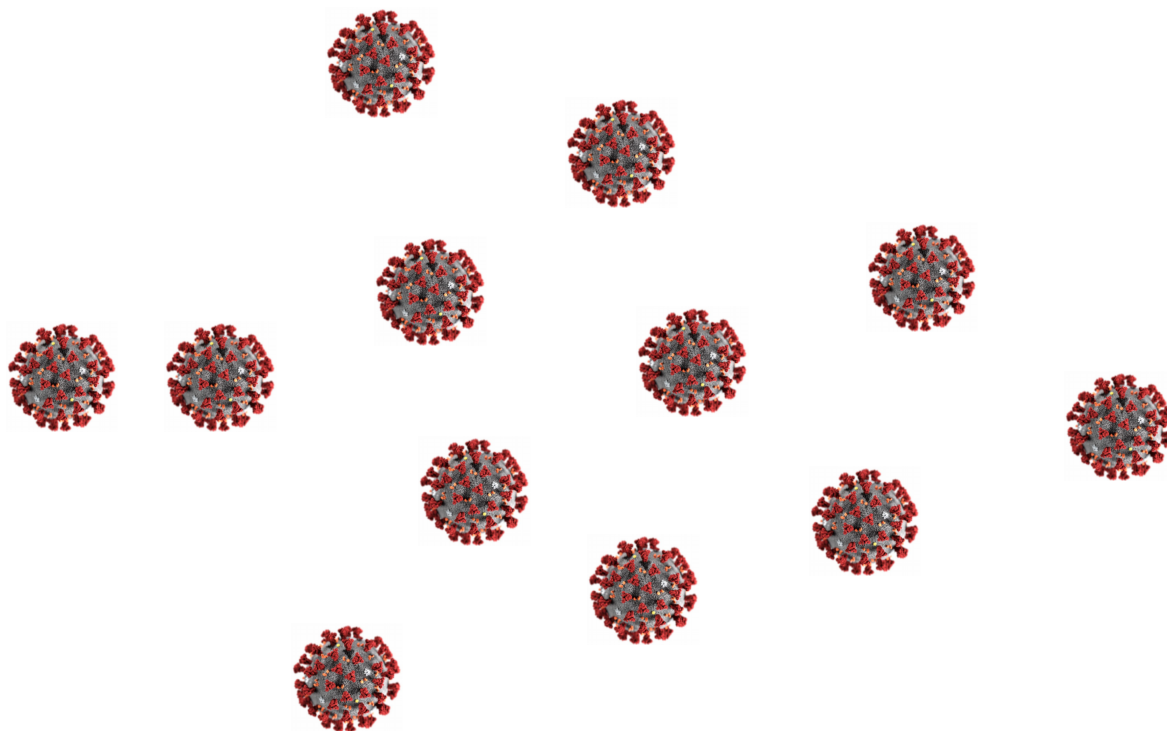


Force Majeure Management – During Covid-19 Pandemic Recovery



Presenter



- Mr. Dubreuil has 35 years, of experience leading projects and organizations through significant development and growth from concept thru to startup, turn arounds, change & claims management, restructuring and process improvement.
- He has in-depth senior management experience in leadership development and team building within project, engineering, and construction management, business development, finance, IT, and operations.

Overview

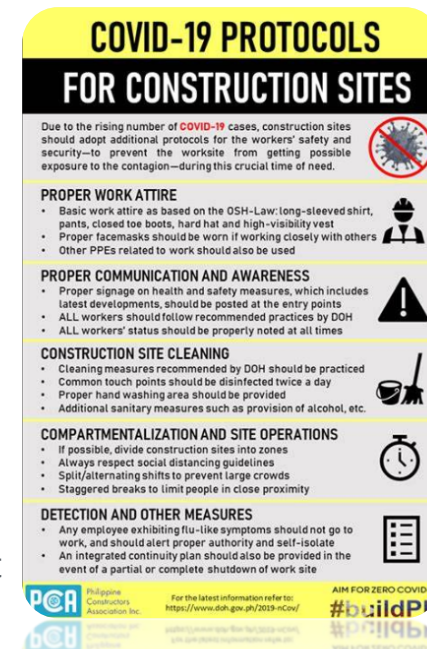
- The New Normal requires **“new ways”** of operating that requires all parties; Owners, Consultants, Contractors, Engineers, and Equipment Suppliers to find new and innovative ways of optimizing cost and schedule to **mitigate the impact of COVID-19 and work towards a sustainable recovery.**
- Excusing a party from its contractual obligations for a force majeure event is the exception. “Contract liability is strict liability. It is an accepted maxim that *pacta sunt servanda*, **contracts are to be kept.**
- This discussion **explores three fundamental methods** to help ensure that as projects resume - the threats to safety, quality schedule and cost are minimized and **opportunities for improvements** in each of these core areas are explored and realized.
- These methods are:
 1. **Transparent Communications**
 2. **Collaboration and Integration**
 3. **Rigorous Change Management**
- Using industry research and experience **we outline how these methods build trust** to develop the ideas to mitigate the impact of COVID-19 Force Majeure events

