

**MANAGING BOND
PROJECTS DURING THE
2009 FINANCIAL CRISIS**
*Contract Suspension and
Termination Issues*

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Introduction

- Key issues:
 - Communication
 - What do the contract documents say?
- Contract suspension and termination issues
 - How and when an Owner can suspend
 - How to minimize and mitigate losses
 - How the team can work together to keep costs and frustration to a minimum
 - Issues frequently encountered

Options When Running Out of Funds

- Default on the construction contract
- Terminate or suspend the contract:
 - For cause
 - For convenience
- Negotiate suspension of the work
- Some other ideas

Suspending or Terminating Construction Contracts

- First: look at the contract documents for:
 - Termination or suspension for cause
 - Termination or suspension for convenience
 - Force Majeure
- Second: figure out where you are on the money and on the construction

Termination for Convenience

- Basic considerations:
 - Your contractual entitlement.
 - Cost factor.
 - For school district projects:
 - DSA closeout documents
- But, Owner will be out of the contract.
- Owner can negotiate closing in buildings etc.
- Some entities are using this to get better prices, even taking into account the cost penalty.

24 2 Termination of Contractor for Convenience

24 2 1 County in its sole discretion may terminate the Contract upon three (3) days written notice to the Contractor. Under a termination for convenience, the County retains the right to all the options available to the County if there is a termination for cause. In case of a termination for convenience, the Contractor shall have no claims against the County except:

24 2 1 1 The actual cost for labor, materials, and services performed that is unpaid and can be documented through timesheets, invoices, receipts, or otherwise, and

24 2 1 2 Five percent (5%) of the total cost of work performed as of the date of termination, or five percent (5%) of the value of the Work yet to be performed, whichever is less. This five percent (5%) amount shall be full compensation for all Contractor's and its Subcontractor(s) mobilization and/or demobilization costs and any anticipated loss profits resulting from termination of the Contractor for convenience.

Termination for Convenience

- Upon receipt of notice, Contractor must
 - Cease operations
 - Protect and preserve the work
 - Maintain insurance

Termination for Convenience

■ Final Payment

- Value of Work executed
- Proven loss as to materials, equipment, tools, construction equipment and machinery
- Overhead and profit for portion of work completed
- Reasonable proven damages

Termination for Convenience

- Assignment of Subcontracts to the District
 - Discretionary with owner

The Contract is Terminated – Now What?

- Preserve construction in place to date.
- If there are sufficient funds, rebid some of the remaining scope?
 - Bid trades and retain CM?
- Negotiate restart to project with the same contractor?
 - Bidding requirements?
 - Change in scope?

Suspension For Convenience

- For suspension for convenience, see if permitted by contract, then consider what rights and remedies the contract provides.
 - “District may, without cause, order Contractor, in writing, to suspend the work in whole or in part for such period of time as District may determine.”
 - If no contract rights, negotiate a suspension.

Suspension For Convenience

- “An adjustment shall be made for increases in the contract sum, including profit on the increased cost of performance, caused by suspension, delay or interruption”

Suspension For Convenience

- “No adjustment shall be made to the extent:
 - performance is, was or would have been suspended, delayed or interrupted by another cause for which Contractor is responsible; or,
 - an equitable adjustment is made or denied under another provision of the Contract documents.”

Suspension /Termination for Convenience

- Written notice required
- Notice based on Board decision at public meeting
- 72 hours notice for regular or special meeting
- Emergency meeting may be called on shorter notice
- Notify Contractor(s) affected in advance
- Board acts by resolution

Suspension/Termination for Convenience

- Written notice required
- Convey notice of Board's action to Contractor(s) as soon as possible, in writing
- Follow notice clause in General Conditions

Suspension For Convenience

- Written Notice
- Terms of suspension
 - extent of suspension of project
 - duration of suspension, if known

Suspension For Convenience

- Contract Adjustment
 - Increased cost of performance
 - Caused by suspension, delay or interruption
 - Determined after suspension ends?

Suspension for cause

- Justify suspension for cause
 - “District may, when it determines it is in the interest of the District, in writing, suspend the work in whole or in part for such period of time as District may determine. District shall pay reasonable damages incurred as a result of the suspension.”

Other Options: Mid-Course Correction

- Means a negotiated change order (and release) that modifies scope and cost.
- Avoids termination.
- Requires funding for whatever final scope is negotiated, but terms are open to negotiation.

Other Options: Force Majeure?

- A possible termination option.
- Is this really a Force Majeure situation?
- Risks of proceeding:
 - Cost
 - Litigation
- Need to show that the Owner has exhausted all other options to fund the project – e.g., bridge financing.

From Cal.Jur.3d

Act of God -- What constitutes

. . . A force majeure is not necessarily limited to the equivalent of an act of God; **the test is whether, under the particular circumstances, there was such an insuperable interference occurring without the party's intervention as could not have been prevented by the exercise of prudence, diligence and care.** (*Mathes v. City of Long Beach*, 121 Cal.App.2d 473 (1943) Second District Court of Appeal holding that clause which provided for termination, suspension and renegotiation of contract in case improvement work was stopped pursuant to federal regulations did not impose illegal burden on property owners in assessment district and comparing such clause to force majeure.

Thank you!

■ How to Reach Us

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