



## E-ALERT

### Related Lawyers

Mark A. Schiavo  
James H. Landgraf

### Related Industries

Construction

### Media Contact

Peter Dunn  
Director of Client  
Relations and  
Communications  
Philadelphia, PA  
pdunn@dilworthlaw.com

## COVID ALERT: GETTING CONTROL OF THE RE-STARTED CONSTRUCTION PROJECT

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Now that construction projects have largely been given the green light to resume, owners, developers, general contractors, design professionals, construction managers, trade subcontractors and suppliers need to address the new and changed conditions.

While there may be well-written contracts up and down the ladder, the fact is that those contracts will require adjustment by formal amendment or change order to reflect the current reality. As much as it may appear distasteful, schedules, pricing, materials and jobsite conditions and productivity may require changes. Most well-written construction and supply contracts provide that the terms of the contract cannot be changed unless through a formal written amendment or change order. To ignore the current reality and insist that a pre-COVID set of contract documents will continue to control will lead to project disputes, escalating animosity, exchanges of potentially impossible demands and ultimately high stakes, costly litigation or arbitration. Just as bad, the parties can simply proceed on a “wait and see” or handshake basis, which can result in confusion of rights and obligations, simply kicks the potential issues “down the road” and will result in many undocumented ambiguities.

While certain contract rights and obligations should not be released, now is the time to make every effort to re-balance the contracts to reflect a rational and realistic recognition of the changed construction environment.

All of the players want to make progress on the project and while none want to give up the initially anticipated profits on the project, the conditions in May/June 2020 and going forward for the immediate future are worlds apart from what existed a year before when the bids, contract documents and schedules were being developed.

Assuming that the parties have agreed that the project will resume and proceed, the following decisions need to be made and actions taken:

- carefully review the existing contract documents to determine which provisions will require adjustment
- make an effort to bring everything current, including:
  - assure that all previously outstanding RFI’s submittals, submittal reviews, payment applications, and change orders/change order requests have been fully met and/or responded to
  - if there were outstanding claims for extra or changed work or delay assertions, either make a concerted effort to resolve them to avoid having them blend in with COVID-related

issues, or specifically identify them and reserve all rights regarding pursuing or defending them

- work with all principal players, including primary subcontractors and suppliers to develop a realistic schedule going forward, rather than dictating a schedule that may not fully take into account productivity changes, supply chain issues and other factors
- attempt to address cost impacts from all perspectives and negotiate, where possible, appropriate adjustments
- review and negotiate any impacts on warranties and guarantees caused by the suspension and schedule extensions
- carefully review jobsite safety requirements to assure that governmental requirements are being met and determining the party(ies) responsible
- review and address requirements for necessary re-mobilization costs (as well as any prior de-mobilization costs)
- consider and address any changes in project participants including sub-contractors and suppliers who simply will be unable to sufficiently mobilize and participate going forward
  - this may require allowing for time to replace a critical subcontractor or supplier and potential cost adjustments
  - this may also require consideration of materials substitutions to accommodate both supply chain limitations and cost control
- analyze and agree to available acceleration options, including:
  - expedited design review of work in place, submittals and RFI's
  - adjustment of phasing
  - reducing limitations on overtime
- consideration – if financing allows – of expedited payment submittals and processing or earlier reduction of retainage in lieu of increasing some of the costs

When these, and other considerations appropriate to the specific project and set of contract documents, have been fully reviewed and discussed among the appropriate parties, written amendments to the contracts or set of change orders implementing these contract changes should be entered, specifically excluding and reserving on any unresolved issues. This will serve to recognize that the parties have accounted for the changed conditions and provide a needed level of certainty going forward.



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If you have any questions on the above or wish to discuss, please contact [James Landgraf](#) or [Mark Schiavo](#).