Force Majeure

Force Majeure events are usually defined as certain acts, events or circumstances beyond the control of the parties, for example, natural disasters or the outbreak of hostilities – **Pandemics**

There is a **continuing duty by both parties to mitigate** the impacts of the force majeure event by:

- **Proactively taking reasonable steps to mitigate** the impacts of the force majeure event. This may include deciding how best to allocate limited goods or considering substitute performance. When choosing the right approach, the interests of both parties must be considered. A *constructive dialogue with the contractual counterparty is crucial here.*
- **Setting up a process to continually review and assess potential steps to mitigate** during the force majeure event. At present, there is uncertainty as to when the duty to mitigate ceases to be engaged. The safest approach is therefore to continually monitor the situation and act accordingly.
- **Keeping a documentary record** of the different mitigation options considered, and the steps taken. It is good practice to keep written notes of what was discussed during telephone calls and meetings. This could be especially important for recording the consideration of options which were ultimately discounted.



Source HFW Legal – Force Majeure – Now What? A Three Step Framework for Mitigation

Force Majeure – Past Examples



Fort McMurray Wildfires - 2016



Global Financial Crisis - 2008



Calgary Flood 2013



Fukushima Disaster -2011

Source: Microsoft Bing Search

Force Majeure - Globally the COVID-19 Pandemic is unlike anything we've faced in our lifetime

- **In fact, there is nothing novel about the novel coronavirus**—at least so far as contract law is concerned.
- Certainly, the scope of the federal, state and provincial governments' shutdown of businesses has been unprecedented, causing massive disruptions to the supply chain, prompting innumerable commercial tenants to declare force majeure on their rental obligations, and impelling parties to back out of all manner of deals due to economic uncertainty.
- But contracts are disrupted by force majeure events of all kinds, and we won't have to wait until the COVID-19 cases meander their way through the judicial process to predict what the law will look like after it is all over.
- **There is nothing about the pandemic that is going to shake the sturdy foundations of contract law.**



Source Lexus Nexus – Force Majeure and Coronavirus (COVID-19): Seven Critical Lessons from the Case Law

COVID-19 - Return to Work Plans

Most owners with large sustaining and capital programs have developed Return to Work Plans that based are on a variety of factors but typically include:

- Government Guidelines and Regulations:
 - Return Phases: Pandemic, Phase 1, Phase 2, Phase 3, New Normal
 - Social Distancing: 2 Meters, Reduced Occupancy Levels
 - PPE Requirements: Masks, Face Shields, Gowns, Gloves
 - Hygiene Requirements: Hand Washing, Surface Cleaning
- Project and Business Priorities:
 - Critical, High, Medium and Normal
- Supply Chain:
 - Engineer, Constructor, Consultant – Availability/Viability
 - Equipment Availability
 - Material Availability



Source CII – UMM Sector - COVID-19 Recovery presentation by Ginny Li May 2020

Transparent Communications – Building Trust

The COVID-19 Impacts are Real

- Industry Study concludes - Construction Productivity Decrease of 20% because of COVID-19
- Through open, transparent and frank communications all parties in a project can mitigate these impacts

Pandemics and Construction Productivity: Quantifying the Impact

Figure 3 provides a table depicting the breakdown of hours collected and task coded to mitigation related activities:

	Total Hours	% of Total Hours	% of Mitigation Hours
Total Hours Available	77,205		
Mitigation Safety & Training	1,598	2.1%	29.6%
Mitigation Distancing & Access Rules	1,865	2.4%	34.6%
Mitigation Cleaning & Disinfecting	1,400	1.8%	25.9%
Mitigation Administration	532	0.7%	9.9%
Total Mitigation Hours	5,394	7.0%	100.0%

Figure 3: Hours by Task Code for Mitigation Activities

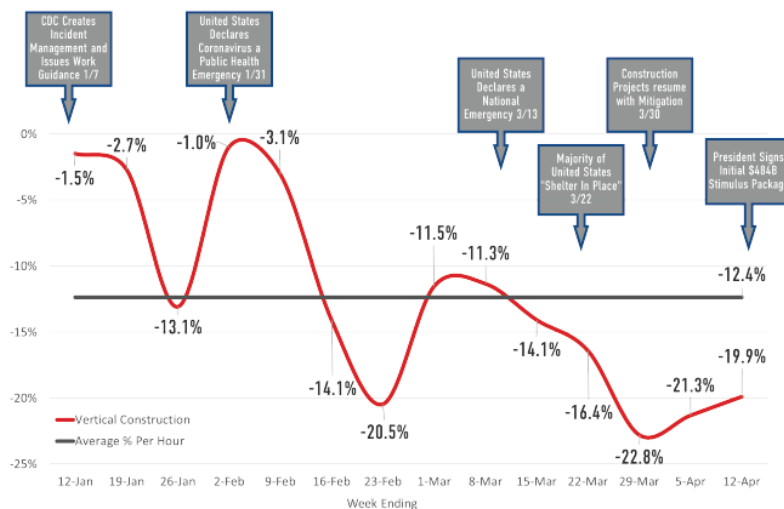


Figure 7: Vertical Construction Productivity Against Events

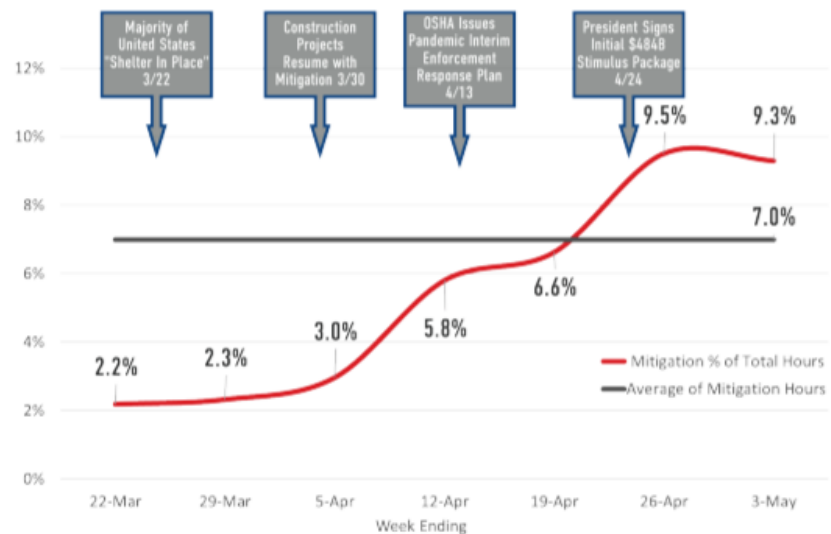


Figure 4: Mitigation Hours as a Percent of Total Hours by Week

Source: Pandemics and Construction Productivity: Quantifying the Impact By Maxim Consulting Group August 5, 2020

Transparent Communications – Building Trust

With Mutual Duties to Mitigate - all parties can improve results through open and transparent communication that includes:

- **Collectively Defining, Quantifying and Agreeing to COVID-19 Impacts:**
 - **Scope** – will it / can it / should it - change because of the COVID-19 delays?
 - **Schedule**
 - Delays - Craft, Equipment, Material, Shop and, Site Availability
 - **Work Methods**
 - PPE, Social Distancing, Occupancy Restrictions, Testing regimes, Inspections – can lead to new methods for craft to work
 - **Cost**
 - Craft Productivity, Premium Pay, Shift Pay, Equipment and Material Prices (alternative suppliers), Mitigation Requirements (Cleaning, Testing, Tracking, Training, Access Control, Distancing)
 - **Quality** – Potential impact because of - alternative materials, methods and equipment
 - **Safety** – Meeting the spirit and the letter of the constantly changing regulations
- **OPEX**
 - Experience from other projects that can be applied to help mitigate impacts
 - Research papers and studies as baselines to establish cost and schedule impacts

