assert that a suspension is a material alteration. See *Borsook v Continental Cas. Co.* (1951) 107 CA2d 21, 24, 236 P2d 383 (release of surety precluded). That said, the surety should receive a copy of the Suspension Order.

### **Other Costs**

More obvious costs that a contractor should be able to recover for will be:

- Direct jobsite expenses, *e.g.*, telephone costs, additional or increased insurance costs; and
- Extra bond premium expenses.

Less obvious costs that a contractor could potentially recover include:

- Impairment of bonding capability; and
- Loss of profits from impairment of capital.

Gibbs & Hunt, California Construction Law at 226 (16th ed 2000) (hereafter California Construction Law).

### **Protection From Suspension**

Understanding the rights and legal obligations of parties under certain provisions of a contract is only one step in the right direction. For an owner or a contractor to fully protect itself from unseen problems associated with suspension, the party must do ample research before entering into any contract and follow specific procedures postcontract to preserve its rights.

### **Pre-Contract**

As with most business dealings, the best course of action for any owner or contractor is to take the necessary steps to protect its interests before problems arise. By researching projects before acceptance, taking only projects with sufficient financial support from the beginning, and negotiating favorable contract terms, a contractor may avoid projects that are likely to end in delays. In the event that a suspension does occur, a contractor will have a better understanding of its contractual risks and compensable damages. Contractors should only bid (and accept) projects that are not questionable. The conscientious contractor must not only read documents before signing them, it must diligently research the proposed project. Researching the project includes:

- Performing background research on both the owner and the lender;
- Running a title search on the property to ensure title is not clouded; and
- Possibly contacting former contractors from the owner's previous projects.

Often, a simple Internet search of the project owner will yield practical, useful information about the owner's financial background, previous successful and unsuccessful projects, business practices, and financial strength.

While negotiated contract terms may be determined by the relative negotiation strength of each party to the proposed contract, given the current state of the economy, making an effort to address certain issues before they arise is a necessity. For example, to assist in the calculation of costs and avoid any ambiguity, the owner and contractor should work to define certain terms in the contract.

When negotiating the contract, both owners and contractors should consider the following:

- *Define Costs.* It is important to define which damages are included in costs. When making this determination, both the owner and the contractor should keep in mind all costs that would be associated with a suspension or delay. Parties should consider whether costs should include unabsorbed overhead created by an idle plant, lost profits, and any other standby costs. Parties might also consider limiting damages by providing a liquidated damages provision for suspension (a popular provision in public contracts) as a daily rate. Although a liquidated damages provision might seem like an attractive option due to the guarantee of payment, contractors should be cautious of accepting such provisions. Often, the damages that the contractor incurs greatly exceed those allowed by the liquidated damages provision. In these situations, if the contractor's contract contained a liquidated damages provision for suspension, the contractor would be barred from a full recovery.
- *Require Owner to Post Project Security.* For private projects, one of the most overlooked (and thus underutilized) tools a contractor has is CC §3110.5. In general, for projects with a contract value of more than \$5 million (or more than \$1 million for tenant improvement projects), the owner must post project security for the benefit of the contractor in amounts varying from 15 to 25 percent (depending on when the project is initially scheduled to be substantially completed) of the contract value. CC §3110.5(b)(1). There are three acceptable types of security that an owner can post:
  - A payment bond;
  - An irrevocable letter of credit; and
  - Funds deposited directly to an escrow account.
- CC §3110.5(b)(1)–(3). This code section cannot be waived by the contractor. CC §3110.5(g). However, to date, most contractors have not forced owners to comply with this code section for fear of losing the contract to another bidder. Given the current state of the economy and the risk of suspension, all contractors must consider requiring compliance with this code section (if the contractor did not previously require compliance).
- *Allowance of Profits.* For an owner, it may be wise to eliminate the recovery of profits altogether.
- *Notice.* It is important to note that the contractor should be familiar with the suspension of work provision in a particular contract and take special note of any owner notification requirements, to ensure that it may timely notify the owner when a work suspension occurs. California Construction Law at 243.
- *Advisability of Deleting Suspension Provision.* It has been suggested that when facing the AIA suspension provision, as discussed above, the contractor may want to delete subparagraph 14.3.2 in its entirety. See Sweet on Construction Industry Contracts: Major AIA Documents at 89 (5th ed 2009).
- *Validity of Pay-if-Paid Clause.* A general contractor may attempt to protect itself from liability to its subcontractors through the use of a pay-if-paid clause. The intent of the clause is to avoid circumstances in which the owner loses funding (or goes bankrupt) and is no longer able to pay, while the general contractor remains liable on its contracts with subcontractors. However, in California, these contract provisions are deemed void as a matter of public policy. *William R. Clark Corp. v Safeco Ins. Co.* (1997) 15 C4th 882, 890, 64 CR2d 578.
- *The Abandonment-of-Contract Doctrine.* Owners will often add provisions to their contracts that specifically preclude a contractor's claim of abandonment. If a complex construction project experiences problems due to erroneous or defective plans, substantial changes requested by the owner, or unanticipated site conditions, the project is usually completed late and materially over budget. Boylan & Gadbois, *The Abandonment-of-Contract Doctrine in Construction Disputes*, Los Angeles Lawyer 21 (Jan. 2002) (hereafter Boylan & Gadbois), available at <http://www.lacba.org/Files/LAL/Vol24No10/966.pdf>. In situations such as these, a contractor will often claim entitlement to the total cost of performing the work under the doctrine of abandonment of contract. Boylan & Gadbois at 21. Once a contractor proves abandonment of contract, the contractor is entitled to recover on a quantum meruit or total cost basis and is not limited by the contract price. *C. Norman Peterson Co. v Container Corp. of Am.* (1985) 172 CA3d 628, 644, 218 CR 592 ("once it is found that the terms of a construction contract have been abandoned, the contractor who completes the project is entitled to recover the reasonable value of

