

Suspend Work – “Remain on Standby” 3 Key Words

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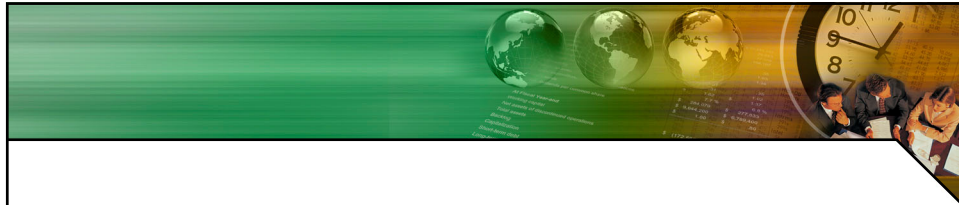


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Introduction

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Introduction

- **What is a Suspension of Work?**
 - ✓ *“...a contractually allowable delay during the course of construction of a project”*
 - ✓ *“...the modern suspension of work clause is nothing more than a compensable delay authorized & addressed by contract”*
 - ✓ *“The Suspension of Work clause has been labelled the administrative equivalent of a breach of contract action for delays”*
- **Suspension of Work clauses has 2 purposes**
 - ✓ **Negates notion contractor only entitled to time extension for owner delays**
 - ✓ **Administrative substitute to breach of contract action**

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Introduction


- Suspension of Work clause in **most** contracts
- Generally
 - ✓ Allows owners to suspend work for own convenience
 - Owners **not** required to justify suspensions
 - ✓ Owners required to issue suspension directives in writing
 - ✓ Contractors **required** to follow directive or risk Termination for Default
 - ✓ Contractors required to “mitigate damages”
 - ✓ Contractors **entitled** to recovery of time & delay damages
- **But** how long suspension lasts & which party responsible for delay & damages **depends** entirely on terms of contract

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Introduction

- Do **not** confuse **Suspension of Work** orders with **Stop Work** orders **if** working on Federal contract
 - ✓ **Suspension of Work** clause used in fixed price A/E & construction contracts (FAR 52.242-14)
 - ✓ **Stop Work Orders** clause employed in contracts for supplies, services or R&D (FAR 52.242-15)
- Many **differences** between two clauses & damage under each
- Contractors **not** aware of which clause in contract may file an **untimely** or **invalid** claim


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Types & Causes of Suspensions

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Types of Suspensions of Work

- 2 types of suspensions of work
 - ✓ **Directed Suspension of Work** – Written, verbal directive from owner to suspend some or all work
 - **Should** be in writing but frequently given verbally
 - ✓ **Constructive Suspension of Work** – Inadvertent action or lack of action on part of owner that causes work suspension – accidental or unintended suspension

“If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed or interrupted (1) by an act of the [owner] in the administration of this contract or (2) by the [owner’s] failure to act within the time specified in this contract...”

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Typical Causes of Suspensions

- ✓ Delay for convenience of owner
- ✓ Late issuance of NTP
- ✓ Delay in site availability
- ✓ Failure to respond to submittals on time
- ✓ Owner interference with work
- ✓ Delay in responding to RFIs
- ✓ Failure to provide permits
- ✓ Inspection delays
- ✓ Delay in issuing changes
- ✓ Delay in investigating alleged DSC
- ✓ Shortage of project funding

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Why Need Suspension Clauses?

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Suspension of Work Clause – Why Does An Owner Need One?

- To change common law
 - ✓ *“One party cannot stop work of the other party without breaching the contract...”*
- Suspension of Work clauses...
 - ✓ Prevent recovery of breach of contract damages
 - Contract abandonment damages
 - ✓ Prevent contractors from terminating contracts
 - ✓ Require contractors to continue work **not** suspended
 - ✓ Limit **compensable** damages – **may not** be entitled to
 - **Profit**
 - **Recover “avoidable costs”**
 - **Extended / unabsorbed HOOH**

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Operation of Suspension of Work Clauses

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Operation of Suspension Clauses


