

Coping with COVID-19: Meeting the Challenges for the Construction Industry

APRIL 8, 2020 | 2:00PM-3:00PM

PRESENTERS: TIMOTHY F. HEGARTY, ESQ. | JAMES J. TERRY, ESQ.

Disclaimer: The material provided is for informational purposes only and does not constitute legal advice of Zetlin & De Chiara LLP. © 2020 Zetlin & De Chiara LLP

How to Address the Impact of COVID-19 on Development, Construction and Design



TIMOTHY F. HEGARTY

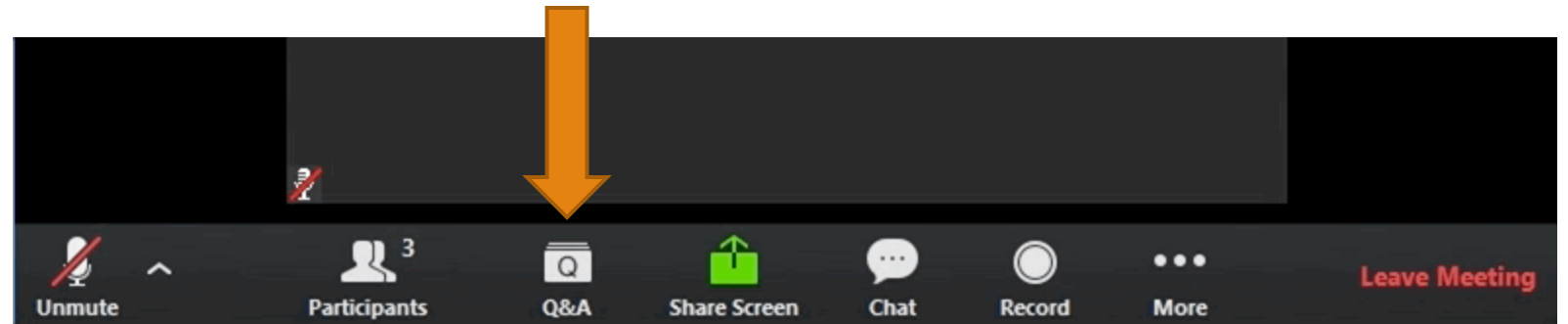


JAMES J. TERRY

QUESTIONS



Submit a question through the
Q&A function on your toolbar



or e-mail questions to
jkosek@zdlaw.com or
ekolenovic@zdlaw.com

WEBINAR TOPICS

- ❑ COVID-19 IMPACT ON CONSTRUCTION
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A101-2017
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A201-2017
- ❑ Contractor Notice/Change Order for COVID-19 DELAY
- ❑ Contract Suspension and Termination Issues
- ❑ Claims/Dispute Resolution
- ❑ Contract Silent: Doctrine of Impossibility
- ❑ Business Interruption Coverage
- ❑ Question and Answer Session

The New York Times

March 25, 2020

The Coronavirus Outbreak | **LIVE** Latest Updates | Should I Wear a Mask? | Maps | Markets | What You Can Do | Newsletter

Virus Rules Let Construction Workers Keep Building Luxury Towers

The laborers, deemed “essential” by New York, work side by side, often sharing portable toilets that rarely have soap or hand sanitizer.

Virus Rules Let Construction Workers Keep Building Luxury Towers

The laborers, deemed “essential” by New York, work side by side, often sharing portable toilets that rarely have soap or hand sanitizer.



By Matthew Haag

March 25, 2020

On the Upper East Side of Manhattan, where, like most New



uesday. Many workers say they cannot
e New York Times

Source:

<https://www.nytimes.com/2020/03/25/nyregion/coronavirus-nyc-construction.html?searchResultPosition=2>



March 2020

NYC
Buildings

March 2020

SERVICE NOTICE

COVID-19 Response: Suspension of all work on non-essential construction and demolition sites

As part of the ongoing COVID-19 public health emergency, in accordance with [New York State Executive Order 202.6](#), [Empire State Development guidance](#) and [New York City Emergency Executive Order 103](#), all work on non-essential construction and demolition sites is suspended for the duration of this state of emergency.

See [Buildings Bulletin 2020-004](#) for guidance on securing suspended construction and demolition sites and [DOB Guidance Document on Enforcement of Essential vs. Nonessential Construction](#). The Department of Buildings will regularly inspect all construction sites to ensure

SERVICE NOTICE

COVID-19 Response: Suspension of all work on non-essential construction and demolition sites

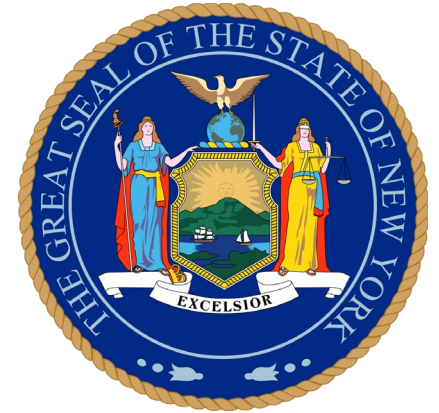
As part of the ongoing COVID-19 public health emergency, in accordance with [New York State Executive Order 202.6](#), [Empire State Development guidance](#) and [New York City Emergency Executive Order 103](#), all work on non-essential construction and demolition sites is suspended for the duration of this state of emergency.

Source: <https://www.nyc.gov/buildings>

Melanie E. La Rocca, Commissioner
build safe | live safe

[nyc.gov/buildings](https://www.nyc.gov/buildings)

Governor Cuomo's Executive Orders



- In accordance with NYS Governor's Executive Order 202.6 and the Guidance on Executive Order 202.6 and subsequent orders published by NYS ESDC Item 9,
 - 1) All non-essential construction must shut down except emergency construction, (e.g. a project necessary to protect health and safety of the occupants, or to continue a project if it would be unsafe to allow to remain undone until it is safe to shut the site).
 - 2) **Essential construction** may continue and includes roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters.
 - 3) For purposes of this section construction work does not include a single worker, who is the sole employee/worker on a job site.

Essential Construction

9. Construction

All non-essential construction must shut down except emergency construction, (e.g. a project necessary to protect health and safety of the occupants, or to continue a project if it would be unsafe to allow to remain undone until it is safe to shut the site).

