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### CONSTRUCTION LAW

# Owner's Checklist For Resuming Construction



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**O**n June 8, 2020, construction officially re-opened throughout New York for all essential and non-essential construction projects and as a result, the construction industry is at the forefront of New York's economic recovery. It is not "business-as-usual" however, as project owners are required to navigate the federal, state and local public health and safety "COVID-19 regulations," which include guidelines issued from New York State Department of Health (NYS DOH), New York City Department of Buildings, U.S. Equal Employment Opportunity Commission, Centers for Disease Control and Prevention, Environmental Protection Agency, and U.S. Department of Labor's Occupational Safety and Health Administration, and cause contractors to develop a "COVID-19 Jobsite Protocol" prior to entering the jobsite.

For those projects that commenced pre-COVID-19 and have been suspended due to the pandemic,

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owners are encouraged to carefully review each construction contract and enter into a "resumption agreement" to address the project-specific consequences of the suspension. Such resumption agreements should, at a minimum, include a project schedule recovery plan and address extended insurance coverage, procurement delays for materials, permitting and filing extensions, and remobilization costs. This article will serve as a guideline for project owners to ensure compliance with COVID-19 regulations and for negotiating resumption agreements for previously suspended projects.

### COVID-19 Jobsite Protocol

In New York, contractors are considered the "responsible parties" for complying with the COVID-19 regulations as it pertains to an active construction jobsite. Prior to entering the jobsite, each contractor (and subcontractor) should affirm its understanding of the COVID-19 regulations through the completion of the online New York Forward "Business Affirmation." Upon completion of the business affirmation, contractors should develop and sub-

mit to the project owner a COVID-19 jobsite protocol, showing how the contractor will comply with the COVID-19 regulations, including addressing the mandatory topics of "people, places, and processes," whereby "people" addresses physical distancing and restricting certain activities, "places" addresses workplace infrastructure, sanitation and availability of PPE, and "processes" relates to screening, testing, and the adoption of contact tracing protocols.

Contractors can create their own safety plan or utilize the NYS "safety plan template," which should be made in accordance with the "standards for construction safety" adopted by the New York City Building and Construction Trades Council and Real Estate Board of New York. Among other things, contractors must designate a representative responsible for daily cleaning logs that include the date, time, and scope of cleaning the jobsite and common areas during and after work shifts.

### Contractual Considerations of Project Suspensions

Before resuming the project, the project owner is encouraged to

enter into a resumption agreement with its general contractor, contractually addressing the consequences of the COVID-19 project suspension. Such resumption agreements should, at a minimum, consider a project schedule recovery plan, extended insurance coverage, indemnification obligations, procurement delays for materials, permitting and filing extensions and remobilization costs.

Revised project schedules account for the time lost during the suspended period and should include a day-for-day extension of time equal to the time lost from the COVID-19 suspension. The revised project schedule should include COVID-19 regulation mandates, including staggering trade schedules and scheduling out-of-sequence work based on the availability of subcontractors. If any given subcontractor is not equipped to return to the project, the contractor should include a plan for out-of-sequence work to optimize project efficiency.

The contractor should notify its insurance carrier of its remobilization and resumption of the project. Given the staggered commencement and completion dates, contractors must ensure that coverage does not prematurely terminate prior to the new project completion date. Additionally, the contractor must consider expanded insurance coverage to cover a potential COVID-19 outbreak within its workforce and the project owner should review the indemnification provision of the underlying construction contract to ensure it captures claims relating to the contractor's new obligations. Owners should include a provision requiring the contractor to cause all healthcare screening, thermal reading and/or

testing providers to maintain medical malpractice insurance coverage.

There have been many procurement delays for materials within the supply chain, whether domestically or internationally as a result of COVID-19. There have been closures and significant delays in some manufacturing facilities, which has led to requests for advance deposits, storage costs and extended lead times. Owners should request an inventory of materials from each contractor and should incorporate a plan to address the schedule and cost impacts due to supplier delays or replacements. Owners should contact lenders regarding releas-

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ing funds for advance deposits and storage costs. As an alternative to advance deposits, owners may negotiate with their lenders to obtain letters of credit or other assurances that can be given to contractors for the procurement of materials from their suppliers without added upfront cost.

Owners should review contracts carefully to determine whether a contractor is entitled to additional costs associated with permitting and filing new building permits or essential work requests that were performed during the project suspension or whether

such costs are included as part of the contract sum.

With respect to additional compensation for COVID-19 delays, our practice group's manuscript form of construction contract provides that a contractor is not entitled to receive any additional compensation for delay or storage of materials arising from a force majeure event. Such provision provides that, "No charge shall be made by contractor for storage of materials, tools and equipment during such delays and no claim shall be made by contractor for damages for any such delay or cessation of work." Absent such a provision, owners should negotiate remobilization and/or storage costs actually incurred as a result of the COVID-19 suspension.

## Conclusion

Although the resumption of construction projects is a welcome advancement, it is not without risk and requires thorough consideration. Project owners can limit the risks by shifting the burden of COVID-19 compliance to contractors and entering into "resumption agreements" before recommencing the project. Understanding the issues and the interplay of the various guidance documents is critical to advancing the goal of a seamless reopening of the project.