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# COVID-19 Impacts and Legal Challenges

Presented By:

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# Business Incubator Leadership Development (BILD)



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## Agenda

1. Market Conditions
2. Travel Restrictions / Executive Orders
3. Operational Impacts
4. Legal Challenges
5. Risk Mitigation





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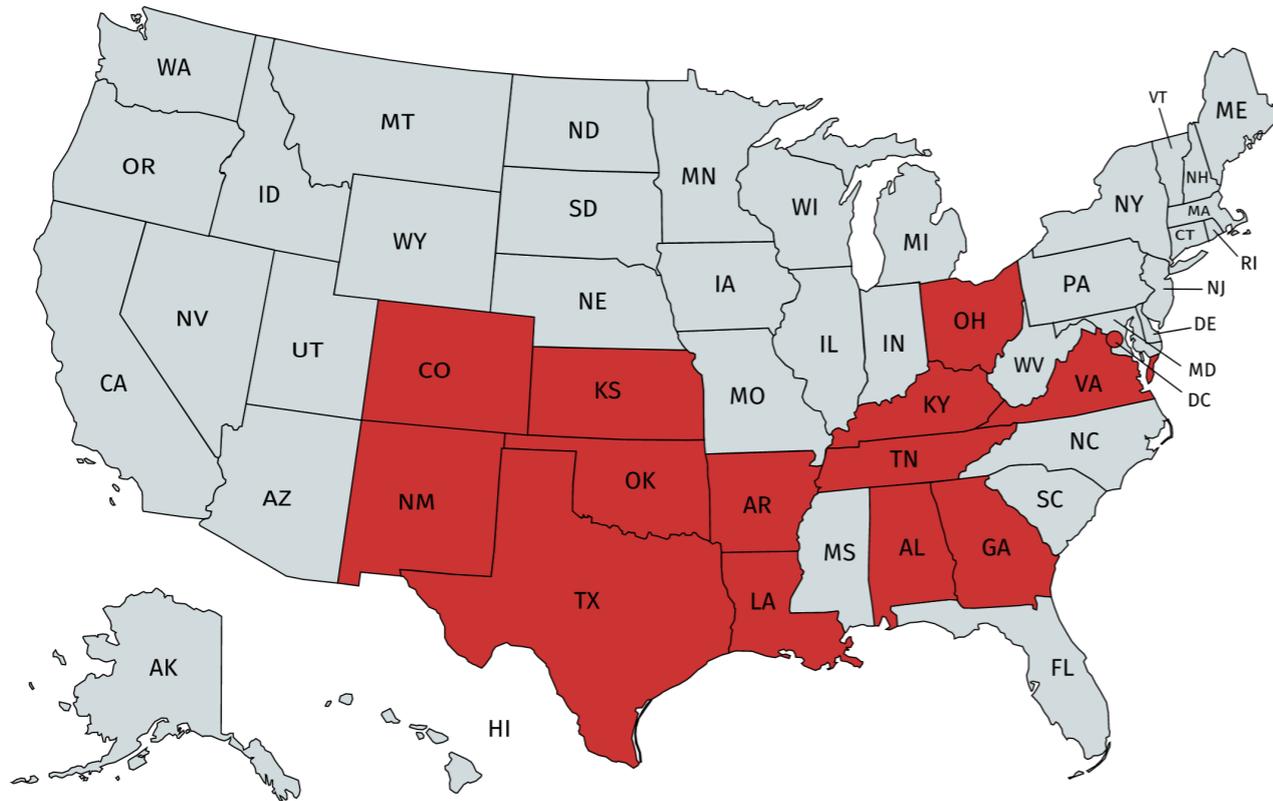




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## About the Speakers



- Based in Dallas, TX
- Structural Steel Erection
- Metal Deck Erection
- Miscellaneous Metals
- Precast Erection
- AISC Advanced Certified Erector