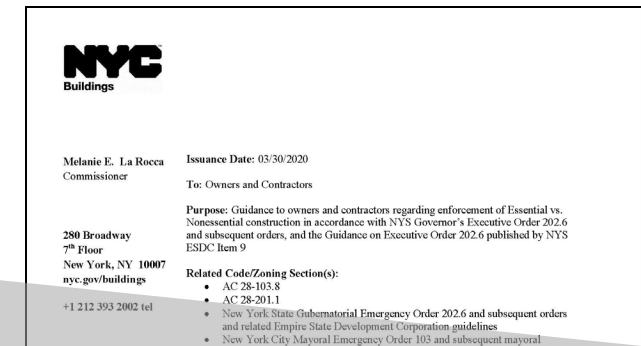
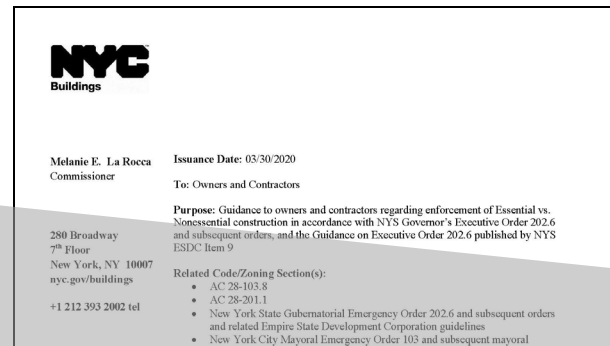
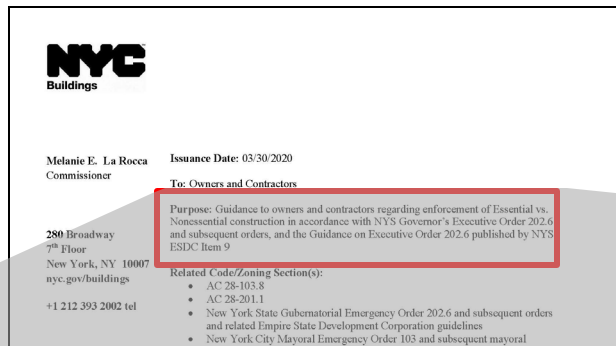
Essential construction may continue and includes roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters. At every site, if essential or emergency non-essential construction, this includes maintaining social distance, including for purposes of elevators/meals/entry and exit. Sites that cannot maintain distance and safety best practices must close and enforcement will be provided by the state in coordination with the city/local governments. This will include fines of up to \$10,000 per violation.

For purposes of this section construction work does not include a single worker, who is the sole employee/worker on a job site.

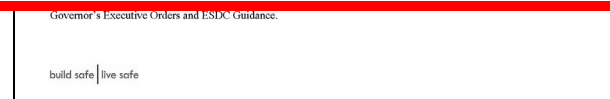


DOB Essential vs. Non-essential and Affordable Housing

March 30, 2020



Purpose: Guidance to owners and contractors regarding enforcement of Essential vs. Nonessential construction in accordance with NYS Governor's Executive Order 202.6 and subsequent orders, and the Guidance on Executive Order 202.6 published by NYS ESDC Item 9



What is Deemed Affordable Housing?

Q2. My affordable housing project is only partially affordable. Can I continue?

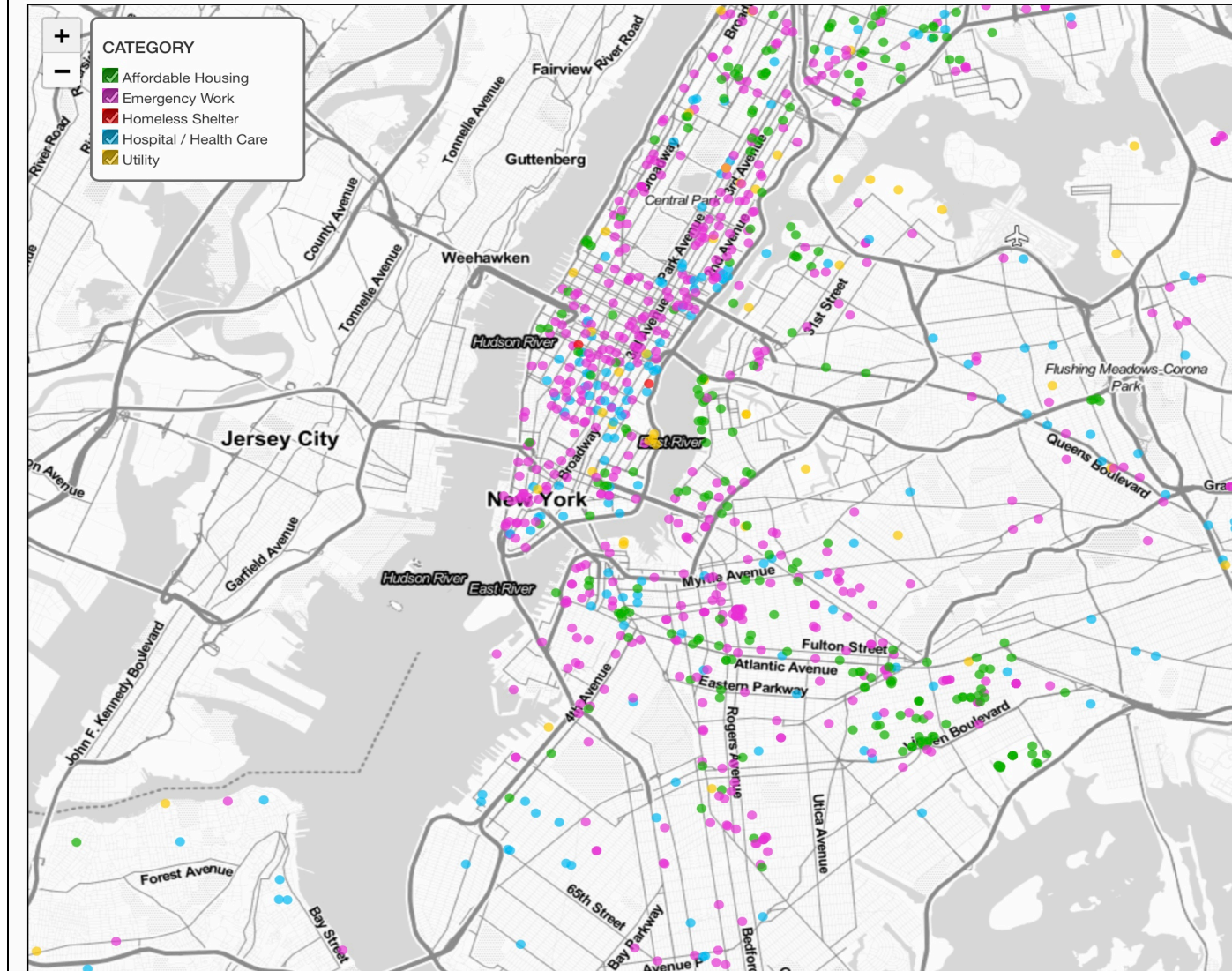
A2. Only affordable housing projects with a minimum of 30% of the units being affordable that are new building construction, or a 100% vacant building conversion can continue during this suspension of non-essential construction.