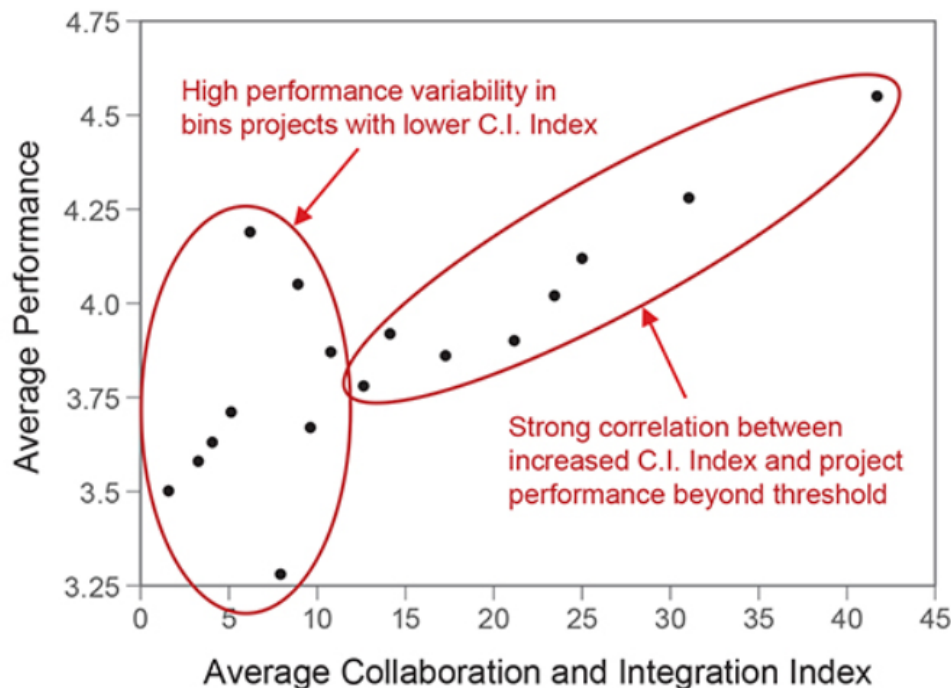
Source: PMI PEMBOK Guide Sixth Addition

Transparent Communications – Building Trust

- **Priority Setting**
 - Schedule vs Cost vs Quality
 - Resource availability based on other party priorities and projects
- **Opportunities**
 - Acceleration, Multiple Shifts, Scope Changes, Deferrals
 - Virtual Meetings: Design, Planning, Inspection, Reporting, Coordination
 - Alternative Approaches: Technology, Work Allocation Amongst Parties, Tooling, Equipment, Methods
- **Threats**
 - COVID-19 setbacks, 2nd and 3rd Waves, Craft, Professionals, Equipment and Material Availability
 - Changing Regulatory Environment – PPE, Hygiene, Social Distancing, Shutdowns, Tracing, Testing
- **Rigorous Documentation**
 - Ensuring that the various types of information are collected, organized and stored with full access by all parties.
- **Verify** - Open book access to the party's costs and resource availability

Source CURT "The Voice Magazine Issue III – "The Capital Projects Industry Reacts to COVID-19" and other Articles