▪ Owners

- ✓ When faced with situation that may cause delay, rework, unable to respond promptly **or** work non-compliant
 - Owner **may** terminate work **or** suspend all or part of work
- ✓ If decision is to suspend work
 - Issue **written** directive
 - **Clearly** describe what work to be suspended
 - Include **direction** on how to deal with pending procurements & material deliveries
 - Address **how** to handle affected subcontractor activities
- ✓ Although **not** in most Suspension clauses, **best practice is to issue "return to work order"** when issue resolved
 - **Why?** Records when damages started & ended

Operation of Suspension Clauses

▪ Contractors

- ✓ If suspension order received verbally obtain **written** directive or **confirm** receipt of verbal order via e-mail
- ✓ Meet with owner to obtain **clear** understanding of work to be suspended
- ✓ Prepare written plan on how to comply with work suspension & provide to owner
 - Include work of subs, suppliers & vendors
- ✓ Track **all** costs arising from suspension including **damage mitigation** costs
- ✓ Track **all** suspended work on schedule to determine schedule impact




Recoverable Damages

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Time Extension & Delay Damages

- When owner suspends work **no** guarantee contractor entitled to time extension
 - ✓ Especially **if** owner suspends **only part** of work
 - ✓ May have to prove **critical path delay**
 - ✓ May have to prove suspension **not concurrent** with other delays
 - May face clause defining concurrent delay as **inexcusable** – no time, no money!
- If **cannot** prove critical path delay, delay to project end date, probably **not** entitled to time extension or delay damages

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Impact Damages

- **Impact damages –**
 - ✓ *“Added expenses due to indirect results of changed work, delay, suspension or changes that are consequence of initial event...”*
- **Examples:**
 - ✓ **Lost productivity**
 - ✓ **Idle labor & equipment**
 - ✓ **Material escalation costs**
 - **If** can show suspension **prevented** earlier procurement
 - ✓ **Increased cost of labor rates or winter work**
 - **If** can show work would have been **completed** before suspension

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Home Office Overhead Damages

- **Unabsorbed home office overhead tests**
 - ✓ Suspension **not** concurrent with other delays
 - ✓ Suspension on **much**, if not all work
 - ✓ Suspension directive **expressly** requires contractor **remain on standby**, ready to resume work **promptly**
 - ✓ Overhead costs **increased** as **sole result** of suspension
 - If **cannot** show overhead costs **increased**, document delay of **indefinite duration** during which could **not** bill **“substantial”** amounts on work **not** suspended to support HOOH
 - ✓ **Not** practical to take on replacement work during suspension

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Overhead, Profit & Bond Costs

▪ Overhead

- ✓ **Cannot** apply to FOOH or HOOH as this would be “**overhead on overhead**”
- ✓ **Can** apply to impact costs

▪ Profit

- ✓ Unless contract expressly **disallows** profit should be able to recover profit

▪ Bond Costs

- ✓ On projects requiring Payment & Performance Bonds **should** be allowed to recover such costs

Limitations on Recoverable Damages

Unreasonable Delays

- Recovery of suspension damages arise from **“unreasonable delays”** on part of owner
 - ✓ *“If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed or interrupted...”*
- Example
 - ✓ If contract stipulates owner review & respond to submittals within 30 days & owner takes 38 days
 - 30 days **“reasonable”** & last 8 days **“unreasonable”**
- **“Reasonable”** vs **“unreasonable”** situation specific

Impact to Critical Path

- If contract requires CPM schedule **must** document suspension impacted **critical path**
 - ✓ Contractor **bears** burden of proof of critical path delay
 - ✓ **Must** prove critical path prolonged as **sole result** of suspension
 - ✓ Delays impacting non-critical work **not** warrant recovery of compensable delay
 - ✓ As critical path changes throughout progress of work, schedule updates **must** be analyzed
- *“...accurate schedule updates generated during the life of the project are better tools for delay analysis than baseline schedules...”*

Avoidable Costs

- Suspension clauses often **prohibit** recovery of “**avoidable costs**”
 - ✓ Term **never** defined in contracts
 - ✓ Results in arguments during settlement negotiations
- Example
 - ✓ Owner suspends work, does **not / cannot tell** contractor how long suspension will last
 - ✓ Speculates it will be “**a week or so**” but ultimately takes **3 months** – extended **1 or 2 weeks at a time**
 - ✓ During negotiations owner argues contractor **should have** demobilized **all** equipment when suspension order given
 - ✓ An “**avoidable cost**”?