Source: *New York Department of Building:*

FAQs: Essential and Non-Essential Construction In New York City During the Covid-19 New York State Emergency

April 2020

Essential Active Construction Sites

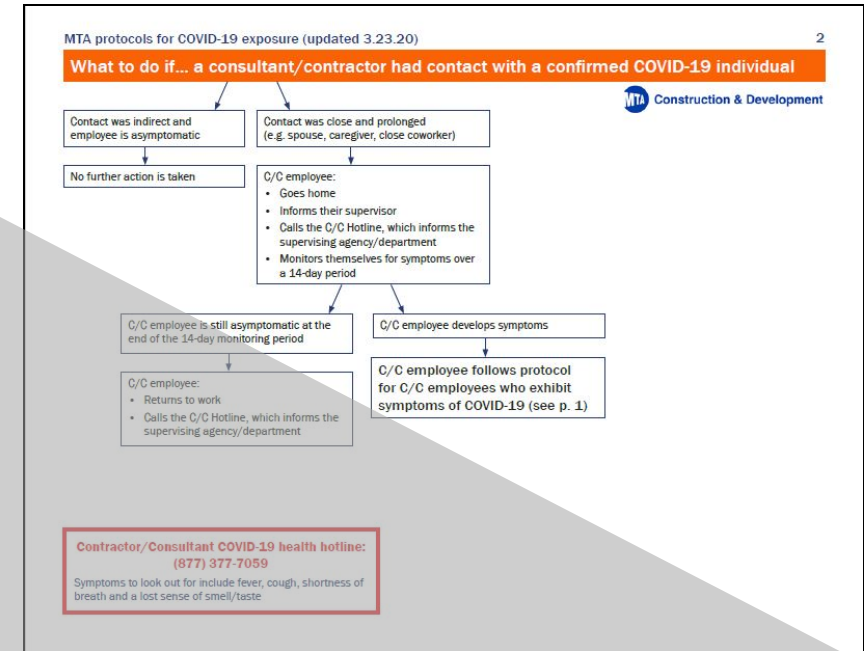
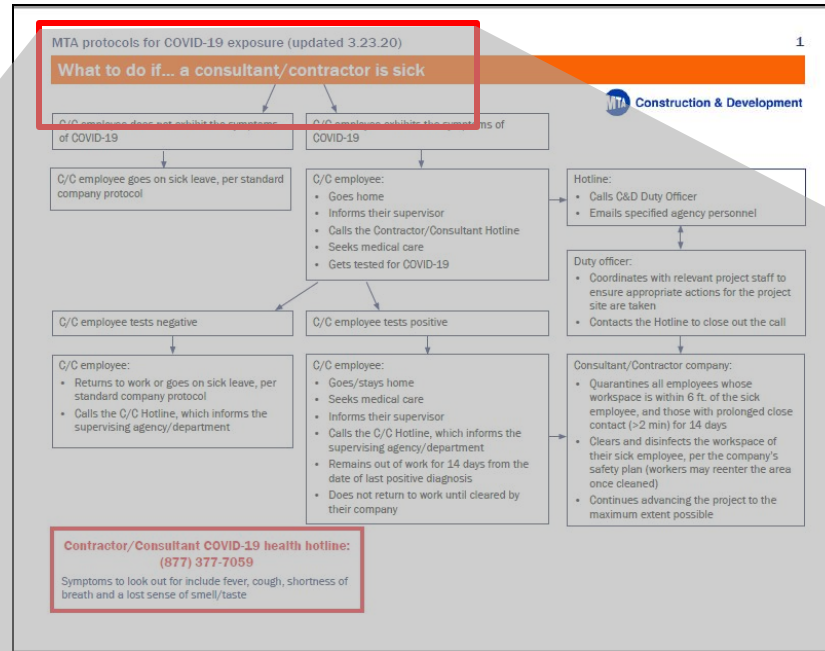


Search:

ADDRESS	BOROUGH
AFFORDABLE HOUSING	
204 AVENUE A	MANHATTAN
601 WEST 29 STREET	Manhattan
211 WEST 28 STREET	Manhattan
127 WEST 43 STREET	Manhattan
214 WEST 72 STREET	Manhattan
232 EAST 54 STREET	Manhattan
1402 YORK AVENUE	Manhattan
1642 YORK AVENUE	Manhattan
128 EAST 112 STREET	Manhattan
152 EAST 116 STREET	Manhattan
23 WEST 119 STREET	Manhattan
406 LENOX AVENUE	Manhattan
424 LENOX AVENUE	Manhattan
426 LENOX AVENUE	MANHATTAN
432 LENOX AVENUE	Manhattan
201 EAST 125 STREET	Manhattan
107 WEST 105TH STREET	Manhattan
981 AMSTERDAM AVENUE	Manhattan
305 WEST 97TH STREET	Manhattan
281 W 118 STREET	Manhattan
410 WEST 128TH STREET	Manhattan
118 W 139 STREET	Manhattan
2794 EIGHTH AVENUE	Manhattan

Showing 1 to 1,255 of 1,255 entries

Source: <https://www1.nyc.gov/assets/buildings/html/essential-active-construction.html>



MTA protocols for COVID-19 exposure (updated 3.23.20)

What to do if... a consultant/contractor is sick

Potential Job Poster for COVID-19 Jobsite

BEST CONSTRUCTION

HEALTH & SAFETY IS OUR TOP PRIORITY

Before you enter the jobsite, please read these questions:
If you answer YES to any of them, please do NOT come to work and contact your supervisor.