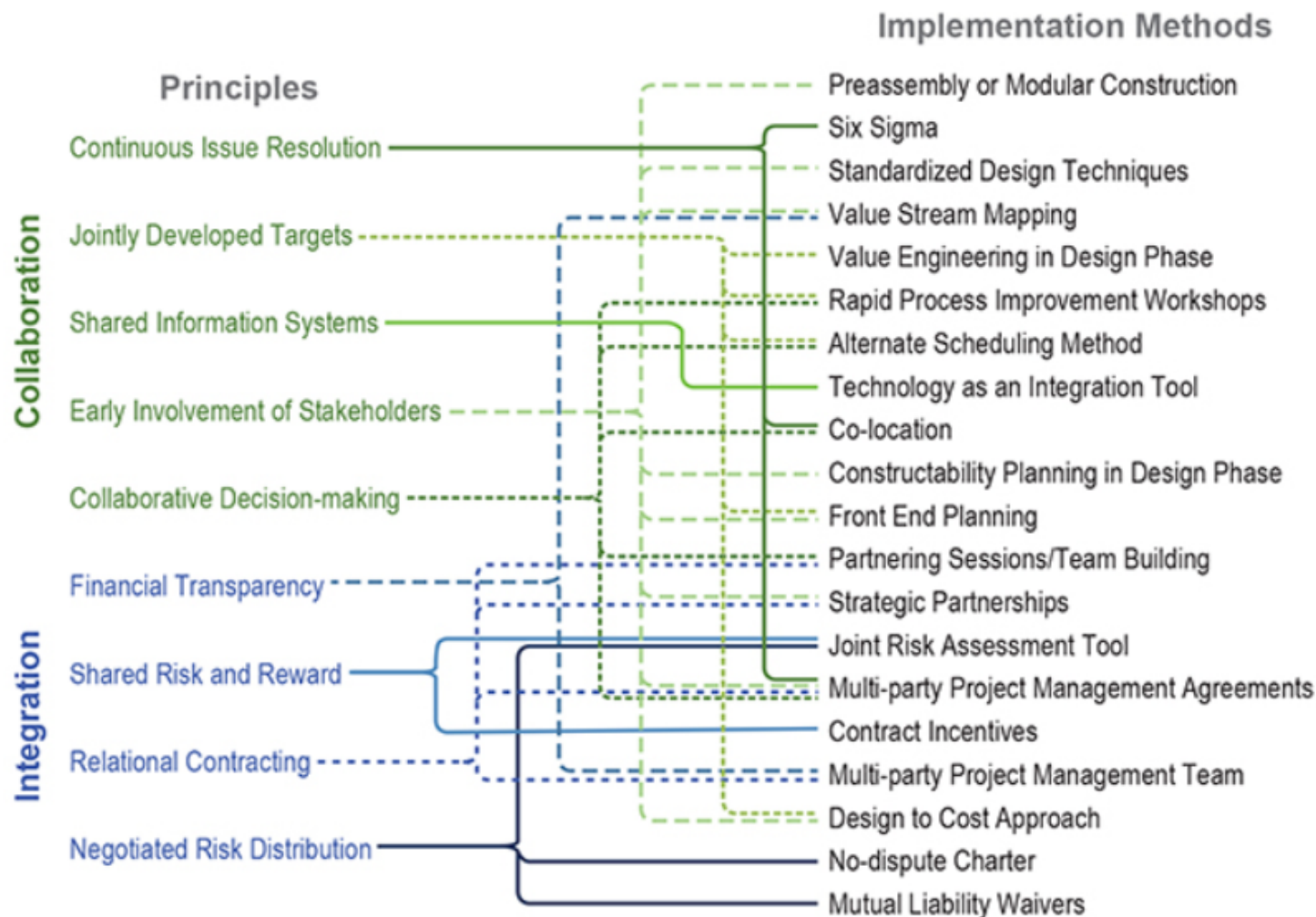
Intense Collaboration and Integration - A Recipe for Success



- Research provides convincing evidence that as the number and intensity of Collaboration and Integration Principles and Methods Increase – **Project Success Rates Increase.**
- **Restarting projects with** specific goals to mitigate the impacts to Schedule, Cost, Quality and Safety caused by the COVID-19 Pandemic requires new approaches
- The intense use of multiple **Collaboration and Integration Principles and Methods** will improve project restarts after being shut down for months

Source CII RT 341 – “Integrated Project Delivery for Industrial Projects” August 2018

Intense Collaboration and Integration - A Recipe for Success



Source CII RT 341 - "Integrated Project Delivery for Industrial Projects" August 2018

Intense Collaboration and Integration - A Recipe for Success

Five simple steps to get started

1. Select a Neutral Facilitator
2. Define the Desired Outcome(s) in Restarting the Project
 - Safety, Quality, Scope, Schedule, Cost
3. Assemble the Cross Functional Teams
4. Develop the Action List required to get the project ready to restart
5. Select the Collaboration and Integration Principles and Methods - that apply to the Project, Action Lists, and Cross Functional Teams