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# About the Speakers

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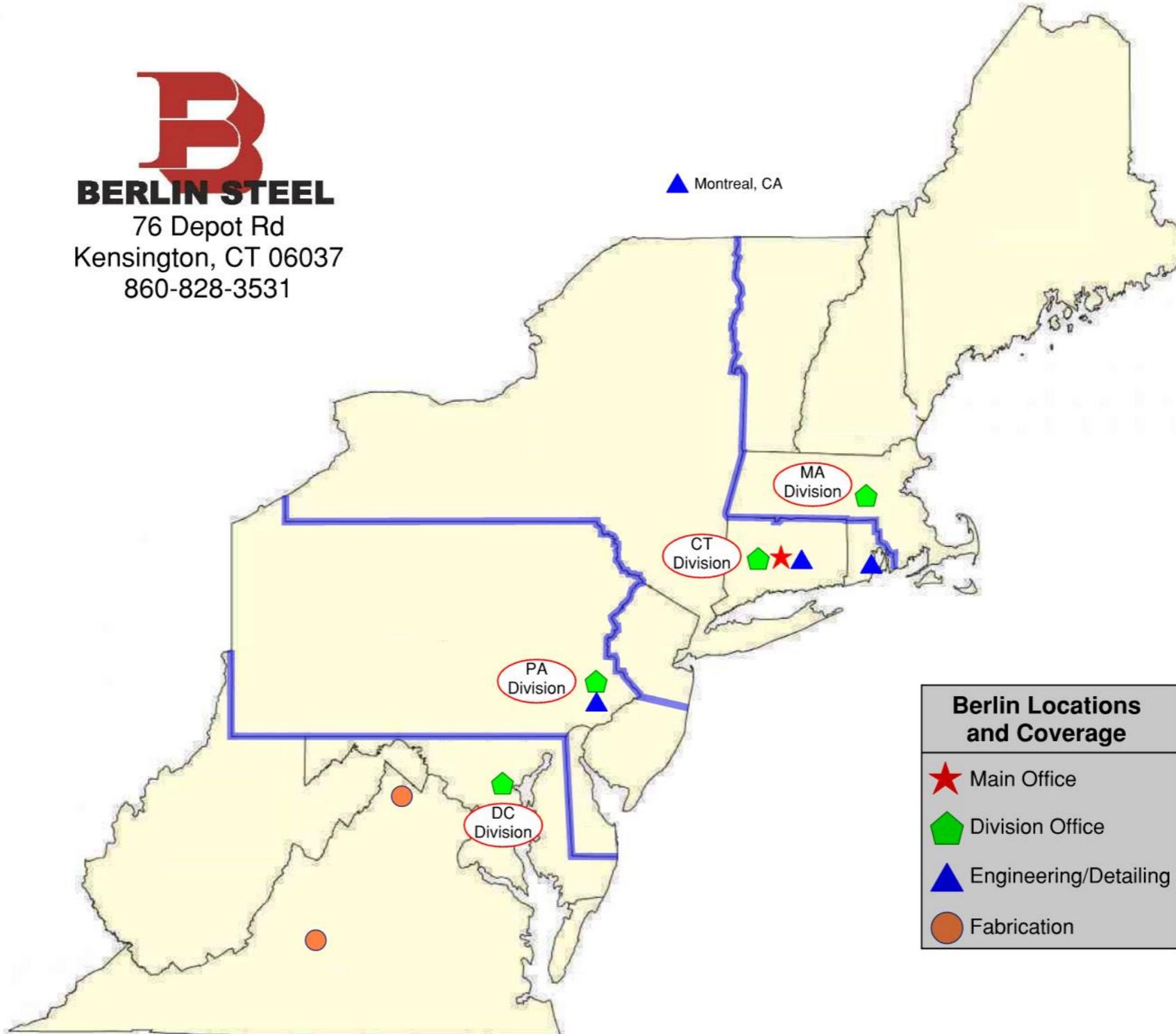