 Are you currently feeling sick?

 Did you take your temperature before arriving at work this morning and is your temperature 100.4° F [37.8° C] or more?
If you do not have the means to take your temperature, discuss any current symptoms of fever with your supervisor.

 Are you having any breathing issues?

BEST CONSTRUCTION

HEALTH & SAFETY IS OUR TOP PRIORITY

Before you enter the jobsite, please read these questions:
If you answer YES to any of them, please do NOT come to work and contact your supervisor.

Thank You

WEBINAR TOPICS

- ❑ COVID-19 IMPACT ON CONSTRUCTION
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A101-2017
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A201-2017
- ❑ Contractor Notice/Change Order for COVID-19 DELAY
- ❑ Contract Suspension and Termination Issues
- ❑ Claims/Dispute Resolution
- ❑ Contract Silent: Doctrine of Impossibility
- ❑ Business Interruption Coverage
- ❑ Question and Answer Session



The American Institute of Architects

A101 - 2017

DRAFT AIA® Document A101™ - 2017

*Standard Form of Agreement Between Owner and Contractor
where the basis of payment is a Stipulated Sum*

AGREEMENT made as of the 1st day of June in the year 2019
(In words, indicate day, month and year.)

BETWEEN the Owner:
(Name, legal status, address and other information)

123 Main St Residential Condominium Owner, LLC

and the Contractor:
(Name, legal status, address and other information)

Best Construction Ever, Inc.

for the following Project:
(Name, location and detailed description)

50 Story, Luxury Condominium Building and Parking Garage
located at 123 Main Street,
Manhattan, New York

The Architect:
(Name, legal status, address and other information)

IMANEXPERT Architects, LLP

The Owner and Contractor agree as follows.

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

The parties should complete A101™-2017, Exhibit A, Insurance and Bonds, contemporaneously with this Agreement. AIA Document A201™-2017, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

§ 3.1 Schedule Commencement

ARTICLE 3: DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 3.1 The date of commencement of the Work shall be:

[« **X** »] The date of this Agreement.

§ 3.3.1 Substantial Completion

§ 3.3 Substantial Completion

§ 3.3.1 Subject to adjustments of the Contract Time as provided in the Contract Documents, the Contractor shall achieve Substantial Completion of the entire Work:

[« **X** »] By the following date: December 31, 2020

§ 3.3.2 Portions of the Work

§ 3.3.2 Subject to adjustments of the Contract Time as provided in the Contract Documents, if portions of the Work are to be completed prior to Substantial Completion of the entire Work, the Contractor shall achieve Substantial Completion of such portions by the following dates:

Portion of Work	Substantial Completion Date
<u>Parking Garage</u>	<u>October 30, 2020</u>
<u>Residential Tower</u>	<u>November 30, 2020</u>

§ 4.1 Contract Sum

§ ARTICLE 4 CONTRACT SUM

§ 4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum shall be One Hundred Million Dollars (\$100,000,000.00), subject to additions and deductions as provided in the Contract Documents. The detailed breakdown of the Contract Sum is set forth in Exhibit A (the "Schedule of Values").

§ 4.5 Liquidated Damages

§ 4.5 Liquidated damages, if any:

If Contractor fails to achieve the required Substantial Completion Dates herein for the (1) Parking Garage and (2) Residential Tower as set forth in Section 3.3.2, as may be adjusted pursuant to this Agreement, Contractor shall pay to Owner as liquidated damages an amount equal to the number of days by which the Work relative to the two dates set forth above for Substantial Completion is delayed times Five Thousand Dollars (\$5,000.00) per day (collectively, the “Liquidated Damages”). Notwithstanding the foregoing, the Parties agree that the above Liquidated Damages was a negotiated amount, entered into at arm’s length, between sophisticated parties and that damages would be difficult to determine in the event of a delay. Accordingly, the recovery of such Liquidated Damages are the Owner’s sole and exclusive remedy for delay damages in the event of the Contractor’s unexcused delay in achieving Substantial Completion or any other date. The maximum Liquidated Damages payable by Contractor will be capped at \$775,000.00.

§ 4.6 Schedule Incentives

§ 4.6 Other:

Contractor shall be entitled to an incentive bonus equal to One Thousand Five Hundred Dollars (\$1,500.00) per day that the Substantial Completion Date for the entire Project as set forth in Section 3.3.1 is achieved early (the “Incentive Bonus”). Notwithstanding the foregoing, in the event of either force majeure or owner-caused delays, the Construction Manager agrees that its rights to collect an Incentive Bonus shall be limited to the number of days the Substantial Completion Date is achieved earlier than the Substantial Completion Date as set forth in Section 3.3.1 as same is extended due to either force majeure or owner-caused delays.

WEBINAR TOPICS

- ❑ COVID-19 IMPACT ON CONSTRUCTION
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A101-2017
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A201-2017
- ❑ Contractor Notice/Change Order for COVID-19 DELAY
- ❑ Contract Suspension and Termination Issues
- ❑ Claims/Dispute Resolution
- ❑ Contract Silent: Doctrine of Impossibility
- ❑ Business Interruption Coverage
- ❑ Question and Answer Session



The American Institute of Architects

A201 -2017

DRAFT AIA® Document A201™ - 2017

General Conditions of the Contract for Construction

for the following PROJECT:

(Name and location or address)

50 Story, Luxury Condominium Building
and Parking Garage
located at 123 Main Street,
Manhattan, New York

THE OWNER:

(Name, legal status and address)

123 Main St Residential Condominium Owner, LLC

THE ARCHITECT:

(Name, legal status and address)

IMANEXPERT Architects, LLP

TABLE OF ARTICLES

- | | |
|----|--|
| 1 | GENERAL PROVISIONS |
| 2 | OWNER |
| 3 | CONTRACTOR |
| 4 | ARCHITECT |
| 5 | SUBCONTRACTORS |
| 6 | CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS |
| 7 | CHANGES IN THE WORK |
| 8 | TIME |
| 9 | PAYMENTS AND COMPLETION |
| 10 | PROTECTION OF PERSONS AND PROPERTY |
| 11 | INSURANCE AND BONDS |
| 12 | UNCOVERING AND CORRECTION OF WORK |
| 13 | MISCELLANEOUS PROVISIONS |

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An Additions and Deletions Report that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

For guidance in modifying this document to include supplementary conditions, see AIA Document A503™, Guide for Supplementary Conditions.