Intense Collaboration and Integration - A Recipe for Success

COVID-19 RESPONSE SUCCESSFUL VIRTUAL COLLABORATION

AUTHORS: ANDY RHODES | HENRY NUTT III | NATASHA SCHNAITMANN

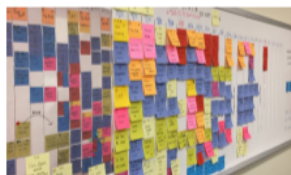


INTERVIEW SUCCESSFULLY

- **Choose a Technology Platform Early:** This gives interviewees a chance to work with the technology, get comfortable, and make the process more seamless.
- **Create More Engagement:** Consider having pre-interview calls, smaller breakout sessions, or a virtual meet and greet prior to the formal interview. These events help build relationships and trust.
- **Leverage Conditions of Satisfaction:** Develop CoS prior to the interview and ask interviewees how they can help your team achieve those goals.
- **Be Flexible:** Technology issues happen. Be open and flexible and try not to judge interviewees based on an issue they couldn't control.
- **Cameras On:** Not just for the interviewees, but interviewers too. This gives the interviewee a fair chance to read the room, monitor body language, and change the course of the discussion as needed.
- **Monitor Local Regulations:** It might be possible for the most critical people to meet in person while still following all guidelines and regulations. Other less critical personnel could interview virtually.

RECREATE VISUAL MANAGEMENT

- People still need to see the items that would be hanging in the Big Room: Parking Lot, Risks and Opportunities Lists, Conditions of Satisfaction, etc... Create electronic versions instead.
- A dedicated Scribe can add content to these items throughout the meeting, minimizing distractions.
- Ensure the Scribe and presenters upload all meeting content to one, common file sharing site. This allows attendees to virtually see Visual Management tools any time they'd like.



UTILIZE A FACILITATOR

- Monitoring body language and the mood of the room is more difficult virtually. Facilitators can ask questions and view body language to ensure the group is engaged.
- Facilitators help manage the agenda and keep the group on schedule, making adjustments on the fly as needed.



FOCUS ON AGENDA PLANNING

- Build in a healthy number of breaks and an adequate lunch. People need that time to manage email, make phone calls, and help their kids with homework.
- Send out the agenda in advance. People will plan around those times.
- Virtual meetings allow people to more easily pop in and out. Stick to your agenda so key resources are calling in at the right times.
- Group topics by attendees. This minimizes downtime between topics, limits the number of times people need to dial in, and decreases inevitable technology issues.
- Utilize a parking lot to stay focused and out of the weeds.
- Ensure conversations are impactful for all attendees.

CREATE VIRTUAL SITEWALKS

- Have someone with deep knowledge of the site lead the tour virtually. This person can answer questions and move the camera to the right locations as information is requested.
- Technology could be leveraged for third party inspections as well.
- Multiple technology options are available that could add value for your team
- Allows off-site personnel (engineers, PMs, etc.) to know the current status of construction for planning purposes.



TURN CAMERAS ON



- Allows the team to see the body language of everyone else. Most communication is non-verbal.
- Creates a more personal, less intimidating environment for speakers.
- Enables your Facilitator to monitor body language and gauge the temperature of the virtual "room".

LEVERAGE BREAKOUTS

- Allows people to talk in smaller groups, creating better personal connections.
- Smaller groups also enable better collaboration and "getting into the weeds" without wasting the time of people that don't need to be engaged in the conversation.
- Pre-plan for these sessions and have the necessary number of call-in links/numbers set up in advance. Know who will lead the sessions as well.

IMPLEMENT VIRTUAL DESKTOP INFRASTRUCTURE (VDI)



- Reduces cost and the complexity involved in replicating massive amounts of data across multiple data centers.
- BIM from anywhere without sacrificing productivity.
- Utilize remote designers without replicating large files, breaking down boundaries across geographically dispersed teams.

MANAGE ATTENDANCE



- Productivity and engagement will decrease as your group sizes goes up. For presentations, feedback shows 30 is a good target number. Limit meetings to 4-6 if you need deep engagement and conversation from all members.
- Rule of Thumb: If the team doesn't recognize your voice by the end of the day, you probably didn't need to be in the meeting.

WATCH DURATIONS

- Build in more, smaller breaks. The majority of the group will struggle to fully focus on a computer screen for more than an hour.
- Most people agree that two back-to-back days of a Virtual Big Room is the maximum that a group can fully engage without losing productivity.



