

Construction Law Alert: Impact of COVID-19 for Construction Project Owner

1) Certain Construction Projects Suspended as “Non-Essential”

On Friday, March 27, 2020, the Empire State Development Corporation issued an additional Guidance regarding the classification of Essential Projects under Executive Order 202.6 as modified by Executive Order 202.8. Section 9 of the Guidance reads:

9. Construction

All non-essential construction must shut down except emergency construction, (e.g. a project necessary to protect health and safety of the occupants, or to continue a project if it would be unsafe to allow to remain undone until it is safe to shut the site).

Essential construction may continue and includes roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters. At every site, if essential or emergency non-essential construction, this includes maintaining social distance, including for purposes of elevators/meals/entry and exit. Sites that cannot maintain distance and safety best practices must close and enforcement will be provided by the state in coordination with the city/local governments. This will include fines of up to \$10,000 per violation.

For purposes of this section, construction work does not include a single worker, who is the sole employee/worker on a job site.

Projects that are **not** being shut down include:

- Emergency construction (projects necessary to protect health and safety of occupants);
- A project that would be unsafe to leave undone, but only until it is safe to shut down the site;
- “Essential Construction”, which includes roads, bridges, transit facilities, utilities, hospitals or healthcare facilities, affordable housing and homeless shelters;
- Projects where there is only one employee or worker on the job site.

At every site that is permitted to operate, workers must always maintain social distancing, including while using elevators, during meals and for entry and exit. All sites that cannot maintain adequate social distances and safety-related best practices must close.

On Monday, March 30, 2020, Governor Cuomo issued Executive Order 202.13, which includes the following:

Executive Order 202.6 is hereby modified to clarify that construction which was an essential service not subject to the in-person work restrictions is modified to provide only **certain** construction is considered

exempt from the in-person restrictions as of March 28, 2020. Further, on and after March 27, 2020, Empire State Development Corporation is hereby authorized to determine which construction projects shall be essential and thereby exempt from the in-person workforce prohibition, contained in EO 202.6 and subsequent Executive Orders which further reduced the workforce requirements. All continuing construction projects shall utilize best practices to avoid transmission of COVID-19.

This extends the authority of the Empire State Development Corporation to make direct determinations as to what qualifies as an essential construction project rather than merely offering guidance regarding the interpretation of prior Executive Orders.

Check <https://esd.ny.gov/> for updates to the guidance which may become formal directives.

There are several unofficial reports indicating that ESD will update their classification of construction-related Essential Business to relax restrictions on public works projects and possibly others. For the moment, we await these updates.

2) Possible Ramifications Related to Force Majeure:

Whether a project is placed on hold or allowed to proceed, contractors will likely incur expenses or require additional time as a result of the pandemic.

Generally, a contractor may recover for additional unavoidable expense or time caused by events a reasonably competent contractor could not have anticipated at the time the contract was entered into. If the pandemic constitutes a *force majeure* event, such recovery might not be limited by the contract terms. For that reason, construction project owners should be proactive in taking steps to prepare to respond to claim notices that will be flowing in.

A. Review your Contract Documents for Provisions that Deal with Excuse for Delay

Many construction contracts do not contain a *force majeure* clause per se, but include other provisions that excuse performance or delays caused by circumstances beyond the contractor's control. The AIA's general conditions for construction, for instance, provide for an extension of the contract time in the event of "labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the [contractor's] control." Change order language may also apply in certain circumstances.

B. Require Your Contractors to Provide Real Time Itemization and Backup

Your construction contracts likely require this. Be sure your contractors submit detailed reporting, itemization and backup. Also, require real-time auditing and communications. This will help you to have confidence that the costs submitted are reliably accurate and eligible for reimbursement.

C. Know Where Your Project Stands

Progress on your project may have come to a halt as a result of COVID-19. It is essential that owners know the status of a project as of that time. Meet with your architect and contractor to determine the amount of work that has been completed and the work remaining. Carefully review all pay applications, change orders, project schedules and material delivery records so you have a snapshot of your project's status at the time of the shutdown.

A site shutdown does not preclude doing paperwork remotely. Completing submittals often lags. This

is a good opportunity to see that this is caught up.

Engage in a careful review of construction contract compliance by all parties, including yourself. Failing to closely follow your contract requirements will reduce your ability to predict the outcome of a dispute if it occurs. It will likely also increase the cost of such disputes.

D. If Your Project is Shutting Down, Make Sure it is Orderly and Safe

Meet with your architect, your construction manager, if applicable, and your contractor to ensure that the project site is placed on hold in a safe, secure, cost effective and orderly fashion

E. Respect the Communication Requirements in your Construction Contracts

Your construction contracts usually require you to communicate through your architect and your construction manager, if applicable. Though you may not normally issue communications directly to your contractor, you should listen to what they have to offer. In addition, certain steps may require approval by your design professional. Know what your contract requires and make sure you follow its terms. Precipitous action may be costly in the future.

F. Have an Acceptable Framework for Costs or Time Eligible for Adjustment

This will require good faith communication involving your design professional, construction manager, if involved, and your contractor. Proactively establishing and following a framework for cost or time adjustments will help encourage the amicable resolution of any claims that may arise, allowing all parties to avoid the expense that often results if such issues become formal disputes. Strive for a relationship of trust and cooperation with your contractor to reach agreement on pandemic-related costs that are eligible for reimbursement, and track these agreed-upon reimbursable costs in real time. Now is the time to meet with your design professional and contractor to establish a reasonable framework for cost reporting and claim resolution.

Our Firm's **construction** attorneys are available to assist you in addressing your specific needs and questions.