ELECTRONIC COPYING of any portion of this AIA® Document to another electronic file is prohibited and constitutes a violation of copyright laws as set forth in the footer of this document.

AIA Document A201™ - 2017. Copyright © 1911, 1915, 1919, 1925, 1937, 1951, 1958, 1961, 1963, 1966, 1976, 1987, 1997, 2007 and 2017 by The American Institute of Architects. All rights reserved. **WARNING:** This AIA® Document is protected by U.S. Copyright Law and International Treaties. Unauthorized reproduction or distribution of this AIA® Document, or any portion of it, may result in severe civil and criminal penalties and will be prosecuted to the maximum extent possible under the law. This draft was produced by AIA software at 11:51:10 PM on 04/07/2018 under Order No. 076557665 which expires on 11/11/2020, and is not for resale. User Notes: (782245258)

1

AIA A201, § 7.2 Change Orders

§ 7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect stating their agreement upon all of the following:

1. The change in the Work;
2. The amount of the adjustment, if any, in the Contract Sum; and
3. The extent of the adjustment, if any, in the Contract Time.

§ 8.2 Time is of the Essence

§ 8.2 Progress and Completion

§ 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement, the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

§ 8.3.1 Force Majeure

“AIA FORCE MAJEURE CLAUSE”

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

What is Force Majeure?

- 1) Commonly referred to as an “Act of God”
- 2) Force Majeure is a force that is more than you can withstand.
- Analysis of how Courts analyze Force Majeure Provisions

New York Case Law for Force Majeure

Will COVID-19 fall within the scope of your force majeure contract:

In New York, Force Majeure is interpreted narrowly.
Kel Kim Corp. v. Cent. Mkts., Inc., 70 N.Y.2d 900, 902 (1987)
(holding that force majeure defense is narrow and excuses nonperformance “only if the force majeure clause specifically includes the event that actually prevents a party’s performance”)

§ 8.3.2/8.3.3 Claims/Recovery of Damages

§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents

WEBINAR TOPICS

- ❑ COVID-19 IMPACT ON CONSTRUCTION
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A101-2017
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A201-2017
- ❑ Contractor Notice/Change Order for COVID-19 DELAY
- ❑ Contract Suspension and Termination Issues
- ❑ Claims/Dispute Resolution
- ❑ Contract Silent: Doctrine of Impossibility
- ❑ Business Interruption Coverage
- ❑ Question and Answer Session

Sample Contractor Notice of COVID-19 Impacts

Best Construction Ever, Inc.
456789 Broad Street
Brooklyn, New York
718.555.5555

April 1, 2020

Via E-Mail: jdoe123MainSt@gmail.net
123 Main St Residential Condominium Owner, LLC
123 Main Street,
Manhattan, New York
ATTN: Jane Doe, Owner's Representative

Re: 50 Story, Luxury Condominium Building
and Parking Garage (the "Project")

Dear Ms. Doe,

As you are aware, we have been actively monitoring the impacts of the Coronavirus ("COVID-19") on the supply chain, labor force and governmental agencies relative to the Project and have implemented protective measures as recommended from various health agencies (including the United States Centers for Disease Control and Prevention ("CDC") and the World Health Organization ("WHO")).

By Executive Order Nos. 202.6 and 202.08, Andrew M. Cuomo, Governor of the State of New York, issued directives imposing certain in-person workforce restrictions in response to the COVID-19 emergency; but directed that: "Any essential business or entity providing essential services shall not be subject to the in-person restrictions." Initially, the Governor's Executive Order stated that all "construction" was an essential service or function (without exception) that was exempt from those restrictions. However, on March 27, 2020, the State of New York (through the Executive Order) Development mandated that construction on the Project (except as otherwise expressly stated) "continue a project if it would be unsafe to all ow to remain undone until it is safe to shut down immediately."

As a result of the foregoing, we are now being unavoidably delayed and impacted by COVID-19. We know we have taken immediate steps to secure the Project. We will also demobilize from the Project as required but will maintain applicable insurance coverages required by the contract. Pursuant to our contract with 123 Main St Residential Condominium Owner, LLC ("Owner"), Best Construction Ever, Inc. ("Best Construction") respectfully must provide this letter in accordance with, but not limited to, the following contract provisions: first paragraph, paragraph A101, Section 8.3.1, all as further defined in the contract. Again, the cause of these delays is the March 27 Government-Ordered shutdown and, at this time, other impacts of COVID-19 as they are becoming known including, but not limited to, access to the construction site, availability and delivery of material, equipment and/or labor, and secure requisite approvals of certain government and nongovernment entities. At this time, we are currently assessing these impacts.

As a result of these unavoidable delays, Best Construction is entitled to an extension of time as provided for in the Contract;

Best Construction Ever, Inc.
456789 Broad Street
Brooklyn, New York
718.555.5555

April 1, 2020

Via E-Mail: jdoe123MainSt@gmail.net
123 Main St Residential Condominium Owner, LLC
123 Main Street,
Manhattan, New York
ATTN: Jane Doe, Owner's Representative

Re: 50 Story, Luxury Condominium Building
and Parking Garage (the "Project")

Dear Ms. Doe,

As you are aware, we have been actively monitoring the impacts of the Coronavirus ("COVID-19") on the supply chain, labor force and governmental agencies relative to the Project and have implemented protective measures as recommended from various health agencies (including the United States Centers for Disease Control and Prevention ("CDC") and the World Health Organization ("WHO")).

Contractor Change Order

CHANGE ORDER NO. 101

Date: April 1, 2020

To Owner: 123 Main St Residential Condominium Owner, LLC

Contractor: Best Construction Ever, Inc.