Source: Lean Construction Institute

Rigorous Project Change Management

- **Change occurs** during the development, planning and execution of projects for a variety of reasons.
 - Regardless of the type and magnitude of a change, **complex dynamics result**.
- **Elements of a project that are subject to change** and affect the change management process include:
 - Project Scope, Project Organization, Work Execution Methods, Control Methods, Contracts and Risk Allocation
- **Rigorous Change Management fully documents changes** on a continuous basis and is a recommended Industry Best Practice to manage cost and schedule certainty.
- **Capturing, recording and agreeing to changes** by type of change as they occur during each Phase of a Project has been proven to improve project success rates.

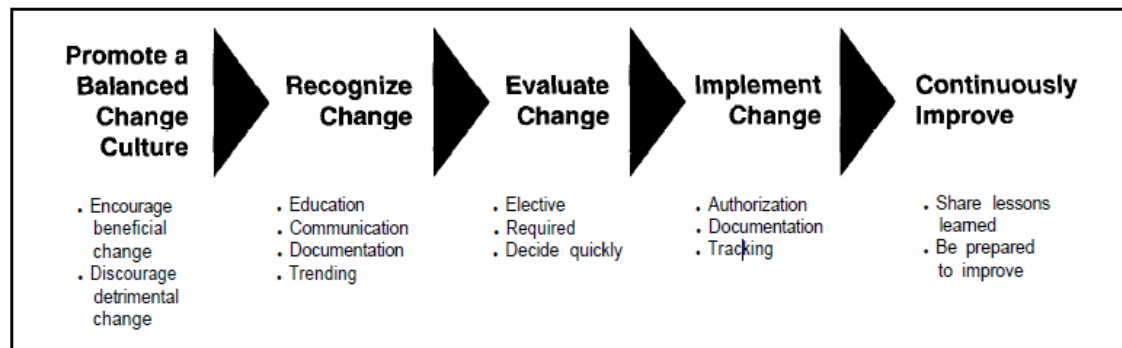


Figure 5. The Principles of Effective Change Management

Rigorous Project Change Management – Proper Categorization

- Performance Related Change
 - Those changes caused by performance of the parties with respect to their obligations under the project agreement for reasons that do not include the COVID-19 pandemic:
 - Design – IFC Drawings
 - Equipment Delivery
 - Permits, Construction Craft Productivity
- Scope Related Change
 - Changes to the Scope of the Project with respect to original project requirements because of changing owner priorities and requirements, regulatory changes etc.
 - Capacity increases or decreases
 - Access to site caused by other projects
 - Permit delays, Court challenges
- COVID – 19 Related Change
 - Changes to the Project that are specifically related to the COVID-19 Pandemic based on the Force Majeure Language within the Project Agreement
 - Schedule Delays, Work Stoppage, Partial Restarts, Phased Restarts
 - Craft Availability, Craft Training, Craft Productivity
 - Equipment Availability
 - Mitigation Requirements, Work Face Distancing, Testing, Tracking, Administration

Source: CII SP 43-1 Project Change Management

Third Party Support Resources

- Project Managers from the project parties **typically have a full plate** just with managing the planning and execution of their projects.
- Depending on the Contracting Methods key project **stakeholders have differing motivations.**
- Experienced 3rd party resources **provide dedicated neutral support** to work through the Changes and Claims that will arise out of the COVID-19 Force Majeure event to **maximize mitigation and minimize litigation.**
- These resources include:
 - Facilitators
 - Risk Specialists
 - Change and Claims Managers
 - Commercial & Contracts Managers
 - Project Controls Specialists – Schedule and Cost
 - Construction Specialists
 - Engineer and Design Specialists



Summary

Force Majeure Management – During the Covid-19 Pandemic Recovery:

- The impacts of COVID-19 are broad and very real and will be felt for quite a while
- We all have a duty to mitigate COVID-19 caused impacts based on our project agreements:
- Three methods to maximize the effectiveness of mitigation are:

- 1. Transparent Communications**
- 2. Willingness to Collaborate and Integrate** using modern principles and methods
- 3. Rigorous Change Management** that clearly separates COVID Changes and Scope Changes from Performance Related changes.



Questions





*Delivering Safe Projects with Certainty, Integration
and World-Class Performance*

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