

Insights

COVID-19: What Every Construction Owner and Entity Should Do Right Now

March 26, 2020

By: Robert S. Schein and Christopher W. Bloomer

Until a few days ago, construction projects seemed to be moving forward notwithstanding the constant barrage of news involving COVID-19. However, a steadily increasing number of states and local units of government have begun considering, and declaring, states of emergency and local governmental emergencies. Many questions are being asked about what impact, if any, COVID-19 will have on construction projects, the trades, manpower, scheduling, and overall safety issues on these projects.

Many of the Executive Orders issued to date have mandated that all persons may leave their homes or residences only for Essential Activities, Essential Governmental Functions, or to participate in Essential Businesses and Operations or Essential Infrastructure as defined in those respective Executive Orders.

As it relates to the construction industry, governmental Orders in **Indiana**, **Illinois**, and **Ohio** each provide that the following activity is considered "Essential Infrastructure" and therefore generally exempt from directives to shutdown or cease operations: "... construction (including, but not limited to, construction required in response to this public health emergency, hospital construction, construction of long-term care facilities, public works construction [school construction, essential business construction], and housing construction."^{1, 2}

For those entities that are not necessarily constructing new facilities, but are maintaining, repairing, or improving existing facilities, those functions are also likely exempt from orders to shutdown or cease operations that utilize the foregoing language or definition of "Essential Infrastructure."

Considering the language contained in the Indiana, Illinois, and Ohio Orders, owners of construction projects and owners of trades and entities involved in construction projects need to quickly analyze if active projects and entities fit within the language of "Essential Infrastructure" such that they can continue operations.

Even if they are allowed to remain open, businesses must still comply with Social Distancing Requirements, as defined in the various governmental Orders, including maintaining six-foot social distancing for both employees and members of the general public at all times. Some projects are already in discussions on how this will impact scheduling, manpower, and coordination. What impact does this then have to the overall project, what impact does this now have to the schedule, what impact does this now have on overall costs to the projects? **All of these questions will require an immediate analysis of the contract agreements in place for the project and immediate**

communications with the parties involved.

In some recent instances, local government units have mandated that certain projects are not considered "essential business and governmental functions" and, as a result, have issued work stoppage orders due to COVID-19. This raises an entirely different set of issues when local governmental entities take more stringent steps than an Order issued by the state.

What every construction owner and entity should do now:

Sudden work stoppage orders have numerous rippling impacts on the project and immediate review of project documents is needed. For instance, what is the time period for giving notices of delays and any claims for additional time, compensation and related impacts? What insurance notices need to be given? What parties need to be notified in the event of a claim? What are the time periods needed to be given under the contract documents? Are those time periods consistent within the entire contract packages? Are there sureties or other entities that need to be notified?

Additional considerations need to be analyzed involving project demobilization and understanding the duration of the work stoppage, and understanding the overall impact to schedule, overhead costs and planning. Further considerations need to be assessed related to overall process in resolving claims and providing the necessary documentation required by the contract agreements. Consideration should be given related to any force majeure clauses as well.

The reality is the impact of COVID-19 is changing daily, and it remains to be seen how long and how large of an impact it will have on construction projects. As a result, all parties need to be fluid and ready to react. **All parties should be immediately reviewing and analyzing their rights, remedies, and obligations under their respective contract documents, insurance policies and related agreements, and understanding any controlling Orders issued by state and local governmental bodies.**

Krieg DeVault is committed to helping you and your business during these unprecedented times. If you have any further questions, comments or concerns, please feel free to reach out to **Christopher W. Bloomer** or a member of our **Construction Law Industry Group**.

[1] See Indiana Executive Order 20-08, ¶ 11; Illinois Executive Order 2020-10, ¶ 9; Ohio Director's Stay At Home Order, March 22, 2020, ¶ 9.

[2] The internal bracketed language was included in Indiana and Ohio's Orders, but not included in the Illinois Order. Nevertheless, the Illinois (and Indiana and Ohio) Orders each provide that "Essential Infrastructure," which includes construction activities, "shall be construed broadly" to avoid impacts to essential infrastructure.