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Consequential Damages

- AIA A201, General Conditions of Construction Contract
 - ✓ “*The owner may, without cause, order the contractor in writing to suspend, delay or interrupt work...*”
 - ✓ “*The contract sum & contract time shall be adjusted for increases in the cost & time caused by the suspension, delay or interruption...*”
- Sounds reasonable, **but** ...
 - ✓ “*The contractor & owner wave claims against each other for consequential damages arising out of ... this contract. This mutual waiver includes ...
Damages incurred by the contractor for principal office expenses including compensation of personnel stationed there...”*
- Allows recovery of FOOH but **disallows** HOOH!

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No Damages for Delay

- Even if owner suspension directive causes delay, some contracts have NDFD clauses
 - ✓ *"No claims for increased costs, charges, expenses or damages of any kind shall be made by the contractor ... for any delays ... from any cause whatsoever; provided that the owner ... may compensate the contractor for ... delays by extending the time of completion of the work..."*
- Transfers risk of delay damages to contractor
 - ✓ **Unenforceable in 9 States** – but statutes apply to public projects, **not** private & **not** subcontracts (CA & CO)
 - ✓ **Enforceable but with "exceptions" in 25 States**
 - ✓ **Never litigated in 6 States**
 - ✓ **Strictly enforced in 10 States**

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NDFD Clauses - Exceptions

- 8 general exceptions to NDFD clauses
 - ✓ Must be **unambiguous** to be enforceable
 - ✓ Owner **waived** clause by previous actions
 - ✓ Delay **not** within contemplation of parties
 - ✓ Delay amounting to **contract abandonment**
 - ✓ Delay event **not** covered by clause
 - ✓ Delay caused by **fraud, bad faith** of owner
 - ✓ Delay caused by owner **active interference**
 - ✓ Clause **barred** by public policy, statutes
- Discuss with legal counsel to see **if** NDFD enforceable in jurisdiction

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Would Have Been Suspended, Delayed or Interrupted By Other Cause or Provided For or Excluded by Other Provisions of Contract

- **Many** Suspension clauses include following language
 - ✓ *"...no adjustment shall be made under this clause for any suspension, delay, or interruption to extent that performance would have been suspended, delayed, or interrupted by any other cause ... or for which an ... adjustment is provided for or excluded under any other term or condition of this contract"*
- **Precludes** recovery **if** suspension concurrent with contractor delay or **if** contract has No Damages for Delay clause

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No Profit Allowed

- Federal contracts specifically disallow profit on suspension claims
 - "...an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, & the contract modified in writing accordingly"*
- Language **clear, unambiguous & enforceable**

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Only Original *Eichleay* Formula Allowed

- Federal courts & some State courts ruled **only original** *Eichleay* formula may be used to calculate HOOH
- 8 different HOOH formulas used in North America
 - ✓ Produce a wide range of recovery using same data
 - ✓ Ran case study on 235 days of project delay case
 - Used actual accounting data from contractor
 - Delay damages ranged from **\$4.3 million** to **\$114,000**
 - Original *Eichleay* formula developed **\$2.1 million**
- Additionally, problems from perspective of owners, contractors & accountants

Court Decisions Impacting Recovery of Damages

Altmayer v. Johnson (1996)

- Case discussed “standby requirement”

- ✓ “...the uncertainty of contract duration occasioned by [owner] delay or disruption...during which the contractor is required to remain ready to perform ... and [the owner’s] procrastination & nonresponsiveness made the length of the performance period extremely uncertain ...”
- ✓ “The standby test does not require that the contractor’s workforce be idle...”
- ✓ “...when a contractor is on standby it is effectively prohibited from making reductions in home office staff or facilities by taking on additional work...[as] it is not usually...practicable to lay off home office employees during short and indefinite delays...”