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▲	Engineering/Detailing
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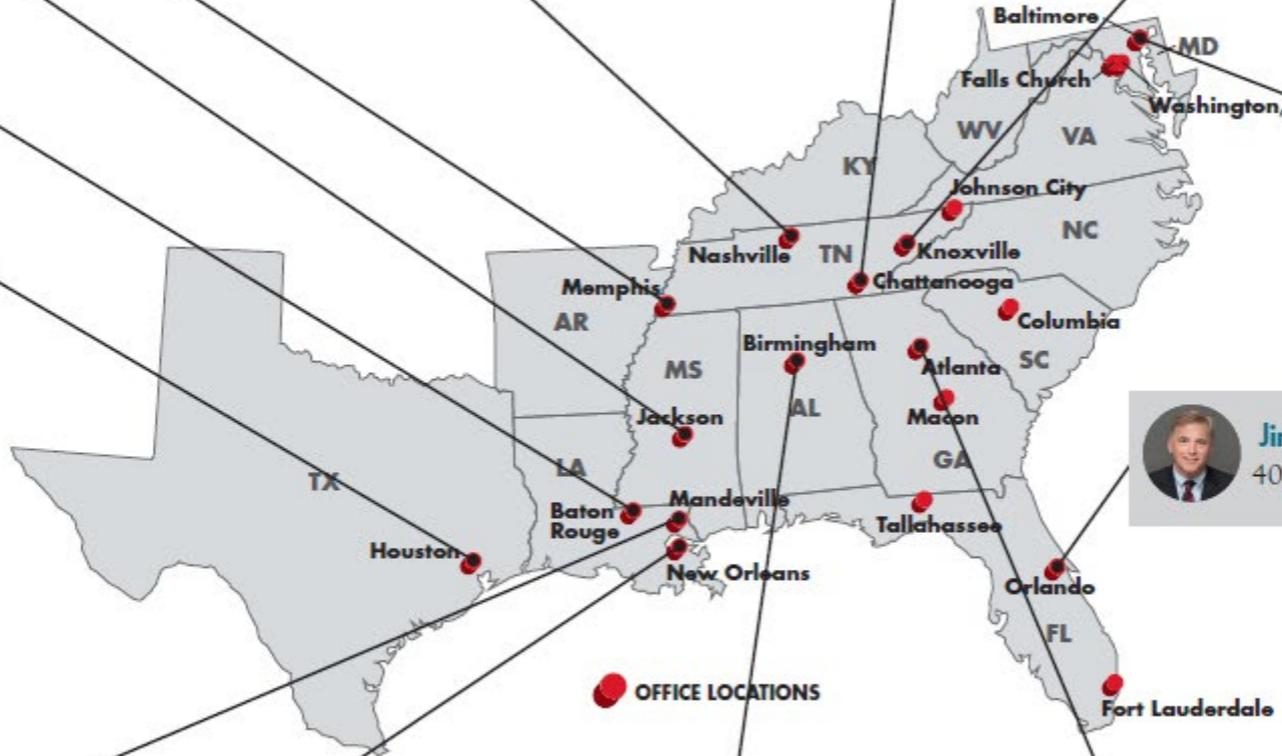
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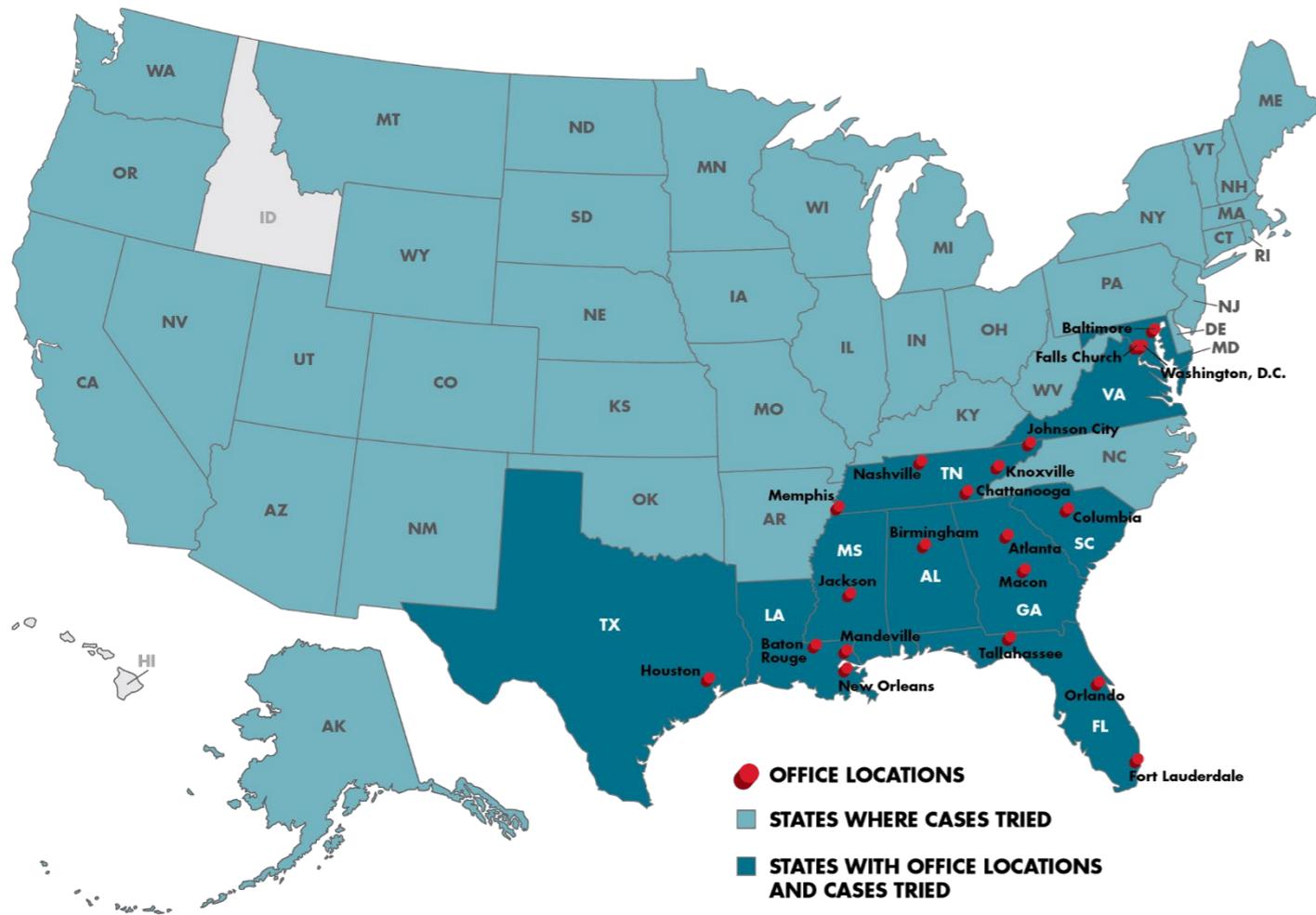




