

**SUSPEND WORK “...REMAIN ON STANDBY...” –
THREE KEY WORDS**

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Abstract

The contract has been awarded and notice to proceed issued. Work has started. The owner issues a suspension of work directive and the contractor shuts down all or a designated portion of the work awaiting the owner’s return to work order. The contractor believes they are entitled to recover all delay and all time related delay damages. Is the contractor right? The owner is liable for the delay damages, right? As Max E. Greenberg commented in 1984 – “It ain’t necessarily so!” This paper examines why owners should have a Suspension of Work clause in contracts and how these clauses work. It identifies what damages are typically owed when an owner suspends all or part of the work and outlines some typical limitations of suspension damages found in many contracts. Additionally, the paper discusses five key court cases decided between 1996 and 2015 that establish the key requirements necessary to collect damages arising from a suspension of work directive. Finally, the paper offers recommendations on what actions contractors should take to protect the recovery of such damages and why these actions may help owners resolve such claims in the field rather than the court.

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Introduction

A Suspension of Work is "...a contractually allowable delay during the course of construction of a project".¹ A Suspension of Work clause allows the owner or their representative to suspend, delay or interrupt the work for the convenience of the owner at any time during the work. A suspension of work can be for any number of reasons, and there is no way to tell what it might be for. Thus,

"...the modern 'suspension of work clause' is nothing more than a compensable delay authorized and addressed by contract."²

Another author summed up the role of the Suspension of Work clause in the following manner.

"The Suspension of Work clause has been labelled the administrative equivalent of a breach of contract action for delays."³

In *Chaney & James Construction Company v. United States*⁴ the United States Court of Claims discussed the role and function of the Suspension of Work clause as follows.

"The Suspension of Work clause has two main functions: it negates the notion that a contractor's exclusive remedy for delays caused by acts of the Government is a time extension, and it provides an administrative remedy for losses and increased costs incurred by the contractor because of suspensions of work caused by the Government. ... the Suspension of Work clause is an administrative substitute for an action at law for breach ..."

¹ Richard J. Wittbrodt and Lynsey M. Eaton, *Project Suspension: What Owners and Contractors Need to Know – NOW!*, CMAA Southern California Chapter – Summer 2009, www.cmaa.org.

² Philip L. Bruner and Patrick J. O'Connor, Jr., *Bruner and O'Connor on Construction Law*, §18:46, West Publishing, 2008.

³ Michael S. Simon, *Construction Claims and Liability*, §12.7, *Suspension of Work Clauses*, Wiley Law Publications, New York, 1989.

⁴ 421 F.2d 728 (Ct. Cl. 1970).

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Suspension of Work clauses are now included in most standard Federal, State and local construction contracts⁵ as well as in industry crafted standard contract documents.⁶ Such clauses generally allow owners to suspend all or a portion of the work for their own convenience. That is, the owner is **not** required to “justify” the suspension directive to the contractor and the contractor **is** required to comply with such a directive upon receipt. Ordinarily, these clauses require the owner to issue a suspension directive in writing. Upon receipt, the contractor is required to stop all work identified in the directive and take appropriate actions to “mitigate the damages” resulting from the directive. However, as will be discussed later in this paper, this is **not** always the case. Additionally, Suspension clauses typically provide entitlement to the contractor allowing recovery of time and delay damages. Again, this is **not** always the case as will be discussed later. Thus, while most current contract documents provide the owner the right to suspend work, how long the suspension will last, and which party bears responsibility for the resulting delay and time related damages depends **entirely** on the language of the contract.

Suspensions of Work should **not** be confused with **Stop Work Orders** if the contractor is performing work under a direct Federal contract, although the two terms are often used interchangeably on construction sites. The Federal Suspension of Work clause is used “...when a fixed-price **construction** or architect-engineer contract is contemplated...” and is found in Federal Acquisition Regulations (FAR) §52.242-14, Suspension of Work. The Federal Stop Work Order clause is typically employed in contracts for supplies, services or research and development and may be found at FAR §52.242-15. There are differences between these two clauses and “A contractor **not** aware of which of these

⁵ See, for example - FAR §52.242-14, Suspension of Work clause contained in Federal contracts; California Department of Transportation Standard Specifications, Section 8-1.06, Suspension; and Section 6-3, Suspension of the Work found in The “Greenbook” - Standard Specifications for Public Works Contractor, 2012 edition.

⁶ See, for example, Article 11.1, Suspension by Owner for Convenience clause employed in ConsensusDocs 200, Standard Agreement and General Conditions Between Owner and Contractor, 2012 edition; Article 14, §14.3, Suspension by the Owner for Convenience clause found in AIA A201, General Conditions of the Contractor for Construction, 2007 edition; and AGC Document No. 200 §11.1.2.

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clauses is in play could unknowingly submit an untimely or invalid claim.”⁷ This paper addresses **only** Suspension of Work directives issued by the owner on a construction project.

Types of Suspensions of Work

There are **two** types of suspensions of work – directed and constructive.

- **Directed Suspensions of Work** – This is a written or verbal directive from an owner or their representative to a contractor to suspend all or a portion of the work of the project. Typically, Suspension of Work clauses require an owner to issue such a directive in writing; however, it is the author’s experience that owners frequently issue verbal directives.

- **Constructive Suspensions of Work** – Constructive suspensions arise when an owner or their representative suspends work or prevents work from proceeding **without** an express directive. A constructive suspension of work is discussed in the following manner.

“If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer’s failure to act within the time specified in this contract...”⁸

In *Merit-Chapman & Scott Corp. v. United States* the court noted that even in the absence of a direct owner action constructive suspensions may be found “...when a delay lasts so long that the contractor cannot be expected to bear the risk and costs.”⁹ This paper

⁷ See Ryan Gilchrist, [The Procurement Playbook – Legal Insight For Government Contractors](#), Oles Morrison, June 26, 2018. See also, [What Is A Stop Work Order? When Are These Orders Issued By The Government?](#), Ebrary.net, https://ebrary.net/4099/management/stop_work_orders.

⁸ FAR §52.242-14.

⁹ 192 Ct. C. 848, 852 (1970).

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examines and discusses a contractor's recovery of damages under **both** directed and constructive suspensions of work.