Job Number
Contract Number
Owner's Project Number
Category

01 **Staffing (Project Exec, Garage PM, Tower PM, Garage Ass't PM, Tower Ass't PM, Garage Ass't Super, Tower Ass't Super, Garage Clerk, Tower Clerk)**

Weekly Cost Forecast:	Week 1 Staffing	\$ 23,288.16
	Week 2 Staffing	\$ 27,173.48
	Week 3 Staffing	\$ 42,476.40
	Week 4 Staffing	\$ 29,608.00

02 **GC weekly costs** **\$ 6,500.00**
[Con Ed, Sidewalk Shed, Porta Johns, Trash Chutes Clean up, Dumpster, Pest Control, Security Photos, Trailer complex, Telephone/Internet]

03 **Misc** **\$10,000.00**

Total \$39,788.16 for Week 1
\$43,673.48 for Week 2
\$58,976.40 for Week 3
\$46,108.00 for Week 4

Contract Schedule: Substantial Completion Date set forth in Section 3.3 is hereby Extended by number of **[TBD]** days of COVID-19 Shutdown and Remobilization

Original Contract Value: \$100,000,000.00

APPROVED AMOUNT	
Tower PM,	
per,	
Week 1 Staffing	\$ 23,288.16
Week 2 Staffing	\$ 27,173.48
Week 3 Staffing	\$ 42,476.40
Week 4 Staffing	\$ 29,608.00
	\$ 6,500.00
Trash Chutes	
Security	
Internet	
	\$10,000.00
Total \$39,788.16 for Week 1	
\$43,673.48 for Week 2	
\$58,976.40 for Week 3	
\$46,108.00 for Week 4	
in Section 3.3 is hereby Extended by number of [TBD]	
Original Contract Value:	\$100,000,000.00
	\$
Extended Contract Amount:	\$
OWNER	
Signature: _____	
Name: _____	
Title: _____	
Date Signed: _____	

Owner Response to Change Order for COVID-19 Shutdown Delay

*123 Main St Residential Condominium Owner, LLC
123 Main Street,
Manhattan, New York*

April 2, 2020

Via E-Mail: JSMITHCONDOGUY@gmail.net

Best Construction Ever, Inc.
456789 Broad Street
Brooklyn, New York
718.555.5555
ATTN: John Smith, President

**Re: 50 Story, Luxury Condominium Building
and Parking Garage (the "Project")**

Dear Mr. Smith

We are in receipt of your proposed Change Order for the COVID-19 impact to the Project.

Your weekly costs are not reasonable and the Change Order is hereby rejected. Attached is our revised Change Order.

We are in receipt of your proposed Change Order for the COVID-19 impact to the Project.

Your weekly costs are not reasonable and the Change Order is hereby rejected. Attached is our revised Change Order.

We also require a recovery plan and detailed analysis of the impact to the critical path.

We are prepared to meet with you to resolve this dispute.

Contractor Change Order

CHANGE ORDER NO. 101

Date: April 2, 2020

To Owner: 123 Main St Residential Condominium Owner, LLC

Contractor: Best Construction Ever, Inc.

Job Number
Contract Number
Owner's Project Number
Category

01 **Staffing (Garage/Tower PM
Garage/Tower Superintendent
Garage/Tower Clerk**

Weekly Cost Forecast:

Week 1 Staffing	\$ 5,000.00
Week 2 Staffing	\$ 5,000.00
Week 3 Staffing	\$ 5,000.00
Week 4 Staffing	\$ 5,000.00

02 **GC weekly costs
[Con Ed, Sidewalk Shed, Porta Johns, Trash Chutes
Clean up, Dumpster, Pest Control, Security
Photos, Trailor complex, Telephone/Internet**

\$ 6,500.00

03 **Misc**

\$0.00

\$ 11,500 per week

Contract Schedule: Substantial Completion Date set forth in Section 3.3 is hereby Extended by number of ___ days of COVID-19 Shutdown and Remobilization

Original Contract Value: \$100,000,000.00

APPROVED AMOUNT

Week 1 Staffing	\$ 5,000.00
Week 2 Staffing	\$ 5,000.00
Week 3 Staffing	\$ 5,000.00
Week 4 Staffing	\$ 5,000.00

\$ 6,500.00

Trash Chutes
Security
Internet

\$0.00

\$ 11,500 per week

Section 3.3 is hereby Extended by number of

Contract Value: \$100,000,000.00

\$

\$

Contract Amount: \$

OWNER

Signature: _____

Name: _____

Title: _____

Date Signed: _____

WEBINAR TOPICS

- ❑ COVID-19 IMPACT ON CONSTRUCTION
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A101-2017
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A201-2017
- ❑ Contractor Notice/Change Order for COVID-19 DELAY
- ❑ Contract Suspension and Termination Issues
- ❑ Claims/Dispute Resolution
- ❑ Contract Silent: Doctrine of Impossibility
- ❑ Business Interruption Coverage
- ❑ Question and Answer Session

ARTICLE 14

TERMINATION OR SUSPENSION OF THE CONTRACT

§ 14.3 Suspension by the Owner for Convenience

§ 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 as described in Section 14.3.1. **Adjustment of the Contract Sum shall include profit.** No adjustment shall be made to the extent

1. that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
2. that an equitable adjustment is made or denied under another provision of the Contract.

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

§ 14.4 Termination by the Owner for Convenience

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 14.4.2 Upon receipt of notice from the Owner of such termination for the Owner's convenience, the Contractor shall

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In case of such termination for the Owner's convenience, the Owner shall pay the Contractor for Work properly executed; costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

§ 14.1 Termination by the Contractor

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:

1. Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
2. An act of government, such as a declaration of national emergency that requires all Work to be stopped;
3. Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
4. The Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Section 2.2.1.

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

§ 14.1 Termination by the Contractor

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination, and damages.

WEBINAR TOPICS

- ❑ COVID-19 IMPACT ON CONSTRUCTION
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A101-2017
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A201-2017
- ❑ Contractor Notice/Change Order for COVID-19 DELAY
- ❑ Contract Suspension and Termination Issues
- ❑ Claims/Dispute Resolution
- ❑ Contract Silent: Doctrine of Impossibility
- ❑ Business Interruption Coverage
- ❑ Question and Answer Session

ARTICLE 15

CLAIMS

§ 15.1 Claims

§ 15.1.1 Definition

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract. The term “Claim” also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim. This Section 15.1.1 does not require the Owner to file a Claim in order to impose liquidated damages in accordance with the Contract Documents.

