



# COVID-19 RESOURCE PACKAGE 3.0





Dear MCAA members,

The law firm of Cohen and Seglias has put together the following “COVID-19” 3.0 package for contractor members to use as the situation dictates for protection and to ensure relief — time, money, etc. This packet is for the use of our members. These forms will need to be edited to a given project’s specific circumstances. This information is not an endorsement, simply a resource as we navigate these uncertain times as an industry.

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

Cohen Seglias’ [Construction Contracts & Risk Management Group](#) prepared sample notice letters for use on jobs where construction has or is about to resume under pre-existing contracts. Also included in this packet is sample language to add to change orders and monthly releases. Additionally, with many companies still bidding and entering into contracts for new work, sample language to include in your proposal to help protect you in the event of a future shutdown or new guidelines is also included in this package. When bidding, remember that COVID-19 is not likely going to be considered a force majeure event due because it should be anticipated when developing your proposal. We suggest that the parties on a project discuss the use of an allowance to cover these costs. A letter to that effect is also enclosed. These forms may need to be revised to fit particular circumstances.

Contents of the package include:

Disclaimers _____	3
Subcontractor Has Issue with Working Conditions _____	4
Contractor Has Issue with Working Conditions _____	5
Change Order Request _____	6
COVID-19 Acknowledgment to Provide Subcontractors or Sub-Subcontractors _____	8
Language for Change Orders _____	9
Language for Monthly Releases in Exchange for Payment _____	10
Proposal Language for Private Bids _____	11
Letter to be Sent Prior to Private Bid to Address PPE Allowance _____	12

## Disclaimers

These materials have been prepared for informational purposes only and should not be considered legal advice. The firm makes no representations or warranties regarding any of the information contained herein and you should not rely or act upon any information provided herein without first consulting with an attorney qualified to speak to such information. We disclaim any responsibility and liability in connection with any actions taken, or not taken, based upon the content of these materials.

By providing information to you, we do not intend to create a lawyer-client relationship of any kind and providing this information does not constitute the establishment of such a relationship. The only way that you can become a client is by way of written agreement signed by both parties, unless some type of alternative arrangement is specifically agreed upon between you and a Cohen Seglias attorney. You should not disclose any confidential information to us by e-mail or otherwise until we can determine that we have no conflict of interest in representing you. Communications made before we have expressly agreed to represent you may not be treated as privileged or confidential and may be subject to disclosure to third persons.

Cohen Seglias is a trade name for Cohen Seglias Pallas Greenhall & Furman, a Professional Corporation. Although we do not intend these materials to be advertising for our legal services, it may be considered advertising in some jurisdictions. We seek to comply with all laws and ethical rules of the jurisdictions where our offices are located but cannot guarantee that this material meets local requirements throughout the United States or the world. We do not seek to represent anyone based upon their viewing this material in a jurisdiction where this material does not conform to local requirements. This material is not an offer to perform legal services in any jurisdiction other than those in which we are licensed to practice, as set forth in the individual descriptions of our lawyers on our website. As you know, the recent government shutdown order requires construction to be suspended. [Contractor] has taken the position that our project is exempt and has directed [Subcontractor] to proceed with the Work even though the dangers of coronavirus are unknown and there is a possibility of fines and criminal charges under the shutdown order. While we dispute that the project is exempt, our contract with [Contractor] does not permit us to stop work in the face of a dispute. As such, we are proceeding. Please note that in the event a fine or charge is levied against [Subcontractor] that [Contractor] will be responsible for payment of such fines and for fully indemnifying [Subcontractor] from any damages that arise from your direction to proceed with the Work.

## Subcontractor has Issue with Working Conditions

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

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

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

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

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

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

Please stay safe and healthy,  
[Subcontractor]

## Contractor has Issue with Working Conditions

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

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

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

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

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

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

Please stay safe and healthy,  
[Contractor]

## Change Order Request

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

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

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

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

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

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

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

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

Sincerely,

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## **COVID-19 Acknowledgment to Provide Subcontractors or Sub-Subcontractors**

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



## **Language for Change Orders**

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

## **Language for Monthly Releases in Exchange for Payment**

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

## Proposal Language for Private Bids

NOTICE: THIS PROPOSAL IS CONTINGENT ON A LACK OF FUTURE IMPACT BY THE CURRENT HEALTH CRISIS, FUTURE PANDEMICS AND FURTHER SHUTDOWNS.

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

## Letter to be Sent Prior to Private Bid to Address PPE Allowance

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

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

Thank you for your consideration.