Some Typical Causes of Suspensions

Courts and Boards of Contract Appeals have reviewed a variety of situations that may give rise to a suspension of work, including the following:

- Delay for the convenience of the owner;
- Late issuance of notice to proceed;¹⁰
- Delay in site availability or site access;
- Failure to respond to contractor requests to modify specification requirements;¹¹
- Delay caused by owner interference with the contractor's work;
- Delay in responding to contractor Requests for Information of Requests for Clarifications in a timely manner;¹²
- Failure to provide required construction permits;¹³
- Delay in owner inspection of the work;
- Delay in issuing change orders;
- Delay in investigation of alleged differing site conditions;
- Other owner actions that result in delay; and,
- Shortage of project funding resulting in a suspension of work.¹⁴

There are numerous other causes of work suspensions, but the above list provides a broad overview of events Courts and Boards have shown their willingness to classify as suspensions of work.

¹⁰ *DeMatteo Construction Company*, PSBCA No.145, 76-1 BCA ¶ 11,485 (1976).

¹¹ *Hardie-Tynes Manufacturing Company*, ASBCA No. 20,582, 76-2 BCA ¶ 11,972 (1976).

¹² *Royal Painting Company*, ASBCA No. 20,034, 75-1 BCA ¶ 11,311 (1975): *Hensler v. City of Los Angeles*, 124 Cal. App. 2d 71, 268 P.2d 12 (1954).

¹³ *Rottau Electric Company*, ASBCA No. 20,283, 7602 BCA ¶ 12,001 (1976).

¹⁴ *C.H. Leavell & Company v. United States*, 530 F.2d 878 (Ct. Cl. 1976).

Suspension of Work Clause – Why Do Owners Need One?

Prior to the time Suspension of Work clauses were routinely included in construction contracts, Federal courts faced with compensable delay claims based on owner issued suspension directives, when the contract had **no** Suspension of Work clause, dealt with such cases as a breach of contract. As a result, the owner was liable for all project delay and all time related damages.¹⁵ In order to **avoid** being found in breach of contract, current construction contracts almost always include Suspension of Work clauses to –

- Prevent contractors from recovering damages typically available under a breach of contract action such as a claim of contract abandonment;
- Prevent contractors from being able to terminate the contract and walk off the job;
- Require contractors to continue performing those portions of the work **not** suspended by the owner, as refusal to continue the work **not** suspended constitutes a breach of contract on the part of the contractor; and,
- Limit compensable damages contractors can claim. For example, under the Federal Acquisition Regulations (FAR) clause a contractor is **not** entitled to profit on the delay damages owed resulting from an owner’s suspension of work directive. Under other contract forms, contractors are precluded from claiming “avoidable costs” resulting from a suspension directive.

Operation of Suspension Clauses

➤ Owners

When an owner is faced with changes or potential changes in the scope of work that might impact the duration of the work or cause rework if implemented; is faced with requests for information or clarification that cannot be responded to promptly; encounters a situation where the contractor’s work is continually non-compliant; or

¹⁵ See *L.L. Hall Construction Company v. United States*, 379 F.2d 559 (1966); *Scott Timber Company v. United States*, 333 F.3d 1358 (Fed. Cir. 2003); and *Haney v. United States*, 676 F.2d 584 (1982).

the contractor is in proceeding with work in an unsafe manner the owner has two potential options. The first, the owner may terminate the work either for convenience or default. However, if the situation or event does **not** warrant a termination action, the owner may issue a suspension directive. If suspension or partial suspension of work is the most cost effective solution, the owner should issue a written suspension of work directive.¹⁶ The suspension directive should –

- Clearly describe what activities are to be suspended;
- Include directions on how the contractor should deal with pending procurement actions and material deliveries;
- Address how the contractor should handle subcontractor activities involved with the suspended work: and,
- Remind the contractor of their obligation to mitigate the damages resulting from the suspension order.

Although **not** specifically addressed in most Suspension clauses, it is **good practice** for the owner to issue a written “return to work” directive when the issue driving the suspension directive has been resolved. In this manner, both the start and the end of the work suspension period is clearly recorded in the project records. These two written directives serve as boundaries for analyzing and resolving the delay period (if any) and the suspension damages.

➤ **Contractors**

If the suspension directive is provided verbally, the contractor should obtain a **written** directive from the owner the same day. If the owner is reluctant respond in writing, the contractor should provide a written response asking the owner to confirm the verbal directive, putting the owner on notice that the contractor intends to implement

¹⁶ A written suspension of work directive is generally required by contract language. Additionally, it is a best practice to issue all suspension directives in writing as such written document clearly documents (1) the date on which the suspension started as well as (2) what work is to be suspended. A clear written record of both will later be most helpful in resolving the damages resulting from the suspension directive.

the verbal directive starting the following day, **unless directed otherwise** by the owner. Upon receipt of a written suspension of work directive the contractor should review the directive to make certain that they understand exactly what work the owner wants suspended. If the suspension order is **not** clear or detailed, the contractor should meet with the owner and work out the details of what work is to be suspended. Once a common understanding on the work to be suspended is achieved, the contractor should prepare a plan on how to proceed, including all affected subcontractors, vendors and suppliers, as appropriate. When the suspension plan is put into effect, the contractor and the affected subcontractors, suppliers, and vendors must start a process of tracking all added costs resulting from the suspension directive, including damage mitigation activity costs, and carefully and thoroughly track the impact of the suspension directive on all impacted activities on the schedule.

Recoverable Damages

As noted previously, recovery of damages under Suspension of Work clauses is entirely dependent upon the language of the contract. Unlike damage recovery under other clauses, such as the Changes or Differing Site Conditions clauses, damages under the Suspension clause are frequently **limited** in various ways.

- **Time Extension and Delay Damages** – Even when an owner suspends work there is **no** guarantee that the contractor is entitled to a time extension, either excusable or compensable. Especially in cases where the owner suspends **only** a portion of the work, if the contract requires documentation of critical path delay; contains a Joint Ownership of Float clause; or has a clause defining concurrent delay as inexcusable delay (i.e., contractor caused delay) the contractor may **not** be entitled to a time extension. If the contractor fails to demonstrate project or critical path delay entitling them to a time extension they are, of course, **not** entitled to delay damages.

