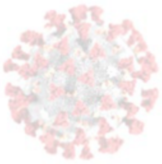
ZETLIN & DE CHIARA LLP



COVID-19 Webinar Questions and Answers

Thank you for your interest in attending our webinar **COVID-19: The Challenges to the Construction Industry** on April 8, 2020. The slides and a recording of the webinar can be found on our website.

Zetlin & De Chiara LLP has created a COVID-19 Information and Resources page for members of the construction community. With federal, state and local programs and regulations changing so quickly, we update it almost daily.

Please contact us if you have any questions.

QUESTIONS & ANSWERS

The following are answers to several of the questions we received during the webinar, some of which we did not have time to answer as part of the program. The answers to the questions are not legal advice. If you have specific legal questions, you should consult an attorney.

	Questions	Answers
1	What modifications to the provisions to AIA Document A201 covered in the April 8th webinar would you make to ensure a party is better prepared for a scenario like this?	There are many provisions to consider, but some of the key provisions would include the following: (a) This crisis has made all parties aware of the importance of the contractual right of either party to terminate the contract, which the Contractor may presently do after only 30 days upon an additional 7 days' notice. From the perspective of Owners/Developers, it would not be unreasonable to see that 30-day waiting period increase to a 120-180 day waiting period. (b) Owners/Developers may also consider adding specific language establishing and defining a contractual duty on the part of the Contractor to mitigate losses, so they do not have to rely on the common-law doctrine requiring any party claiming damages to have taken reasonable mitigation steps. Here are examples of the provisions that may be added to contracts: • Detailed recovery plans to be updated regularly during the shutdown. • An express requirement for clear identification and adequate substantiation of any costs incurred by reason of the shutdown to prevent excessive staffing charges as well as unanticipated "miscellaneous" costs. • Any prior schedule delays to the project as of the shutdown will be considered in determining any relief to which the contractor might be entitled. (c) While particularly helpful to contractors, it may be advantageous to both parties to eliminate any ambiguity by expressly including epidemic, pandemic, or other widespread health emergencies in the definition of *force majeure* under Section 8.3.1 of AIA A201. (d) Consideration may be given as to whether productivity losses are to be recognized as a compensable form of damages notwithstanding the contractual waiver of consequential damages.

2	Would COVID-19 and the order by the Governor of the State of New York be considered a *force majeure*?	A *force majeure* is an event or situation that cannot be overcome, not only because of physical constraints, but governmental constraints as well. The order by the Governor of New York has rendered it objectively impossible for construction work to be performed that is not considered "Essential." Applying the *ejusdem generis* analysis, under which catch-all phrases like "any other condition beyond the contractor's reasonable control" must be read to encompass only conditions similar to those specifically enumerated in the provision, the categories that are enumerated in provision 8.3.1 are all extraordinary and dangerous situations such as fires, casualties etc. Therefore, absent contractual provisions to the contrary, the likely answer is yes, COVID-19 and the Governor's order are a *force majeure*.
3	What if the Owner/Developer had not received notifications from their Contractors about delays? Should the Owner/Developer request updates from their Contractors, in addition to regular project report obligations?	Communication among the construction team members is even more critical during a crisis when so much is beyond the control of the parties. If the Contractor has not conveyed that the project will be adversely affected by a construction shutdown, the Owner is under no obligation to solicit additional reports except if there are contract provisions to the contrary. In ordinary times, the Owner would have no compelling reason to do so. However, this is not business as usual. Now, despite the absence of any contractual duty to solicit updates as to the impact of the shutdown, the prudent Owner will want to know how the shutdown and delays in receiving supplies will impact the schedule and costs. It is likely that the Owner will require the Contractor to update the contract schedule and to analyze the options, if any, to recover the lost time. If the Project is cost-plus based, the Owner may engage the Contractor in a discussion of ways to mitigate costs by reducing or reassigning staff during the shutdown.
4	If a submitted recovery schedule maintains the original substantial completion date of the contract, is the contractor entitled to time delay GC/CM extended costs?	If the Contractor does not believe COVID-19 will impact the substantial completion date because the critical path has not changed, and states that even with the COVID-19 shutdown, substantial completion is still on track for the previously agreed upon completion date, the Contractor would not be entitled to a time extension. Notwithstanding the foregoing, and subject to the contract language, the Contractor may be entitled to the costs associated with the safe shutdown of the site, the remobilization when the work is restarted and possibly costs associated with acceleration efforts, if requested.

5	Some GCs and Owners may look for loopholes in order to bend the rules regarding whether their sites are "Essential." They may ask their Subcontractors to continue work via email implying that they have the "Essential" designation. If we are to take their word, are we absolved of any fines that may be incurred?	With respect to New York City projects, DOB recently mandated that "Essential" projects are required to obtain a "Certificate of Authorization." If an Owner/General Contractor wants the project designated as "Essential," the applicant of record must use the DOB NOW portal to request the authorization and provide documentation. If the request for authorization is denied, the party may make up to two appeals. Beginning March 31, 2020, violations for performing Non-Essential construction work will lead to a maximum penalty of $10,000, issued to each permit holder in violation on the site. To protect themselves, Trade Contractors may want to request proof that the construction site is classified as "Essential," and therefore not controlled by the pause order in Executive Order 202.6.