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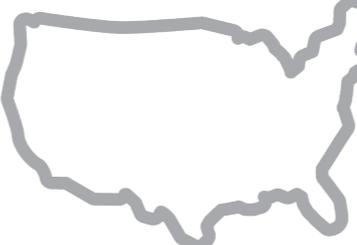


## Litigation



**85+** ATTORNEYS   
WITH MORE THAN **20** TRIALS 

MORE THAN   
**150** ATTORNEYS WITH TRIAL EXPERIENCE

TRIAL EXPERIENCE IN **48** STATES 

**3** MEMBERS OF AMERICAN COLLEGE OF TRIAL LAWYERS 

**35** LITIGATORS   
SERVED AS FEDERAL AND STATE APPELLATE CLERKS AND FORMER STATE SUPREME COURT CLERKS

**60** CASES   
REVIEW GRANTED OR SOUGHT BY U.S. SUPREME COURT



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# Market Conditions

1. New Opportunities
2. Bid Pressures
3. Allowances / Add Alternates
4. Business Development /  
Selling the Job





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## Market Conditions

6.Length of Time to Contract  
(or Not)

7.Cancelled / Delayed Projects

8.Price Fluctuations





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# Legal Implications

1. Fixed Priced Contracts
2. Termination for Convenience
3. Promissory Estoppel /  
Detrimental Reliance



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# Fixed Price Contracts

- 53% of rebar used across the globe is produced in China.
- Absent an escalation clause (or de-escalation clause), Subcontractor generally bears the risk of price increases.
- Price Escalation Clause: “If material or equipment, which the contractor is required to supply are not available due to a shortage or unavailability for any reason (including epidemics, pandemics, or other outbreaks), then an acceptable substitute shall be found and an adjustment in the contract price shall be made accordingly. A delay in obtaining delivery of the substitute item shall be a legitimate reason for an extension of the contract time.”
  - Good luck ;)
- Bid Qualifications





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# Termination for Convenience

**AIA A401-2017**

## **§ 7.2.2 Termination for Convenience**

**§ 7.2.2.1** If the Owner terminates the Prime Contract for the Owner's convenience, the Contractor shall promptly deliver notice to the Subcontractor.