- **Impact Damages** – Regardless of whether the contractor can prove critical path delay, the contractor **may** be entitled to recover impact damages. Impact damages are generally discussed as added expenses due to the indirect results of a changed

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condition, delay, suspension of work, or changes that are a consequence of the initial event.¹⁷ Some examples of potential impact damages resulting from suspension directives include:

- Lost labor productivity;
 - Idle labor and equipment;
 - Material escalation costs – **provided that** the suspension directive caused the contractor to delay material procurement actions **and** the costs of the material increased during the suspension period;¹⁸
 - Increased costs of winter construction work - **provided that** the contractor can demonstrate that, **but for the owner’s suspension directive**, the suspended work would have been completed **prior to** the winter period;¹⁹ and,
 - Increased wage rate costs - **provided that** the contractor can demonstrate that, **but for the owner’s suspension directive**, the suspended work would have been completed **prior to** the wage rate increase.²⁰
- **Field Office Overhead (FOOH) Costs – Provided that** the contractor can demonstrate that the suspension directive was the sole proximate cause of the project completion delay, the contractor’s field general conditions costs (e.g., on site project management personnel and site office expenses, etc.) are typically recoverable.
- **Home/Head Office Overhead (HOOH) Costs – Likewise, provided that** the contractor can demonstrate that the suspension directive was the sole proximate cause of the delay to project completion they **may** be able to recover home/head office overhead costs (e.g., corporate management and accounting, human relations costs,

¹⁷ Cost Engineering Terminology, AACE International Recommended Practice No. 10S-90, Rev. October 23, 2013.

¹⁸ The Impact of Delay Damages, Smith & Howard, July, 2014, <https://www.smith-howard.com/the-impact-of-delay-damages/>

¹⁹ See *Owen v. U.S.*, 44 Ct. Cl. 440, 445 (1909); *J.D. Hedin Constr. Co. v. U.S.*, 347 F.2d 235, 256 (Ct. Cl. 1965); *American Line Builders, Inc. v. U.S.*, 26 Cl. Ct. 1155, 1211–12 (1992); *Youngdale & Sons Constr. Co. v. U.S.*, 27 Fed. Cl. 516, 547, 557 (1993); *Kit-San-Azusa, J.V. v. U.S.*, 32 Fed. Cl. 6478, 656 (1995).

²⁰ See *Luria Bros. & Co. v. U.S.*, 177 Ct. Cl. at 743, 746 (1966); *J.D. Hedin Constr. Co. v. U.S.*, 347 F.2d at 256 (1965); *Wilner v. U.S.*, 24 F.3d at 1401 (1994); *Servidone Constr. Corp. v. U.S.*, 931 F.2d at 861.

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home office equipment and rent, etc.). However, if the contractor is performing work under a direct Federal contract, they are subject to the “unabsorbed home office overhead recovery” tests. The unabsorbed home office overhead tests are summarized below.²¹

- Was the owner caused suspension **not** concurrent with any other delay caused by some other event?
 - Can the contractor demonstrate a suspension of work **on much, if not all** of the work of the project?
 - Did the owner issue a suspension directive **expressly** putting the contractor on **standby**?
 - Can the contractor document that, as a sole result of the suspension of work, they incurred **added** overhead costs?
 - If **not**, can the contractor document that the owner caused a substantial delay of an **indefinite duration** during which they could **not** bill substantial amounts of work on the contract?
 - Can the contractor demonstrate that it was **not** practical for them to take on replacement work during the delay period?
- **Overhead Markup Costs** – To the extent that the contractor can demonstrate project delay, typically the contractor can recover delay damages; extended FOOH and, perhaps, extended HOOH. Since these costs are, in and of themselves, overhead costs then the contractor is most likely **not** entitled to add overhead markup to overhead costs. However, impact damage costs are generally subject to overhead markup, unless specifically precluded by the terms of the contract.
- **Profit & Bond Costs** – Unless the contract, like Federal contracts, expressly disallow profit on suspension costs, then contractors probably can recover profit on suspension costs. And, on projects with Performance and Payment Bond requirements, bond

²¹ Matt McGinn, *Suspension of Work*, Contract Administration, December 16, 2008.

costs should legitimately be added to the agreed upon costs caused by a suspension directive.

Limitations on Recoverable Damages

- **Unreasonable Delays** – The first challenge a contractor must overcome in prosecuting a suspension of work claim is to demonstrate that the owner action or lack of action constituted an “unreasonable delay”. Many Suspension of Work clauses include limiting language.

“If the performance of all or any part of the work is, **for an unreasonable period of time**, suspended, delayed or interrupted...”²²

Cibinic, Nash and Nagle commented on this requirement in the following manner.

“Recovery of costs under the Suspension of Work ... clause is granted only for delays that are unreasonable in duration. This limitation of recovery to unreasonable delays is accomplished by determining whether the delay is the result of government fault or was incurred pursuant to a contractual right of the government. If fault is found, the courts and boards generally hold that the entire period of the delay is unreasonable, whereas in the case of delay dues to exercise of a contractual right, the contractor is compensated for only the unreasonable portion of the delay.”²³

For example, if the contract stipulates that the owner has 30 days in which to review and respond to contractor submittals and the owner takes 38 days, the contractually specified 30 days are “reasonable delays” and the contractor is **not** entitled to a time extension. The remaining 8 days are “unreasonable delays” and the contractor **may**

²² FAR §52.242-14(b), Suspension of Work.

²³ John Cibinic, Jr., Ralph C. Nash, Jr. and James F. Nagle, Administration of Government Contracts, 4th Edition, The George Washington University National Law Center, Wolters Kluwer Law & Business, Washington, D.C., 2006.

