# Essential and Permitted Construction under Gov. Cuomo's PAUSE-NY Orders and Associated Guidance

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# Today's Speakers

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## As a result of the emergency declared by the Governor, Executive Order ("EO") 202.6 required that:

- All businesses, to the maximum extent possible, were to use work from home procedures;
- Each employer was to reduce its in-person workforce at work locations by 50%; and
- Any "essential business or entity providing essential services or functions," which included construction, was not subject to the in-person restrictions.

# The next day, Executive Order 202.7 was issued

- It increased the in-person workforce reduction to 75%.
- Essential businesses or entities providing essential services or functions were again not subject to the in-person restrictions.

**The Economic Development Corporation ("ESD") Guidance has been modified several times since its first issuance on March 20, 2020, particularly as it relates to construction activities**

# ESD Guidance

At first, construction, listed in EO 202.6 as Essential, was encompassed as an“Essential Business” in the Guidance’s functional list as:

“9. Construction, Including:

- skilled trades such as electricians, plumbers
- other related construction firms and professionals for essential infrastructure or for emergency repair and safety purposes”

The wording used raised numerous questions from the industry.

# PAUSE Executive Order 202.8

On March 21, EO 202.8 was issued (the "PAUSE" Executive Order). Among other items, it modified EO 202.6 to require nonessential workforce in-person reductions of **100%.** It additionally provided:

"*Any entity providing essential services or functions, whether to an essential business or a non-essential business shall not be subjected to the in-person work restriction, but may operate at the level necessary to provide such service or function*"

# State Agency/Authority Public Work

**In the interim between the issuance of the PAUSE EO and just prior to issuance of the ESD Guidance, DOT issued its own guidance, stating:**

"the Executive Order provides that essential businesses and services not subject to the in-person restrictions include transportation infrastructure including vendors that provide essential services needed to ensure the continuing operation of government. The Department is continuing implementation of its capital program as an essential government function and will continue to let and construct projects. The companies awarded such contracts including subcontractors, suppliers, vendors and specialty firms are all exempt for work to support the capital program."

# State Agency/Authority Public Work (Cont'd)

This was echoed in large part by other agencies, including MTA, the Thruway Authority, and the State University Construction Fund. The Office of General Services Design and Construction stated on March 21, 2020 that it:

"is continuing implementation of its capital program as an essential government function and will continue to bid and construct projects. The companies awarded such contracts including subcontractors, suppliers, vendors and specialty firms are all exempt for work to support the capital program. This includes professional services required to support these functions."

# State Agency/Authority Public Work (Cont'd)

It is our understanding that if an agency does not reactively modify its guidance after a change in the ESD guidance, it does not deem modification to be necessary.

One of the Frequently Asked Questions posted by ESD asks if EO 202.8 workforce reductions (which increased the in-person reduction to 100%) apply to state and local governments. The answer was that they were not included. The FAQ did not address 202.6 or the ESD Guidance.

# The Guidance is Amended

On March 27, 2020, the ESD Guidance was modified as to construction:

"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."

# OGS Revises its Guidance

The next day, OGS revised its earlier guidance in reaction to the ESD changes, stating:
"OGS and our client agencies are currently evaluating all projects to determine which contracts are impacted by this directive.
In the event the State decides to shut down the contract work, a stop work order will be issued pursuant to the General Conditions. Any delays associated with this directive will be evaluated in accordance with the provisions of the contract General Conditions.
At the direction of the regional supervisor, your firm may be required to submit a shutdown plan.
The shutdown plan should include provisions to ensure we are appropriately securing and maintaining the site, providing for periodic inspections of site conditions throughout the shutdown period, that there are no code violations, safety hazards, or security issues during the shutdown period.
If you receive a request to submit a shutdown plan, please do so within two business days .."

# EFC's Guidance

On the same day, Empire State Facilities ("EFC") stated that:

"Pursuant to Governor Cuomo's Executive Order 202.6 and the Empire State Development's Guidance For Determining Whether a Business Enterprise is Subject To a Workforce Reduction Under Recent Executive Orders, amended March 27, 2020, all water and wastewater construction projects are deemed essential construction services and construction may continue. Every construction site must maintain social distancing and safety best practices."

# Local Government Work

On March 29, 2020, ESD stated in an email that:

"Local governments, including municipalities and school districts, are allowed to continue construction projects at this time as government entities are exempt from the essential business restrictions. However, to the greatest extent possible, local governments should postpone any non-essential projects and only proceed with essential projects when they can implement appropriate social distancing and cleaning/disinfecting protocols. Essential projects are those that have a nexus to health and safety of the building occupants or to support the broader essential services that are required to fulfill the critical operations of government or the emergency response to the COVID-19 public health crisis."

*This provision is not yet present in the Guidance.*

# Essential Construction is Paired Back

On March 30, 2020, EO 202.13 was issued, modifying 202.6 and providing in part that:

"Executive Order 202.6 is hereby 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 … All continuing construction projects shall utilize best practices to avoid transmission of COVID-19."

# Construction Work in Support of Essential Businesses is Permissible

On March 30, 2020, ESD further stated:

"Construction in support of essential businesses is permissible, but only with appropriate social distancing and cleaning/disinfecting precautions. If those cannot be met, the project should be postponed."

*This has not yet been incorporated the ESD Guidance.*

# Summary

The takeaways, as of today:

- State agency/authority public work – depends on the determination of the involved state agency (see the OGS Guidance for one example)

- Municipal or school district work – if non-essential (meaning not having a nexus to health and safety of the building occupants or to support the broader essential services), may be postponed (*not yet explicitly in the ESD Guidance*)

- Private work – depends on whether the construction is in support of an Essential Business. The designation of such work as essential is subject to the determination of ESD per EO 202.13. *(not yet explicitly in the ESD Guidance)*

# Summary (Cont'd)

- If work is deemed not essential, it will need to shut down safely, and contractors will be asked to submit shutdown plans in what could be a very tight timeframe.

- Essential businesses, while exempt from the reductions, are nonetheless expected to reduce their in office-workforce to work from home to the greatest degree possible;

- Subcontractors and material suppliers/fabricators/design professionals, etc. to Essential Businesses, are exempt from the in-person rule, but only to the degree necessary to provide the essential functions or services.

# Social Distancing and Safety Standards

In every case, social distancing requirements must be maintained, including for purposes of elevators/meals/entry and exit, and safety best practices must be adhered to.

- Consideration: will compliance increase costs/time that should be the subject of a change order (e.g. the additional of a shift to diffuse the workplace concentration)?

Sites that cannot, by their configuration or the nature of the work, maintain distance and safety best practices must close.

# Penalties

Violation of the in-person restrictions by a nonessential business can be a violation of Public Health Law Section 17. That statute contains numerous possible penalties, as well as the possibility of injunction.

Violation of the social distancing and safety requirements by current construction sites may result in closure and enforcement will be provided by the state in coordination with the city/local governments. We are advised that this will include fines of up to $10,000 per violation.

# STAY TUNED

The situation remains fluid and dynamic. Please stay tuned to AGC's COVID-19 website, www.agcnys.org/coronavirus, which contains updates as they become available.

# Questions?

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