ARTICLE 15

CLAIMS

§ 15.1.2 Time Limits on Claims

The Owner and Contractor shall commence all Claims and causes of action against the other and arising out of or related to the Contract, whether in contract, tort, breach of warranty or otherwise, in accordance with the requirements of the binding dispute resolution method selected in the Agreement and within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all Claims and causes of action not commenced in accordance with this Section 15.1.2.

ARTICLE 15

CLAIMS

§ 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later

ARTICLE 15

CLAIMS

§ 15.1.5 Claims for Additional Cost

If the Contractor wishes to make a Claim for an increase in the Contract Sum, notice as provided in Section 15.1.3 shall be given before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

.

ARTICLE 15

CLAIMS

15.1.6 Claims for Additional Time

§ 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section 15.1.3 shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

.

Waiver of Consequential Damages

§ 15.1.7 Claims for Consequential Damages

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

1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
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 the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.7 shall be deemed to preclude assessment of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

ARTICLE 15

CLAIMS

§ 15.2 Initial Decision

§ 15.2.1 Claims, excluding those where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2 or arising under Sections 10.3, 10.4, and 11.5, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, an initial decision shall be required as a condition precedent to mediation of any Claim. If an initial decision has not been rendered within 30 days after the Claim has been referred to the Initial Decision Maker, the party asserting the Claim may demand mediation and binding dispute resolution without a decision having been rendered. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner.

ARTICLE 6 DISPUTE RESOLUTION

§ 6.1 Initial Decision Maker

The Architect will serve as the Initial Decision Maker pursuant to Article 15 of AIA Document A201–2017, unless the parties appoint below another individual, not a party to this Agreement, to serve as the Initial Decision Maker.

§ 15.3 Mediation

§ 15.3.1 Claims, disputes, or other matters | in controversy arising out of or related to the Contract, except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.7, shall be subject to mediation as a condition precedent to binding dispute resolution.

ARTICLE 6 DISPUTE RESOLUTION

§ 6.2 Binding Dispute Resolution

For any Claim subject to, but not resolved by, mediation pursuant to Article 15 of AIA Document A201–2017, the method of binding dispute resolution shall be as follows:

[« X »] Arbitration for disputes less than Two Hundred Thousand Dollars (\$200,000.00) pursuant to Section 15.4 of AIA Document A201–2017

[« X »] Litigation for disputes in excess of Two Hundred Thousand Dollars (\$200,000.00) in a court of competent jurisdiction

§ 15.4 Arbitration

§ 15.4.1 If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation pursuant to Section 15.3 for which the dollar amount is equal to or less than \$200,000.00 (exclusive of interest and costs) may be heard and determined in New York City before one (1) arbitrator who is a practicing attorney with not less than 15 years' experience in the practice of construction law in New York City in accordance with the Construction Industry Rules of the American Arbitration Association, and judgement upon the Award rendered thereon may be entered in any court of competent jurisdiction. The arbitrator shall not have the power to apportion the costs and fees of the arbitration, which shall be borne as incurred, nor shall the arbitrator have any power to award counsel fees or exemplary damages. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

WEBINAR TOPICS

- ❑ COVID-19 IMPACT ON CONSTRUCTION
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A101-2017
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A201-2017
- ❑ Contractor Notice/Change Order for COVID-19 DELAY
- ❑ Contract Suspension and Termination Issues
- ❑ Claims/Dispute Resolution
- ❑ Contract Silent: Doctrine of Impossibility
- ❑ Business Interruption Coverage
- ❑ Question and Answer Session

Doctrine of Impossibility

But our contract does not address Force Majeure related issues...

DOCTRINE OF IMPOSSIBILITY

- “[I]mpossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible.

Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract,” *Kel Kim Corp. v. Central Mkts.*, 70 N.Y.2d 900, 902, 524 N.Y.S.2d 384, 519 N.E.2d 295 [1987].

The excuse of impossibility is generally “limited to the destruction of the means of performance by an act of God, vis major, or by law” *407 E. 61st Garage v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281, 296 N.Y.S.2d 338, 244 N.E.2d 37 [1968], *Kolodin v. Valenti*, 115 A.D.3d 197, 200 (1st Dept. 2014). That impossibility, in turn, “must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract” (*id.*, at 902, 524 N.Y.S.2d 384, 519 N.E.2d 295; see, *Matter of A & S Transp. Co. v. County of Nassau*, 154 A.D.2d 456, 458, 546 N.Y.S.2d 109).

WEBINAR TOPICS

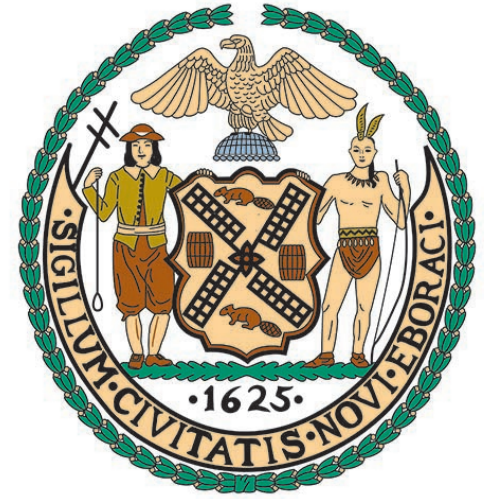
- ❑ COVID-19 IMPACT ON CONSTRUCTION
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A101-2017
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A201-2017
- ❑ Contractor Notice/Change Order for COVID-19 DELAY
- ❑ Contract Suspension and Termination Issues
- ❑ Claims/Dispute Resolution
- ❑ Contract Silent: Doctrine of Impossibility
- ❑ Business Interruption Coverage
- ❑ Question and Answer Session

Obstacles to receiving Business Interruption Coverage

Business interruption generally requires a “direct physical loss or damage” to property at the insured premises to trigger coverage. Insureds will have a hurdle to prove that Coronavirus causes property damage. Without showing property damage, New York will generally not extend coverage to insureds. *See Cohen & Slamowitz, LLP v. Zurich Am. Ins. Co.*, 168 A.D.3d 905, 907, 92 N.Y.S.3d 365, 368 (N.Y. App. Div. 2019).