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be entitled to a time extension, **provided that** they can meet the time extension requirements of the contract. “Reasonable” versus “unreasonable” delays are situation specific and “A determination of what amount of time is reasonable highly depends on the specific facts and circumstances of each situation.”²⁴

- **Impact to Critical Path** – Many contracts require that construction schedules be created by the contractor and submitted to the owner for review and acceptance. Often, modern contract documents require that schedules be prepared using the Critical Path Method (CPM). **If** the contract requires CPM scheduling, then most such schedule specifications require that the contractor demonstrate critical path delay to obtain a time extension and time related damages.²⁵ Federal courts have weighed in on this issue ruling that when establishing the extent of owner caused delay to project completion, the contractor bears the burden of proving critical path delays.²⁶ Courts have also noted that delays impacting non-critical path activities do **not** delay the project and thus, do **not** warrant recovery of compensable delay.²⁷ In *Hoffman Construction Company of Oregon v. United States*²⁸ the Court ruled –

“[W]hen the contract utilizes CPM scheduling, the contractor **must prove that the critical path of the work was prolonged** in order to prove a delay in project completion.” (Emphasis provided)

²⁴ Suspension of Work Clause – Unreasonable Delays Are Compensable, Excell Consulting, December 18, 2014, <https://excellconsulting.net/suspension-of-work-clause/>

²⁵ See, for example, United Facilities Guide Specification, Section 01 32 01.00 10, Part 3.3, Time Extensions (April 2015) and Minnesota Department of Transportation Standard Specifications for Construction, Division 1, Section 1806.1(2) (2014).

²⁶ See *Kinetic Builders, Inc. v. Peters*, 226 F.3d, 1307, 1317 (Fed. Cir. 2000); *Essex Electro. Engrs., Inc. V. Danzig*, 224 F.3d at 1295-6 (2000); *Sauer, Inc. v. Danzig*, 224 F.3d 1340, 1345-6 (Fed. Cir. 2000); *Wilner v. U.S.*, 24 F.3d at 1399 (1991); *G.M. Shupe, Inc. v. U.S.*, Cl. Ct. 662, 728 (1984); *PCL Constr. Servs., Inc. v. U.S.*, 47 Fed. Cl. 745, 801 (2000).

²⁷ See *CEMS, Inc. v. U.S.*, 59 Fed. Cl. 168, 230 (2003); *PCL Constr. Servs., Inc. v. U.S.*, 47 Fed. Cl. 802 804 (2000).

²⁸ 40 Fed. Cl. 184, 197-198 (1998), *aff'd in part, rev'd in part on other grounds*, 178 F.3d 1313 (Fed. Cir. 1999).

Additionally, Courts have determined that because a project's critical path changes over time, critical path schedule **updates** are necessary and must be analyzed.²⁹ Finally, in *Blinderman Constr. Co. v. U.S.*³⁰ the Court noted that accurate schedule updates generated during the life of the project are better tools for delay analysis than baseline schedules.

- **Avoidable Costs** – Some Suspension of Work clauses specifically **preclude** recovery of “avoidable costs” when pricing damages due to suspension directives. In the author's experience the term “avoidable costs” is almost never defined in the contract documents, thus leading to many arguments during negotiations concerning damages owed due to a suspension of work order. It is author's experience that the issue of “avoidable costs” is within the eye of the beholder. Having argued this issue on both the contractor's and the owner's side, for example, it is **not** at all uncommon for an owner to assert that all rented or leased construction equipment should have been demobilized from the site immediately upon receipt of the suspension directive. If the owner has **not** reviewed the terms of the rental or lease agreement, they rarely understand the costs of making this decision. The issue is further exacerbated when the owner has suspended all or some of the work but has **not** or **cannot** tell the contractor how long the suspension is likely to remain in effect. For example, the author was involved in a suspension of work claim where the owner's initial suspension directive estimated the suspension period to be only 2 or 3 weeks. The suspension directive was extended multiple times, for another week or so, ultimately resulting in a suspension of work of nearly a year. When the suspension claim was filed by the contractor, the owner argued that the contractor should have demobilized all equipment and their onsite office immediately upon receipt of the suspension directive. Under these circumstances, was maintaining the equipment onsite really an “avoidable cost”?

²⁹ See *Sterling Millwrights, Inc. v. U.S.*, 26 Cl. Ct. 49, 75 (1992); *Fortec Constructors v. U.S.*, 8 Cl. Ct. 490, 505 (1985), *aff'd*, 804 F.2d 141, (Fed. Cir. 1986)

³⁰ 39 Fed. Cl. 529 (1997).

- **Consequential Damages Clauses** – Some contracts, the AIA A201, General Conditions of the Contract for Construction (2007 edition) for example, appear to provide full payment for owner issued suspension directives that impact the end date of the project.

“§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 suspension, delay or interruption...”

At first reading, this clause appears to be straightforward and understandable. However, Article §15.1.6, Claims for Consequential Damages, substantially reduces the contractor’s recovery of time related damages in the following manner.

“The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes...

2. damages incurred by the Contractor for **principal office expenses** including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from Work.”

- **No Damage for Delay Clauses** – Even if contractors can prove that owner issued suspension directives impacted the critical path of the project and caused the end date of the work to be later than required, they still may be **unable** to recover any delay damages. If the contract contains a No Damage for Delay (NDFD) clause and the work is performed in a jurisdiction where such clauses are legally enforceable, the contractor may find that its recovery is limited to time only, but **no** delay damages

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(i.e., an excusable, non-compensable delay). Three examples of NDFD clauses are set forth below.

“Neither the Owner or Contractor shall be entitled for damages for any delay caused by the Owner in the performance of work under the contract. In such event, however, the Owner shall grant the Contractor an extension of time.”³¹

“No payment or compensation of any kind shall be made to the contractor for damages because of any hindrance or delay from any cause in the progress of work, whether hindrance or delay be avoidable or unavoidable. Any finding by any administrative officer, arbitrator, and/or judge that a delay was caused either wholly or in part by actions of someone other than the contractor shall only entitle the contractor to equivalent extensions of time.”³²

“No claims for increased costs, charges, expenses or damages of any kind shall be made by the Contractor against the Owner for any delays or hindrances from any cause whatsoever; provided that the Owner, in the Owner’s discretion, may compensate the Contractor for any said delays by extending the time for completion of the Work as specified in the Contract.”³³

All NDFD clauses purport to transfer the risk of delay damages to the contractor and exculpate the owner from paying such damages, even if the owner was the sole proximate cause of the delay. There are several exceptions to the enforceability of NDFD clauses. The exceptions are summarized below.

