



## Find the silver lining – It's out there - by Melissa Billig

April 06, 2020 - [Front Section](#)



By now, your inbox has been inundated with COVID-19 updates. Many friends, clients and businesses have been impacted by this pandemic, which has created an extremely challenging business environment. Every industry and every company has been affected. Many businesses have been forced to close their offices and to remotely adapt to the fluidity of the events—and quickly. The key to weathering this mini-storm is to remember that it will pass and instead of being paralyzed by this new normal, we should focus on the silver lining that this pandemic has given—the gift of time.

We should use this gift of time wisely—to recalibrate and to get your businesses ready for when the pandemic lifts. We should use this time to review our existing contract documents, which the pandemic has certainly reminded us are very crucial components of the design, construction and real estate process. The days of using outdated forms or of hastily cobbling together your agreements are no longer viable. The strength of your contract documents are being tested under the events surrounding this pandemic and, going forward, your agreements need to be bolstered and, perhaps, even overhauled.

Examples of contract provisions that will undoubtedly proliferate as a result of this pandemic are:

### **Suspension**

Suspension provisions should clearly identify the circumstances under which an owner can suspend, as well as when design or construction professionals can suspend their services and work for the project (aside from a project owner's material default). These provisions should provide the right to suspend in the event of widespread illnesses and staffing problems outside the control of the parties or restricted access to the project site (and even neighboring properties) due to government imposed

restrictions or shut downs. These provisions should also specify reasonable suspension periods and the ability to terminate, as well as scope of permitted reimbursable demobilization and remobilization costs.

## Termination

While termination is typically permitted for convenience or cause, the rights of a design professional or contractor to terminate are typically limited to only when a project owner fails to remit payments under the agreement. Depending on your perspective, termination provisions should set forth whether there can be a termination for cause in this type of environment. Additionally, given that the courts are currently not operational, the agreements should address the efforts the parties take to resolve disputes prior to any termination.

## Project Schedule and Delay Impacts

Depending on your perspective, the project schedule and delay provisions may need to address whether there are schedule extensions for delays outside the control of the parties. Where permitted, schedules may need to be adjusted, without penalty, for the inability to staff the project or, worse, lockdowns caused by a pandemic. These provisions should also identify when, if ever, additional compensation for these types of schedule extensions are permitted and/or warranted.

## Force Majeure

Now, more than ever, the typically dormant force majeure provisions are at the forefront. But, one must question whether this pandemic is considered a force majeure event under your agreement and, if so, does that only permit a time extension? Is the pandemic causing an actual impossibility of performance? Does the impact of the pandemic require the issuance of delay notices under the contract documents? Depending on your perspective, these provisions will need to be modified to include (or exclude) pandemic caused and/or related events.

## Site safety

The New York City Department of Buildings has issued, and continues to issue, COVID-19 guidelines resulting from the pandemic. How should contracting parties manage project sites so that they ensure compliance with these guidelines on pending, and future, projects?

Future agreements should take into account the above-noted uncertainties with schedules, staffing, lockdowns, regulations from the Department of Buildings and others, dispute resolution (courts are currently closed) and innumerable other unknowns.

This new-found time is also a great opportunity to update your company websites, get current on your continuing education requirements, and to even update or expand your state licensures. Just saying.

At Ingram, we are helping our clients navigate this situation as it evolves. Feel free to reach out, should you need assistance.

**Melissa Billig, is a partner with Ingram Yuzek Gainen Carroll & Bertolotti LLP, New York, N.Y.**