its services on a quantum meruit basis”). See *Schulster Tunnels/Pre-Con v Traylor Bros., Inc./Obayashi Corp.* (2003) 111 CA4th 1328, 4 CR3d 655 (contractor owed subcontractor under abandonment doctrine for excessive cost overruns). To proceed under an abandonment theory of liability, it must be shown “that both parties intended to disregard the contract.” 111 CA4th at 1343 n12. See also *Boylan & Gadbois* at 21. The abandonment doctrine, however, is inapplicable to a public works contract. *Amelco Elec. v City of Thousand Oaks* (2002) 27 C4th 228, 238, 115 CR2d 900 (abandonment doctrine fundamentally inconsistent with state competitive bidding statutory scheme). The abandonment-of-contract doctrine is favorable to contractors who have incurred numerous damages. Owners, however, often include contract provisions that preclude this type of recovery. Contractors should examine all contract terms relating to change orders and payment procedures. Owners will often include language in the contract that contains an affirmative statement that by executing a change order, the parties have reached accord and satisfaction for direct and indirect costs arising from the change, including delay, inefficiency, and acceleration costs. *Boylan & Gadbois* at 25.

### ***Postcontract***

While contracting around these issues in future contracts is the best course of action, most contractors may be currently facing the likelihood of suspension or an actual suspension with standard form provisions, such as those provided by the AIA, in their contract. Under these standard provisions, the owner is permitted to suspend work for as long as it may determine necessary. Often, the contractor will be unaware of how long the suspension period will last. Once a contractor has encountered a suspension of work, it is important to begin monitoring and documenting all additional costs associated with the suspension. California Construction Law at 243.

- *Keep Detailed and Accurate Records During All Phases of Construction.* Accurate and complete records are the principal source of evidence for verifying that the contractor’s work conformed to the contract documents. Proper record management is key to resolving proof of time delays and damages. Construction Scheduling at 211. During the entire period of performance, the contractor should establish and maintain an effective recordkeeping system.
- *Preserve All Statutory Rights.* Once a contractor is faced with an actual suspension of the project, it is important that the contractor preserve all of its rights and remedies. In most states, the remedies available to contractors include mechanics’ liens, stop notices, and bonds. On private works of improvement, all of these remedies are available to contractors. See California Construction Law at 347, 354. However, on public works of improvements, there is no right to a mechanics’ lien; only subcontractors have the ability to serve a stop notice and make a claim on a payment bond. CC §3181; CC §3019 (no mechanics’ lien on public works projects); *North Bay Constr., Inc. v City of Petaluma* (2006) 143 CA4th 552, 556, 49 CR3d 455 (“no right to impose a lien on property owned by a public entity unless such a right has been expressly conferred by statute,” which did not exist here); California Construction Law at 419.
- *Bringing Claims Against the Owner.* Once there has been a suspension on a project and the contractor has identified the problems that were encountered on the project, the contractor must determine if it is entitled to recover money or a time extension, or both, for such claims. Again, it is advisable that the contractor review the suspension clause in the construction contract. This can be determinative of whether the contractor will be able to recover costs associated with the suspension, whether the contractor can terminate the contract based on the suspension, or whether the contractor is obligated to continue performance. It is at this stage in the suspension process that contractors and owners alike should seek legal counsel to determine their prospective damages and potential liability.
- *Prompt Payment Claims for Private Contracts.* Although a project owner might be able to avoid liability for paying a contractor any amounts due to suspension, the owner is liable for all payments due prior to the delay or suspension, or both. As discussed under “Damages for Suspension” above, an owner must release withheld funds within 45 days from the date of completion; a cessation of labor for 60 continuous days qualifies as actual completion. CC §§3260(c), 3086(c). A wrongful failure to make a payment will subject the owner or general

contractor to a 2-percent per month statutory penalty regardless of whether the project is expected to resume in the near future. CC §3260(g).

### **Conclusion**

The rights and obligations of owners and contractors on any specific project generally begin and end with the terms of the construction contract. On a construction project, every provision of the construction contract can have a serious impact on the duties and obligations of all of the parties on the project. It is vital that both owners and contractors make themselves aware of the suspension terms governing a project before a problem arises. Owners and contractors who are not aware of the suspension terms in the contract run the risk of subjecting themselves to unnecessary risk—either by way of paying more or accepting less than amounts to which they may otherwise be entitled.

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