³¹ Edward Kinberg and Michael Cook, A Study of the “No Damage for Delay” Clause (Technical Publication 108), M.E. Rinker, Sr. School of Building Construction, University of Florida, November 2000.

³² Ibid.

³³ *Travelers Cas. & Sur. Co. v. Dormitory Auth. – State of New York*, 735 F. Supp. 2d 42 (S.D.N.Y. 2010)

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- The clause must be unambiguous to be enforceable;
- The owner must **not** have waived the clause by previous actions;
- The delay was **not** within the contemplation of the parties when the contract was executed;
- The delay amounted to contract abandonment;
- The delay event was **not** included in or covered by the clause;
- The delay was caused by fraud, bad faith of the owner;
- The delay was caused by owner active interference; or,
- The clause is barred by public policy or statute.

These exceptions to an NDFD clause are narrowly applied and subject to the law of the jurisdiction that governs the contract.³⁴ Thus, a contractor faced with such a clause is well advised to confer with their legal counsel promptly when a suspension directive is likely to cause a project delay especially if their contract has an NDFD clause.

- **Work Would Have Been Suspended, Delayed or Interrupted By Any Other Cause Or Provided For Or Excluded Under Another Provision Of The Contract** – Another limitation on recovery of damages under Suspension of Work clauses is often embedded in both government and private contracts with language such as the following.

“...no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is

³⁴ For a more thorough review of these exceptions, see Eugene Polyak, Who Pays for Delay? How Enforceable is a No Damage for Delay Clause?, Smith Currie, January 31, 2017. See also Jon M. Wickwire, Thomas J. Driscoll, Stephen B. Hurlbut and Scot B. Hillman, Construction Scheduling: Preparation, Liability and Claims, 2nd Edition, §7.09, *Exceptions to Enforcement of No Damages for Delay Clauses*, Aspen Publishers, Inc., A Wolters Kluwer company, New York, 2003.

provided for or excluded under any other term or condition of this contract.”³⁵

Another standard contract form used widely throughout the U.S. includes the following language.

“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.”³⁶

Read carefully, either of these clauses can be used to preclude any recovery of time or time related damages due to concurrent delay (“...any other cause...” or “...another cause...”) or to reinforce a No Damage for Delay clause.

- **No Profit Allowed** – Federal government contracts specifically **preclude** recovery of profit on any delay damages arising from a suspension directive with the following language.

“...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, and the contract modified in writing accordingly.”³⁷

- **Only The Original Eichleay Formula Allowed for HOOH Recovery** – There are at least eight different formulas for calculating extended or unabsorbed home office

³⁵ 52 CFR §52.242-14, Suspension of Work (April 1984).

³⁶ AIA Document A201 – General Conditions of the Contract for Construction, Article 14.3.2, Suspension by the Owner for Convenience (2007).

³⁷ 52 CFR §52.242-14, Suspension of Work (April 1984).

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overhead employed in North America. Some years ago, the author published a paper that took a single case that had 235 days of compensable delay and ran it through each of the formulas. The delay damages owed varied widely from a low of \$113,796 to a high of \$4,300,030.³⁸ However, the Federal courts have determined in *Wickham Contracting Company v. Fischer*³⁹ that the **original Eichleay** formula⁴⁰ is “...the exclusive means available for calculating unabsorbed home office overhead” costs. In the context of the paper referenced above, the original *Eichleay* formula in the case study resulted in recovery of \$2,092,675 (some \$2,207,355 **below** the highest recovery calculated in the case study paper). In addition to mandating use of the original *Eichleay* formula to calculate recovery of unabsorbed home office overhead costs, there are several practical problems associated with the use of *Eichleay* from the perspective of accountants, owners and contractors. Also, Federal courts and some State courts have proscribed when and under what circumstances the *Eichleay* formula can be employed including the following. The contractor –

- a. Must experience owner caused (compensable) delay;
- b. Of indefinite (unknown) duration;
- c. Suspending most, if not all, of the project work;
- d. Resulting in a substantial disruption or decrease in the income stream from the project;
- e. Remain ready to resume contract work immediately; and,
- f. Is unable to secure comparable replacement work during the impacted period in order to replace the reduced cash flow from this project.⁴¹

³⁸ James G. Zack, Jr., *Calculation and Recovery of Home Office Overhead*, 2001 AACE International Transactions, AACE International, Morgantown, WV.

³⁹ 12 F.3d 1574 (Fed. Cir. 1994).

⁴⁰ Aside from the original *Eichleay* formula there are two other variations of the formula.

⁴¹ See James G. Zack, Jr. and David W. Halligan, Practical Problems With Pricing Delay Using Eichleay, Navigant Construction Forum™, 2010; Reginald M. Jones, *Recovering Extended Home Office Overhead: What is the State of Eichleay?*, Procurement Lawyer, Vol. 40, No. 1, Fall, 2004; and Howrey LLP, *Unabsorbed Home Office Overhead – Making a Prima Facie Case for Entitlement to Recovery Under Eichleay*, Construction Weblinks®, August 28, 2006.

Thus, the home office overhead recovery formula mandated by Federal courts results in recovery of lower delay damages than some other formulas and imposes several rules for when the formula can be used. Either will impact the recovery of delay damages brought about by owner issued suspension directives.

Court Decisions Impacting Recovery of Damages Due to Suspensions of Work

There have been several court decisions over the past two decades that impact – positively or negatively – the recovery of damages under the Suspension of Work clause. The following discusses five court decisions and their impact on contractor recovery of damages due to owner issued suspension of work orders.

➤ *Altmayer v. Johnson* – 79 F.3d 1129 (Fed. Circ. 1996)

This case discussed and clarified the **standby requirement** necessary to justify recovery of home office overhead due to an owner’s suspension of work directive. The U.S. Court of Appeals for the Federal Circuit took up this case up on appeal from the General Services Administration (GSA) Board of Contract Appeals. Altmayer leased a building to GSA for a ten year period. However, for the lease to start Altmayer had to build out or renovate the building’s interior in accordance to government issued specifications. Altmayer hired Haas to perform the renovation work. Haas provided finish schedules for wood trim and carpeting to GSA for their approval and included the procurement activities for both in their CPM schedule. The government ultimately approved the submittals but the delay in approval caused a delay to completion of several months. Altmayer filed a delay claim on behalf of Haas seeking recovery of their home office overhead which was denied by GSA. In part, GSA alleged that Haas did not meet the **standby requirement** and thus could **not** recover *Eichleay* damages. Relying on previous cases the Court defined “standby” in the following manner.