Virus Exclusions: After 2003 Severe Acute Respiratory Syndrome Outbreak” (“SARS”), many insurers included a Bacteria or Virus Policy Exclusion to business interruption coverage. It will be important for policyholders to examine their policies and determine whether there is a virus exclusion which would preclude coverage for Coronavirus related loss.

Executive Actions Taken to Aid Insureds



THE CITY OF NEW YORK
OFFICE OF THE MAYOR

EMERGENCY EXECUTIVE ORDER NO. 101

March 17, 2020

EMERGENCY EXECUTIVE ORDER

EMERGENCY EXECUTIVE ORDER NO. 101

March 17, 2020

EMERGENCY EXECUTIVE ORDER

WHEREAS, on March 7, 2020, New York State Governor Andrew Cuomo declared a State disaster emergency for the entire State of New York to address the threat that COVID-19 poses to the health and welfare of New York residents and visitors; and

WHEREAS, Emergency Executive Order No. 98, issued March 12, 2020, contains a declaration of a state of emergency in the City of New York due to the threat posed by COVID-19 to the health and welfare of City residents, and such declaration remains in effect for a period not to exceed thirty (30) days or until rescinded, whichever occurs first; and

WHEREAS, the risk of community spread throughout New York City impacts the life and health of the public and public health is imperiled by the person-to-person spread of COVID-19; and

WHEREAS, the reduction of opportunities for the person-to-person transmission of COVID-19 in meetings and other gatherings is necessary to combat the spread of this disease; and

WHEREAS, this order is given because of the propensity of the virus to spread person-to-person and also because the virus physically is causing property loss and damage; and

NOW, THEREFORE, I, Bill de Blasio, Mayor of the City of New York, do hereby order, pursuant to the powers vested in me by the laws of the State of New York and the City of New York, including but not limited to the New York Executive Law,

§ 4. This Emergency Executive Order shall take effect immediately, and shall remain in effect for five (5) days unless it is terminated or modified at an earlier date.


Bill de Blasio,
MAYOR

WHEREAS, this order is given because of the propensity of the virus to spread person-to-person and also because the virus physically is causing property loss and damage;

Source: <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-101.pdf>

Legislative Actions Taken to Aid Insureds Bill A-10226

New York State legislature is currently contemplating a bill to provide business insurance coverage due to Covid-19. The bill states:

“Notwithstanding any provisions of law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption, shall be construed to include among the covered perils under that policy, coverage for business interruption during a period of a declared state of emergency due to the coronavirus disease 2019 (COVID-19) pandemic.”

The bill would require insurers to indemnify the policyholder “subject to the limits under the policy, for any loss of business or business interruption for the duration of a period of a declared state emergency” due to the COVID-19 pandemic, the text of the bill adds.

WEBINAR TOPICS

- ❑ COVID-19 IMPACT ON CONSTRUCTION
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A101-2017
- ❑ Delays – Force Majeure
 - ❖ AIA DOCUMENT A201-2017
- ❑ Contractor Notice/Change Order for COVID-19 DELAY
- ❑ Contract Suspension and Termination Issues
- ❑ Claims/Dispute Resolution
- ❑ Contract Silent: Doctrine of Impossibility
- ❑ Business Interruption Coverage
- ❑ Question and Answer Session

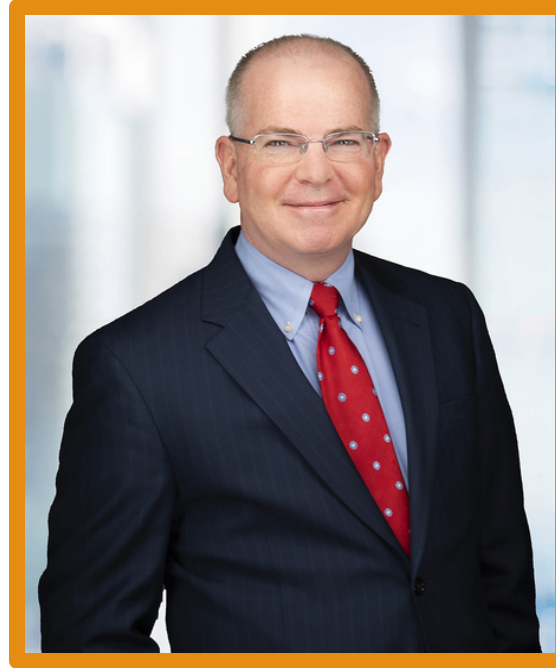
THANK YOU



RESOURCE LINK

[https://www.zdlaw.com/
covid-19-information-
resources](https://www.zdlaw.com/covid-19-information-resources)

**ZETLIN &
DE CHIARA** LLP



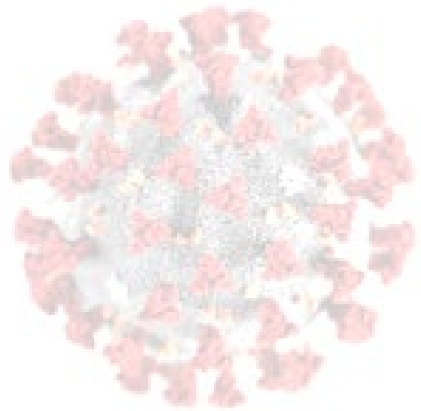
TIMOTHY F. HEGARTY
thegarty@zdlaw.com



JAMES J. TERRY
jterry@zdlaw.com

Zetlin & De Chiara LLP
801 Second Avenue
New York, New York 10017
T: (212) 682-6800
WWW.ZDLAW.COM

Disclaimer: The material provided is for informational purposes only and does not constitute legal advice of Zetlin & De Chiara LLP. © 2020 Zetlin & De Chiara LLP



Coping with COVID-19: Meeting the Challenges for the Construction Industry

APRIL 8, 2020 | 2:00PM-3:00PM

PRESENTERS: TIMOTHY F. HEGARTY, ESQ. | JAMES J. TERRY, ESQ.

Disclaimer: The material provided is for informational purposes only and does not constitute legal advice of Zetlin & De Chiara LLP. © 2020 Zetlin & De Chiara LLP