**§ 7.2.2.2** In case of such termination for the Owner's convenience, the Subcontractor shall be entitled to receive payment for Work properly executed, costs incurred by reason of the termination, and reasonable overhead and profit on the Work not executed.

**§ 7.2.2.3** Upon receipt of notice of termination, the Subcontractor shall

- .1 cease operations as directed by the Contractor in the notice;
- .2 take actions necessary, or that the Contractor may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing Sub-subcontracts and purchase orders and enter into no further Sub-subcontracts and purchase orders.



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# Termination for Convenience

In addition to Contractor's right to suspend or terminate for cause as set forth above, Contractor may, in its sole discretion, at any time, without cause and for whatever reason including the Contractor's own convenience, **suspend or terminate** all or any part of Subcontractor's Work under this Agreement by giving written notice to Subcontractor. If any part of Subcontractor's Work is terminated or suspended for convenience, **Subcontractor shall be entitled to compensation for costs directly related to such suspension or termination including reasonable demobilization and cancellation charges, provided said costs and charges are authorized in advance by Contractor.** Subcontractor shall not be entitled to anticipated profits or overhead on Subcontractor's Work that has not been performed or on materials or equipment that have not been furnished. If the reason for the termination of this Agreement is due to any action of the Owner, then Contractor shall not be liable to Subcontractor for any sum greater than that which Contractor receives from Owner with respect to Subcontractor's Work.





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# Termination for Convenience

## Takeways / Negotiations

1. Must be entitled to compensation for work in place (earned revenue)
2. Must be entitled to costs of demobilization and termination costs (restocking fees, penalties, etc.)





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## Promissory Estoppel / Detrimental Reliance

- Be careful how and when you bid a job.
- Elements of Contract: (1) Offer; (2) Acceptance; and (3) Consideration
  - Elements generally do not exist when subcontractor simply submits a bid
- Under what circumstances can a subcontractor be held to it bid:
  1. A clear and definite promise;
  2. Where bidder has a reasonable expectation that the bid will induce action on part of contractor;
  3. Contractor actually and reasonable relies on the bid; and
  4. Reliance causes a detriment which can only be avoided by the enforcement of the promise.





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## Travel Restrictions / Executive Orders / Delays

### 1. State by State Restrictions

a. Employee Travel

b. Management / Oversight

### 2. Job Shutdowns





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## Operational Impacts / Delays

1. Jobsite Controls / Safety Plan
  - a. Safety Issues
  - b. Morale Issues
2. Additional Costs
  - a. Hard Costs - Cleaning / Hand sanitizer / Wash Stations / Masks / Etc.
  - b. Administrative – JHAs / HR
3. Delays
  - a. Job Shutdowns / Outbreaks
  - b. Material Deliveries
4. Productivity: (a) office; and (b) site
5. Other Issues: (a) Team Building / Camaraderie; (b) Fatigue / Complacency; and (c) Training





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## Force Majeure

Prime Contract will Control

### AIA A201-2017, § 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

3. General Take-away: Time but not Money





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## No Damages for Delay

Time Extension for Delay – An extension of time under the Contract shall be Contractor's **sole and exclusive remedy for any delay to the Work or impacts to the progress of the Work**, even if such delays were unforeseeable or due in whole part to the actions of Owner.





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## No Damages for Delay

- What's at Stake for a Contractor?
  - Entitlement to additional compensation resulting from delays.
  - Generally are enforceable with a few exceptions, such as active interference.
- Protections
  - Some states prohibit; courts disfavor
  - If possible, delete (highly unlikely)
  - If not, tie to rights under prime contract, modify to allow for cap of delay damages, or allow damages after threshold period of delay



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## Loss of Productivity / Inefficiency Can I Recover the Costs?





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## Loss of Productivity / Inefficiency

- What is the effect on bottom line? 15%?
- How do you prove / demonstrate inefficiency?
  - Measured Mile Analysis – empirical method that compares productivity rate ratio before and after
  - MCAA Factors (Mechanical Contractor Association of America)
  - Total Cost Method / Modified Total Cost – disfavored analysis





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## Loss of Productivity / Inefficiency Can I Recover the Costs?