“...the uncertainty of contract duration occasioned by government delay or disruption ... during which the contractor is required to remain ready to

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perform... and [the government's] procrastination and nonresponsiveness made the length of the performance period extremely uncertain..."

The Court also noted that "The standby test does **not** require that the contractor's workforce be idle" and commented that "...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..." This decision is generally **favorable** for contractors.

➤ ***P.J. Dick v. Principi*** – 324 F.3d 1364 (Fed. Circ. 2003)

P.J. Dick (Dick) contracted with the Department of Veterans Affairs (VA) for an addition to a VA medical center. During the course of the work, the VA issued more than 400 changes causing project delay. However, the VA issued only 107 days of time extensions. At the end of the project Dick filed a claim for 260 days of compensable delay seeking recovery of FOOH and HOOH. The claim was denied by the VA. Dick appealed the denial to the VA Board of Contract Appeals. The Board granted a time extension of 260 days but concluded that only 60 of the delay days resulted from government ordered suspensions. Upon reconsideration the Board increased the suspension days to 65 days. Dick appealed the decision to the U.S. Court of Appeals for the Federal Circuit. The Appellate Court focused, to large extent, on the **standby requirement** when considering time related damage due to suspensions of work. The Court determined Dick was **not** placed on standby "...because PJD was able to progress other parts of the work during the time periods it alleged it was suspended." Additional conclusions reached by the Appellate Court follow.

"...where the government suspends all work on the contract, but tells the contractor work will begin again on a date certain, the contractor **cannot** be on standby..."

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“...where the government gives the contractor a reasonable amount of time to remobilize its work force once the suspension is lifted, the contractor **cannot** be on standby...”

“...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...”

As a result of *P.J. Dick* some commentators have suggested that it **may be very difficult to meet the standby requirement** as it is unlikely that a Contracting Officer will issue a suspension order containing a requirement that the contractor be ready to immediately resume full scale work with **no remobilization period**.⁴² This decision is **not favorable** for contractors.

➤ *Nicon, Inc. v. U.S.* – 331 F.3d 878 (Fed. Circ. 2003)

Nicon adds yet another hurdle to recovery of suspension costs. The Corps of Engineers (Corps) bid and awarded a contract to Nicon. A disappointed bidder filed a bid protest and the Corps suspended action on the project. The Corps instructed Nicon to “...take no actions as to the preparation and forwarding of submittals...” Nicon notified the Corps that they would “...cease any further mobilization efforts associated with the project.” The bid protest was dismissed some 107 days after the contract was awarded. Despite Nicon’s repeated requests that the Notice to Proceed (NTP) be issued, the Corps **terminated the contract for convenience** 181 days after the bid protest was dismissed without ever issuing the NTP. The period in dispute in this case was, therefore, 288 days. Nicon submitted a Termination Settlement Proposal that included direct costs, overhead and profit **plus** unabsorbed HOOH for 288 days but used a **modified version** of the

⁴² Ralph C. Nash and John Cibinic, *Postscript: Unabsorbed Overhead and the “Eichleay” Formula*, 17 No. 6, *Nash & Cibinic Report* 33 (June 2003).

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Eichleay formula. The Corps awarded the direct costs, overhead and profit but denied the HOOH. Nikon appealed this decision to the U.S. Court of Claims. The court upheld the denial of Nikon's unabsorbed home office overhead claim "Because Nikon seeks unabsorbed overhead under a formula that is **not** recognized by the Federal circuit, its claim must be rejected."⁴³ Nikon appealed to the United States Court of Appeals for the Federal Circuit. This 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 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.**"

This decision is **not favorable** for contractors.

➤ *The Redland Company v. U.S.* – Ct. of Fed Claims No. 08-606C (April 7, 2011)

The Air Force issued a contract to The Redland Company to resurface an aircraft parking area on a base in October 2000. On December 1, 2000 the Contracting Officer issued the NTP. However, **on the very the same day** the Contracting Officer issued an order suspending **all** work on the project until further notice. The Air Force ultimately lifted the suspension order on October 18, 2004 (**nearly four years later**), directed that work begin on October 20th, and be completed by December 19, 2004 – a period of 60 days. The Redland Company began work as directed but was unable, for a variety of reasons, to complete the work until January 11, 2006 – some 449 days after the suspension of work

⁴³ The *Eichleay* formula relies upon total contract billings, total company billings during the contract's period of performance and total company overhead during the same period. Since work never started Nikon could **not** provide these numbers so they attempted to create an alternative formula to address their unique situation.

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order was lifted, far beyond the 60 day period of completion earlier directed. The Contracting Officer granted a time extension through January 11, 2006, did **not** assess any liquidated damages but also did **not** grant any compensation for the additional time for the initial four year suspension of work or the subsequent project delays. The contractor filed claims for additional compensation and requested that the Contracting Officer issue a final decision approving or denying each claim within the time limit contained in the Contract Disputes Act (CDA). The Contracting Officer neither issued a final decision nor did he notify the contractor when such a decision would be issued. The contractor filed suit in the Court of Federal Claims. The case involved nine distinct claims. However, of interest for this paper is Claim 1 – Unabsorbed Home Office Overhead. The contractor sought recovery of their unabsorbed home office overhead for the period between December 1, 2000 and October 18, 2004 – nearly four years – and calculated the damages based on the *Eichleay* formula. The Court openly acknowledged that the Air Force issued the NTP and suspended all work on the same day. The Court likewise acknowledged that the suspension extended until October 18, 2004. Citing *P.J. Dick, Inc., Nikon, Inc.* and *Altmayer* the Court of claims noted that to establish entitlement to *Eichleay* damages a contractor must prove three elements:

1. Government caused delay or suspension of work of an uncertain duration;
2. The suspension or delay must extend the original time of performance or that the contractor finished on time but still incurred unabsorbed overhead costs because it planned to finish earlier; and,
3. The government required the contractor to “remain on standby during the period of suspension, waiting to begin work immediately or on short notice once the suspension was lifted”.

