



## **Downtime, Not Dead Time: Jobsite Resilience During the COVID - 19 Pause**

Steel Institute of America  
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...Construction attorney Tara B. Mulrooney, Esq., a partner at Zetlin & De Chiara, cites the American Institute of Architects (AIA)'s standard contractual forms, particularly their change- order procedures and notice provisions, as vital safeguards when conditions beyond any party's control (*force majeure*) cause delays. "Section 8.3 of the A201 general conditions is really the main provision that provides—assuming it hasn't been modified—*force majeure* language that would be applicable for COVID-19 delays and suspensions," she notes. "Even when AIA forms are used," she adds, "they often are negotiated and modified and changed by the parties... so it's really important to make sure that you're paying attention to specific modifications that are made for a particular project."

Problems can arise when notice of a change order, a delay, or a claim for additional time and cost falls outside specified time frames. In the current situation, "where you're going to be well over a month of a delay, you're going to need to get it approved to have the project extended by that time period," Mulrooney cautions. "If somehow your claim is considered waived and therefore you can't make a claim for the additional time and expense, that could be a devastating situation for a

contractor to be in.”

The pandemic may create unfamiliar scenarios legally as well as operationally. The definition of force majeure could be a potential sticking point, Mulrooney notes, if a contractor is incapacitated by the disease. “Courts will generally enforce what you have included in your force majeure provision, and if something is not listed, generally they’re looking for something to be listed, or at least to be of a like kind to a specific event that is listed.... Under the AIA provision there isn’t anything relating to sickness; it includes things like labor disputes or fires, unusual delays in deliveries, unavoidable casualties, certain adverse weather conditions, but it doesn’t specifically include anything related to a pandemic or sickness. The AIA and a lot of times other contracts will have language saying ‘other causes beyond a contractor’s reasonable control.’ So if you’re working or operating within that type of language, you can make an argument. I would think that you’d also have to make an argument that there aren’t other people on your workforce that could fulfill those obligations or perform the work.”

Questions of COVID-related site safety have not produced labor disputes to date, Mulrooney reports, but “there definitely have been reports of certain trades not feeling particular sites were able to provide a safe environment with respect to being able to follow CDC guidelines and New York regulations relating to how far apart you should be from people, or how many people can be in a particular area.” Reasonable-person standards for safety or negligence, Mulrooney notes, depend on specific contexts. “When we look at reasonableness for this outbreak, it’s much harder to say what that is; it’s developing as people are experiencing it... I think if you are able to say that you’re following New York regulations, or guidance put out by the DOB or ESD, and if you’re following those recommendations, I think you have a strong argument that you’re acting reasonably.... In some particular areas, the DOB’s guidance might be more specific.” Although COVID has thrown us all onto *terra incognita*, this territory has enough resemblances to familiar ground that civic institutions can guide prudent decisions.

### **Making the most of virtual officing**

Ultimately, the COVID pause may change the design and construction industries, as firms discover unexpected value in certain procedures. Working from distributed locations via internet and video, some firms have found, has been surprisingly easy, often drawing on the digital expertise of younger staffers. Some studies have even found that remote work is more productive, by multiple metrics, than office work.

Challenges in site conditions raise questions about which meetings really need to occur onsite, or which operations require people and which could rely on camera-equipped drones. If the pandemic has required “the economic equivalent of a medically induced coma,” traditional centralized offices may never be the same after the economy reawakens. Construction, however, will always need live

workers in a real place. Today's emergency underscores how irreplaceable they are, and how critical it is to plan for their well-being.

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