- Decision favorable for contractors

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P.J. Dick v. Principi (2003)

- Court determined Dick not on standby

- ✓ “...because PJD was able to progress other parts of the work during the time periods it alleged it was suspended...”
- Not on standby when owner
 - ✓ “...tells the contractor work will begin again on a date certain...”
- Not on standby when
 - ✓ “...the government gives the contractor a reasonable amount of time to remobilize its work force when suspension lifted...”

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P.J. Dick v. Principi (2003)

- Added that –

“...standby clearly requires something more than an uncertain delay as this is a separate requirement of the case law; the implication is that the contractor must be required to keep at least some of its workers and necessary equipment at the site, even if idle, ready to resume work on the contract (i.e., doing nothing or working on something elsewhere that allows them to get back to the contract site on short notice...”

- Decision **not** favorable for contractors

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Nicon, Inc. v. U.S. (2003)

- Contract bid & awarded
- NTP **not** issued due to bid protest
 - ✓ Bid protest **not** upheld but NTP **never** issued
- Contract **terminated** for owner convenience
- Nicon filed “**termination settlement proposal**”
 - ✓ Based on 288 days from contract award to T4C
 - ✓ Used **modified version** of *Eichleay* formula
 - ✓ Claim denied HOOH claim because courts **demand** use of **original** *Eichleay* formula
- Nicon appealed decision
- Appellate court ruled **against** Nicon

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Nicon, Inc. v. U.S. (2003)

- Appellate court ruled that –

“...Eichleay damages are only available when delay causes contract performance to require more time than originally anticipated ... it is clear that a contractor is only injured with respect to indirect cost when the performance period of a contract is extended as a result of government caused suspension and not because of the suspension per se ... The Court of Claims was therefore correct in concluding that the Eichleay formula is only applicable in situations in which contract performance has begun”

- Decision **not** favorable for contractors

The Redland Company v. U.S. (2011)

- Air Force issued NTP & **on same day** issued suspension directive for **all** work
 - ✓ Suspension lasted **nearly 4 years (12/01/00 – 10/18/04)!**
 - ✓ When suspension lifted, owner directed work be completed in **60 days**
 - ✓ Redland completed work **449 days later – 389 days late!**
- Redland filed **suspension claim** for 4 year period using *Eichleay* formula for unabsorbed HOOH
 - ✓ Contracting officer granted time extension for **entire** delay period (suspension period + later delay = **1806 days**)
 - ✓ Did **not** assess LDs
 - ✓ **Denied** HOOH claim
- Redland appealed to Court of Claims

The Redland Company v. U.S. (2011)

- Court of Claims **denied** recovery of HOOH during 4 year suspension
- Redland **appealed** to Court of Appeals for Federal Circuit
- Appellate Court acknowledged 4 year suspension **but** –
 - ✓ Citing *P.J. Dick, Nikon & Altmayer* Court ruled to justify *Eichleay* damages contractor **must prove** –
 - Owner caused delay, suspension of **uncertain duration**
 - Suspension **delayed end date** of project **or** work finished on time, but contractor incurred unabsorbed HOOH because **early completion delayed**
 - Owner required contractor *“remain on standby during the period of suspension, waiting to begin work immediately or on short notice once suspension lifted”*

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The Redland Company v. U.S. (2011)

- Citing *Nikon*, court stressed *Eichleay* damages **only** available if delay, suspension occurs **after** performance of work has **begun**
- Appellate court ruled
 - ✓ Owner caused suspension of **uncertain duration**
 - ✓ Suspension **delayed** project completion
 - ✓ **But**, Redland had **not** started work &
 - ✓ Had **not** been directed to *“remain on standby”*
- Redland **unable** to recover unabsorbed HOOH
- Decision **not** favorable for contractors

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H.J. Lyness Construction v. U.S. (2015)