The Court, citing *Nikon*, stressed that *Eichleay* damages are only available when the government caused delay occurs **after performance has begun**, thereby extending the period of performance. The Court analyzed Redland’s claim and determined while the government had issued a suspension order of uncertain duration which extended the original time of performance, Redland (1) had **not** started work on the project and (2) had **not** been required by the Contracting Officer to “remain on standby” until the suspension

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order was removed. Thus, despite a four year suspension of work, the contractor was denied any recovery of unabsorbed home office overhead using the *Eichleay* formula and was denied the right to recover unabsorbed home office overhead using an alternative method of calculation. Critical to the Courts denial recovery was fact that the suspension directive was **silent** as to whether the contractor was to “remain on standby” while the work was suspended.

At first reading, it appears that Courts do **not** always understand that “work” begins before the first dirt is moved. Providing bonds and insurance; arranging and finalizing subcontract, supplier, and vendor agreements; planning the work; preparing and submitting the bid breakdown; etc. all are “work” even though **no** physical work in the field has commenced. Additionally, once a contract is awarded a contractor’s bonding capacity is impaired to the extent of the initial contract value. During the four years Redland was suspended, their bond and their insurance were in full force and effect. Assuming Redland was a small contractor this bond impairment may have prevented them from bidding on some other projects as they may **not** have had sufficient bonding capacity to cover new projects. All are real costs incurred by contractors. Notwithstanding *Redlands*, contractors **may** be able to recover these damages as “impact damages” or, if the contract is terminated for convenience, following *Nicon*, the contractor may be able to recover such costs through their Convenience Termination Proposal. This decision certainly is **not favorable** for contractors.

➤ *H.J. Lyness Construction, Inc. v. U.S.* – 121 Fed Cl 287 (Fed. Cl. May 15, 2015)

GSA contracted with H.J. Lyness to renovate a federal building. During performance of the work, GSA had issues with the fire evacuation plan. Unable to resolve these issues, GSA terminated Lyness for convenience. Lyness and GSA could **not** reach agreement on the convenience termination settlement proposal. Lyness filed suit in the Court of Federal Claims. As the government had already admitted liability the only issue before the court was the damages owed Lyness. As part of the claimed damages Lyness sought recovery of unabsorbed home office overhead. Lyness asserted a specially crafted formula for calculating unabsorbed home office overhead for this case. The court denied

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the use of this formula and reaffirmed that only the original *Eichleay* formula can be used to calculate unabsorbed home office overhead costs. Additionally, the court reiterated the basic three requirements for recovery of such damages.

1. Government caused delay or suspension of uncertain duration;
2. The government caused delay or suspension extended the original time of performance of the work or that, even though the contract was completed within the required time, the contractor incurred additional costs as they were prevented from completing earlier than required; and,
3. The contractor must have been instructed to remain “on standby” and was therefore unable to take on other work during the delay period.

Following the line of thought expressed in *The Redland Company, Inc.* the Court **denied** recovery of any unabsorbed home office overhead damages on the basis that contractor could **not** provide evidence that it was required to “remain on standby”. Again, this decision is **not favorable** for contractors.

Current Tests for Recovery of Suspension of Work Damages

Based on these Court cases if the contractor seeks to recover damages due to either a directed or a constructive suspension of work, the contractor must demonstrate that –

1. Work on the project had commenced;
2. The suspension of work was directed or otherwise caused by the owner;
3. The delay due to the suspension was for an “unreasonable” period of time;
4. The suspension of work was for an uncertain duration;
5. The suspension of work extended the original or adjusted time of performance of the work or planned early completion of the work;
6. The suspension of work was the sole proximate cause of the project delay;
7. The contractor’s work would **not** have been delayed, suspended or interrupted by any other cause;

8. Recovery of the suspension damages is **not** provided for or excluded under any other provision of the contract;
9. The contractor was instructed to remain “on standby” ready to return to work promptly upon cessation of the suspension;
10. The suspension damaged the contractor by causing additional costs as they were prevented from completing on time or earlier than required, resulting in a substantial disruption or decrease in the stream of income from the project;
11. The contractor was **unable** to take on other work during the suspension period; and,
12. The extended or unabsorbed home office overhead costs have been calculated using the original *Eichleay* formula, **unless** the contractor is pursuing recovery of these damages in a jurisdiction that utilizes another formula for these purposes.⁴⁴

How Can Contractors Protect Their Right to Collect Damages?

The lesson for contractors – In the event an owner or their authorized representative suspends all or part of the work on a project but does **not** state that the contractor “...**must remain on standby ready to resume work promptly...**” then recovery of extended or unabsorbed home office overhead is seriously in doubt. If a situation such as this arises, the author recommends that contractors take the following course of action.

- **Review the suspension directive carefully** – The contractor **must** understand the **exact** scope of work the owner wants suspended. If the suspension directive is unclear or if the contractor does **not** accurately understand what work is to be suspended they should meet with the owner promptly upon receipt of the directive to obtain a full understanding of the owner’s direction. Failure to do so **may** result in the contractor suspending more work than the owner intended. Should this happen, the contractor is likely to be faced with arguments concerning self-imposed delay, concurrent delay, self-imposed damages and/or unintended impacts.

⁴⁴ For example, the *Manshul* Formula crafted and used by New York State Courts as an alternative to the *Eichleay* Formula.

- **Obtain the suspension of work order in writing from the owner or their designated representative** – Upon receipt of a **verbal directive** to suspend some or all of the work the contractor should, the same date, (1) write to the owner specifically asking them to **confirm** the verbal directive in writing;⁴⁵ (2) ask the owner for the their estimate the suspension period, if known; and, (3) ask if the owner wants them to “...remain on standby...”? If the answer is “**yes**” then home office overhead damages may be recoverable. If the answer is “**no**” then the contractor is alerted to the situation and should seek other ways to reduce their damages. If the owner does **not** respond to this written request for guidance concerning standby within a day or if the owner confirms that the contractor is **not** required to remain on standby, then the contractor should provide written notice to the owner that they intend to remove **all** labor and equipment from the site within the next few days and intends to charge the cost of demobilization and remobilization of these resources, all impact costs of labor replacement, and all damage mitigation costs to the owner when the suspension of work lifted and the return to work order given.