1. Prime Contract Will Control
2. Takeaways – if you want to preserve or proceed with a claim
  - a. Notice
  - b. Notice
  - c. Notice
  - d. Document
  - e. Document
  - f. Document





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## MCAA Factors

Factor	Percent of Loss per Factor		
	Minor	Average	Severe
1. <b>STACKING OF TRADES:</b> Operations take place within physically limited space with other contractors. Results in congestion of personnel, inability to locate tools conveniently, increased loss of tools, additional safety hazards and increased visitors. Optimum crew size cannot be utilized.	10%	20%	30%
2. <b>MORALE AND ATTITUDE:</b> Excessive hazard, competition for overtime, over-inspection, multiple contract changes and rework, disruption of labor rhythm and scheduling, poor site conditions, etc.	5%	15%	30%
3. <b>REASSIGNMENT OF MANPOWER:</b> Loss occurs with move-on, move-off men because of unexpected changes, excessive changes, or demand made to expedite or reschedule completion of certain work phases. Preparation not possible for orderly change.	5%	10%	15%
4. <b>CREW SIZE INEFFICIENCY:</b> Additional workers to existing crews "breaks up" original team effort, affects labor rhythm. Applies to basic contract hours also.	10%	20%	30%
5. <b>CONCURRENT OPERATIONS:</b> Stacking of this contractor's own force. Effect of adding operation to already planned sequence of operations. Unless gradual and controlled implementation of additional operations made, factor will apply to all remaining and proposed contract hours.	5%	15%	25%
6. <b>DILUTION OF SUPERVISION:</b> Applies to both basic contract and proposed change. Supervision must be diverted to (a) analyze and plan change, (b) stop and replan affected work, (c) take-off, order and expedite material and equipment, (d) incorporate change into schedule, (e) instruct foreman and journeyman, (f) supervise work in progress, and (g) revise punch lists, testing and start-up requirements.	10%	15%	25%



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## MCAA Factors (cont.)

Factor	Percent of Loss per Factor		
	Minor	Average	Severe
7. <b>LEARNING CURVE:</b> Period of orientation in order to become familiar with changed condition. If new men are added to project, effects more severe as they learn tool locations, work procedures, etc. Turnover of crew.	5%	15%	30%
8. <b>ERRORS AND OMISSIONS:</b> Increases in errors and omissions because changes usually performed on crash basis, out of sequence or cause dilution of supervision or any other negative factors.	1%	3%	6%
9. <b>BENEFICIAL OCCUPANCY:</b> Working over, around or in close proximity to owner's personnel or production equipment. Also badging, noise limitations, dust and special safety requirements and access restrictions because of owner. Using premises by owner prior to contract completion.	15%	25%	40%
10. <b>JOINT OCCUPANCY:</b> Change cause work to be performed while facility occupied by other trades and not anticipated under original bid.	5%	12%	20%
11. <b>SITE ACCESS:</b> Interferences with convenient access to work areas, poor man-lift management or large and congested worksites.	5%	12%	30%
12. <b>LOGISTICS:</b> Owner furnished materials and problems of dealing with his storehouse people, no control over material flow to work areas. Also contract changes causing problems of procurement and delivery of materials and rehandling of substituted materials at site.	10%	25%	50%
13. <b>FATIGUE:</b> Unusual physical exertion. If on change order work and men return to base contract work, effects also affect performance on base contract.	8%	10%	12%
14. <b>RIPPLE:</b> Changes in other trades' work affecting our work such as alteration of our schedule. A solution is to request, at first job meeting, that all change notices/bulletins be sent to our Contract Manager.	10%	15%	20%
15. <b>OVERTIME:</b> Lowers work output and efficiency through physical fatigue and poor mental attitude.	10%	15%	20%
16. <b>SEASON AND WEATHER CHANGE:</b> Either very hot or very cold weather.	10%	20%	30%





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## What Can We Do to Mitigate Risk?

1. Plan, Plan and Plan
2. Understand (and Negotiate) Contracts
3. Price the Risk
4. Follow Your Subcontract and the Prime Contract
5. Documentation is Key
  - a. Notices
  - b. Updated Schedules
6. Reservation of Rights / Lien Waivers
7. Billing / Collections – Cash is King





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## Q&A

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