- Lyness leased building to GSA for 10 years
 - ✓ Building had to be renovated before lease began
 - ✓ GSA had issues with fire evacuation plan
 - ✓ Terminated Lyness for convenience
- GSA & Lyness could **not** agree on termination settlement
 - ✓ Lyness filed suit in Court of Claims
 - ✓ **Only** issue was damages owed
- Lyness sought unabsorbed HOOH using **specially crafted** *Eichleay* formula
- **Why?**

H.J. Lyness Construction v. U.S. (2015)

- *Eichleay* Formula relies on **actual costs** from project & company for **actual period of work**

$$\frac{\text{Total Contract Billings}}{\text{Total Billings for Actual Contract Period}} \times \frac{\text{Total Overhead During Actual Contract Period}}{\text{Total Overhead}} = \text{Allocable to Contract}$$

$$\frac{\text{Allocable Overhead}}{\text{Actual Days of Contract Performance}} = \text{Daily Overhead Cost Allocable to Contract}$$

$$\text{Daily Overhead} \times \text{Days of Owner-Caused Delay} = \text{Home Office Overhead Owed}$$

- Lyness terminated, **not** have actual costs for entire project necessary to use *Eichleay*

H.J. Lyness Construction v. U.S. (2015)

- Appellate court ruled **only** original *Eichleay* formula can be used to calculate unabsorbed HOOH
- Court reiterated the 3 part test outlined by previous cases
- Court determined Lyness could **not** provide evidence they were required to “*remain on standby*”
- Lyness **not** allowed to recover HOOH
- Decision **not** favorable for contractors

Current Tests for Recovery of Suspension of Work Damages

Current Tests for Damage Recovery


- Based on *Altmayer, P.J. Dick, Nicon, Redlands Company & Lyness* current tests to recover suspension damages are –
 1. Work on project “**commenced**” after NTP
 2. Suspension **directed, otherwise caused** by owner
 3. Delay for “**unreasonable**” period of time
 4. Suspension for “**uncertain duration**”
 5. Suspension **extended contract duration or planned early completion date**
 6. Suspension “**sole proximate cause**” of project delay

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Current Tests for Damage Recovery

7. Work would **not** have been delayed, suspended or interrupted by “**any other cause**”
8. Recovery of damages “**not provided for or excluded**” under any other provision of contract
9. Contractor instructed to “**remain on standby, waiting to begin work immediately or on short notice once suspension lifted**”
10. Suspension caused **additional costs** as contractor prevented from completing on time or earlier & **prevented** from billing work to support HOOH
11. Contractor **unable** to take on other work during suspension period
12. Extended, unabsorbed HOOH calculated using **original Eichleay formula**

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How Can Contractors Protect Their Right to Collect Suspension Damages?

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Recommendations for Contractors

- Review suspension directive
- Understand **exact scope** of work to be suspended
 - ✓ **Failure to do so may result in suspending more work than owner directed & caused**
 - **Self-imposed delay**
 - **Concurrent delay**
 - **Self-imposed damages**
 - **Unintended impacts**
- Avoidable costs, concurrent delay & contractor caused impact **not** recoverable
- If **not** understand work to be suspended meet with owner to obtain **full** understanding

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Recommendations for Contractors

- Obtain suspension directive **in writing** from owner or authorized representative
 - ✓ If receive **verbal directive** write to owner same day
 - Obtain **written** directive to suspend work
 - Ask for **estimate** of suspension period
 - Ask if owner wants contractor to “**remain on standby**”
 - If response is “**yes**” – HOOH **may** be recoverable
 - ✓ If response is “**no**” start preparation of plan to **demobilize** from site (cold standby)
 - ✓ If owner **not** respond within 1 day, provide written notice – “**in absence of response**” will demobilize within few days
 - At sole expense of owner + remobilization to site later

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Recommendations for Contractors