- **Prepare two plans for the suspension period.** If the owner advises that they do **not** know how long the suspension period will last or if they advise that the suspension will last several week or longer, then the contractor should prepare **both** of the following plans.⁴⁶ It is the author’s experience that owners do **not** often realize or think about the cost of hot or cold standby and are both surprised and reluctant to settle such damages after the fact arguing the contractor’s “failure to mitigate damages”. To avoid this situation, it is recommended that the contractor prepare the two plans outlined below.

⁴⁵ In the author’s experience, the authority to suspend work is a decision **not** typically delegated to anyone below the level of project manager. Unless the directive arises from an “emergency”, if a project engineer, field engineer, inspector, etc. directs a suspension of work contractors are well advised to confirm the direction in writing from the responsible individual named in the contract.

⁴⁶ If the owner advises that the suspension is likely to last only a few days or a couple of weeks, and the contractor has sufficient work to perform on the site that can serve as a “work around” to keep the crews and equipment gainfully employed, then these plans **may not** be needed. If this is the case, however, contractors are well advised to notify the owner in writing of the details and estimated cost of the “work arounds” they intend to employ in any event.

- **Hot Standby** – This plan should discuss the contractor’s proposed plan in **narrative form** and include a **detailed estimate** of the costs to implement it. The contractor should base the plan on the available work **not** suspended, the details of the work to be performed during the suspension period, the potential cost of continuing the work **not** so suspended (including remobilization of crews and equipment from the suspended work to other work; labor productivity impacts of working piecemeal during the suspension period; the cost of remobilization of crews and equipment back to the planned work when the suspension is lifted; etc.) Additionally, the hot standby plan should include the costs that affected subcontractors, suppliers, and vendors will incur as a result of the implementation of the plan. As well, the contractor should include projected impact costs such as lost productivity, idle labor and equipment, material escalation costs, increased costs of performing work in bad weather conditions, cost of wage rate increases, etc. Additionally, overhead, profit and bond costs should be included as well extended FOOH and HOOH to the extent that the suspension order is projected to impact the project’s critical path.
- **Cold Standby** – This plan should include the cost of demobilizing **all** labor and equipment; project site office; storage and security of materials delivered to the site but **not** yet incorporated into the work; equipment storage in offsite facilities; remobilization of labor and equipment when the return to work order is provided; etc. If the contractor anticipates bringing **new** labor crews to the site when the suspension order is lifted the cost of their safety training, learning curve productivity loss, etc. should likewise be included. Similar costs of impacted subcontractors, suppliers and vendors should also be included. As noted above, overhead, profit and bond costs should be included as well extended FOOH and HOOH to the extent that the contractor can demonstrate that the suspension order impacted the project’s critical path.

Once the two plans are complete and priced out, a comparison of the two should be performed to determine the most **cost effective** plan; that is, the plan

that will result in lower damages for the owner. These two plans and the cost effectiveness analysis of the two should be provided in writing to the owner.

- **Meet with owner to discuss two plans** – After the owner has had the opportunity to review both plans the contractor should meet with the owner to discuss the details of each. The object of this meeting to make certain the owner fully understands the details of each plan and, most importantly, understands what costs in each plan are relatively firm costs and which are only estimates and what circumstances may arise that may increase or decrease the estimated costs. It is important that the owner leave the meeting with the full understanding that neither plan has a firm fixed cost and both are only anticipated or approximations of costs. Especially if the suspension is for the convenience of the owner or results from an event that the owner has some degree of control over, the faster the owner resolves the issue or event, the lower the cost impact of both plans will be. A full understanding of the owner’s potential cost exposure may spur the owner to resolve the issue sooner – for both themselves and the contractor.

- **Obtain decision from owner, in writing, on which plan to execute** – Once the above understanding is attained, the contractor should request a decision from the owner, in writing, on which plan the owner wants the contractor to implement. If the owner gives a verbal direction to proceed with a specific plan, obtain the decision in writing. Should the owner **not** agree to provide direction in writing, the contractor should write to the owner to the effect that –

“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 and time impacts in accordance with the approved plan and once the suspension order is removed, will submit a change order proposal for approval.”

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Should it appear that the owner is reluctant to make such a decision the contractor should write to the owner to the effect that –

“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 and time impacts in accordance with the plan and once the suspension order is lifted, will submit a change order proposal for approval.”

- **Follow the plan, track all costs & all schedule impacts** – In either case the contractor needs to track all costs, all schedule impacts, and all other impact costs separately from base scope work. The contractor should instruct all affected subcontractors, suppliers, and vendors to do the same. Once the suspension directive is lifted, all cost and schedule information should be compiled and submitted to the owner in the form of a change order request, in strict accordance with the terms and conditions of the contract documents.

- **Advantages for owners** – If these recommendations are followed by both the owner and the contractor, the owner will have the opportunity to participate in planning those activities that will continue during the suspension period, if any. The owner should be able to mitigate their own damages. Likewise, the owner **may** require submittal of cost and time impact reports during the suspension period similar to the reports required by many owners when issuing a time and materials change order (though on a less frequent basis). Additionally, the owner will be able to track ongoing activities during the suspension period. As a result, there should be fewer “surprises” when the contractor submits the final cost and schedule impacts at the end of the suspension period. Ultimately, it is believed that that owners and contractors will be better positioned to settle suspension claims on the basis of well documented damages (both time and cost) on the jobsite, **not** in the courtroom.

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Conclusion

Recovery of damages under the Suspension of Work clause is **not** a foregone conclusion and has become more problematical than many contractors believe. The court mandated tests for recovery of damages under the Suspension clause are more complicated than in the past. Based on *P.J. Dick*, *Nicon*, and *Altmayer, Eichleay* damages to recover HOOH are harder to recover. It appears unlikely that owners and their representatives will include a requirement that contractors must “**remain on standby**” throughout the suspension period, “**ready to return to work immediately once the suspension is lifted**”. Contractors **must** learn how to protect their rights to recover damages resulting from a suspension directive or face the prospect that, like The Redlands Company, **not** being able to recover such damages even when the owner directs work be suspended.