- Regardless of owner direction prepare **2 plans**
 - **Hot Standby**
 - ✓ What work will continue during suspension
 - ✓ How remobilize labor & equipment to work on **not** suspended
 - ✓ Labor productivity impacts of “**work arounds**”
 - ✓ Cost of labor & equipment relocated or idled
 - ✓ Costs from subs, vendors, & suppliers
 - ✓ Other impact costs
 - ✓ Remobilization costs when suspension lifted
 - ✓ Overhead, profit & bond costs
- Prepare narrative with cost & schedule impact estimates**

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Recommendations for Contractors

▪ **Cold Standby**

- ✓ Cost of demobilizing **all** labor, equipment, field trailers, etc.
- ✓ Cost of continuing security for site & materials stored on site, materials & equipment storage at offsite facilities
- ✓ Cost to remobilize when suspension lifted
- ✓ If **new** labor required when suspension lifted **include** new learning curve, productivity losses, safety training, etc.
- ✓ Include costs for subs, vendors, suppliers, etc.

Prepare narrative with cost & schedule impact estimates

Recommendations for Contractors

- Compare costs & schedule impacts of **both** suspension plans
- Determine which plan **most** cost effective for owner
- Submit **both** plans to owner along with cost effectiveness analysis

Recommendations for Contractors

- Meet with owner, discuss **both** plans
 - ✓ Discuss **both** plans **in detail** so owner fully understands **each** plan
 - ✓ Owners must understand what costs are **relatively firm** & which costs are **SWAGs**
 - Including what **factors** may influence costs + or -
 - ✓ Important that owner leaves meeting understanding **neither** plan has firm fixed cost & both are only **estimated costs**
- Make certain owner fully understands cost & schedule impact of suspension
 - ✓ **Incentivize** owner to resolve suspension issue promptly!

Recommendations for Contractors

- Obtain **written decision** from owner – which plan to implement
 - ✓ After meeting request **written decision** from owner
 - If owner gives verbal directive, ask for decision **in writing**
 - ✓ If owner **not** agree to provide decision **in writing**, send following letter

“Pursuant to our meeting of this date, we confirm that you have directed us to remain on hot standby. Accordingly, we will start implementation of the hot standby plan you approved within 48 hours. We will track all cost & time impacts in accordance with the approved plan & once the suspension order is lifted, we will submit a change order proposal for approval.”

Recommendations for Contractors

✓ If owner **reluctant** or **refuses** to make decision, send following letter

"Pursuant to our meeting of this date, due to your lack of direction, we intend to implement the hot standby plan as this plan mitigates your damages more than the cold standby plan. Unless directed otherwise in writing, we will start implementation of the hot standby plan within 48 hours. We will track all cost & time impacts in accordance with the plan & once the suspension order is lifted, will submit a change order proposal for approval."

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Recommendations for Contractors

- Implement suspension plan
- Follow plan **as closely as possible**, track **all** costs (direct, indirect, impact & time related costs) & schedule impacts
 - ✓ **Instruct** subcontractors, suppliers, vendors, etc. to do same
- Once suspension directive lifted, compile **all** costs (from all affected parties) **as soon as possible**
- Submit cost to owner as proposed change order
- Negotiate change order on basis of **actual cost & schedule impacts** arising from agreed plan

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Advantages for Owners

- Owner has opportunity to
 - ✓ **Participate** in planning activities during suspension
 - ✓ **Mitigate** own damages arising from suspension
- Owner **may** require submittal of cost & time impacts during suspension period
 - ✓ **Similar** to T&M change order
- Owner able to **track** activities ongoing during suspension
 - ✓ **Few surprises** when cost & schedule impacts submitted at end of suspension
- Able to **review & settle** damages on basis of **documented damages**

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Conclusion

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Conclusion

- Recovery of damages under Suspension clause **not** foregone conclusion
 - ✓ **More** problematical than contractors believe
 - ✓ Tests for recovery of damages **more** complicated than in past
 - **Unlikely** owners will include *“remain on standby ready to go back to work promptly”* when issue suspension directive
 - Contractors **must** learn how to protect rights to recover damages resulting from suspension
- Or face risk of not being able to recover damages!**

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Questions or Discussion?

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