



AGC NYS

Newsletter

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UPCOMING EVENTS
January 2021

- 14 AGC STP Program – Unit 4, Contract Documents (online or in-person)
19 Killer Contract Clauses – 8 week online series

Industry News

UPDATED: New York Updates Cluster Action Guidance; AGC Seeks Clarification of Differing Definitions of "Essential" Construction

New York State last weekend updated its metrics and guidance for its COVID Cluster Action Initiative. You can read the metrics and guidance at this link.

Based on these new metrics and guidance, if a region reaches "Red Zone" status, only essential businesses may operate.

Notably, however, the updated guidance points to NY Forward page, which includes both the earlier, more restrictive definition of "essential" construction (item 9 at this link) that incorporates the various guidance and determinations from ESD we had communicated back in the spring encompassing school construction, existing construction on behalf of essential businesses, etc., as well as the cluster guidance (item 9 at this link) that broadly deems construction as essential.

AGC NYS has been in communication with the Administration and is seeking clarification whether it is intended that there be two distinct and different definitions of construction as essential, one for "Red Zones" under the cluster action initiative that is broader and one for "NY on Pause" that is more restrictive—or whether there is simply older information that is still published.

As it stands at this time, any such restrictions for construction would only apply with a "Red Zone" designation or with a full "NY on Pause" order.

As you may recall, AGC NYS last week led a statewide coalition of industry groups calling on Governor Cuomo to continue to deem construction essential as the State grapples with a renewed surge of COVID-19 cases. You can view that letter here.

We continue to believe construction can operate safely with appropriate health and safety precautions—and the Administration's own data supports that view. On Friday, during his briefing, Governor Cuomo provided data that showed construction as the source of exposure in only .66% of COVID cases from September to November, according to contact tracing data.

AGC NYS and our industry partners will continue to both advocate for the broadest definition of essential construction and for clarity on that definition. Our industry possesses the resources and expertise to work safely in this challenging environment, keeping a critical component of the economy functioning, New Yorkers working and supply chains functioning.

This is obviously an evolving situation and we anticipate we will be re-entering a period of frequent changes to these rules and guidance. We will continue to keep the membership informed of developments and will compile the latest information at our COVID-19 resource page, www.agcnys.org/coronavirus.

As always, the AGC NYS staff remains available at any time to address any questions, concerns or challenges you may have.

AGC of America Sues To Block Fed's Unlawful Effort To Change Paycheck Protection Program (PPP) Rules
Small Business Administration and Office of Management and Budget Secretly Crafted Questionnaire that Asks about Everything Other Than the Economic Uncertainty that Congress Intended to Drive Program

The Associated General Contractors of America [filed suit](#) to compel Small Business Administration (SBA) and the Office of Management and Budget (OMB) to revise the questionnaire being used to reassess whether companies were eligible for Paycheck Protection Program (PPP) loans. The construction association is also asking the federal courts to restrict use of the information that the questionnaire generates until the SBA makes it available to the public and revises it.

"The administration has every right, and obligation, to ensure businesses were eligible to apply for and receive the relief loans," said Stephen E. Sandherr, the association's chief executive officer. "But they do not have the right to use a secretly crafted form to gather unprecedented amounts of proprietary information that has little or nothing to do with the economic uncertainty that led businesses to apply for the loans in the first place."

The complaint, which the association filed in the United States District Court for the District of Columbia, asserts that the process that produced the form, and the form itself, violate the Paperwork Reduction Act and the Administrative Procedures Act, and that the federal agencies failed to meet the minimum standards for due process. The association is requesting the court to declare that the questionnaire is arbitrary and capricious, and to declare that the SBA cannot lawfully use the information that the form generates to find a company ineligible for a PPP loan or deny a company's application for forgiveness of its loan.

The association noted that the CARES Act (which established the PPP program) only required loan applicants to make a "good faith certification that the uncertainty of current economic conditions makes necessary the loan request..." Instead of asking borrowers how they concluded they faced such uncertainty when applying for their loans, the form attempts to set a means test, a revenue reduction test and a liquidity test that Congress never contemplated, and it focuses on later events that few companies could have predicted when applying.

The two agencies also disregarded the legally mandated process for developing a questionnaire. OMB authorized the SBA to use the form in complete secrecy, instead of releasing it and providing a 60-day period for public comment. The agencies also violated the Administrative Procedure Act by arbitrarily declaring – to bypass the normal review process – that the new questionnaire required approval on an "emergency" basis and did not constitute a change in the scope of SBA's prior information collection process.

"Resorting to a secret form that disregards Congressional intent and retroactively changes the criteria for a loan is not due diligence; it is unlawful and needs to stop before employers are irrevocably harmed," Sandherr added.

Construction Industry Conference Recap

Thank you to everyone who made our 2020 Virtual Construction Industry Conference a success! While we would much rather have seen everyone in Saratoga Springs this year, we're thrilled to have offered a great virtual event with high-quality content, networking opportunities and a great Trade Show. We hope you'll take a moment to fill out the survey sent on Monday to let us know how we did.

Thank you to our sponsors:

Milton CAT & SITECH, Donnelly Construction, Haugland Group, LLC, Milwaukee Tool, Arold Construction, Barr & Barr, Inc., Infotech, Northwestern Mutual - Pat DiCerbo, CHA Consulting, Inc., Couch White, LLP, C.P. Ward, C & S Companies, High Steel Structures, LLC, Insurance Office of America, OGGI Concrete Forms & Accessories

Congratulations to the following for winning Amazon gift cards at the Virtual Industry Conference Trade Show!

Jeremy Babbitt, Jeff Bauer, Emily Finn, Melissa Joiner, Doug May, Matthew Schooley, Bill Terrell, Ken Wojtkowski

Congratulations to our Safety Excellence Award Winners!

Andron Construction Corp., BBL Construction Services, LLC,
Bette Cring, LLC, Charles A. Gaetano Construction Corp.,
EW Howell Company, LLC, Hueber-Breuer Construction Co., Inc.,
Lehigh Construction Group, Inc., Turner Construction Company,
Wainschaf Associates, Inc

Congratulations to our Excellence in Partnering Award Winners!

Each year we receive up to a dozen applications for demonstrations of excellence in partnering between Contractors, Owners, designers and other project stake holders. Partnering is recognized formally when signing a partnering charter, and more often informally when the project team agrees to put differences aside and work together to complete the best project result.

Contractors honored with this award stand out for their ability in the following areas:

- Achieving a common goal
- Honoring all stake holders
- Resolving Conflict
- Improving communication on the project with all audiences
- Incorporating team-building activities
- Revealing cost or time savings and/or improvements on a project

This year we have three projects receiving the Excellence in Partnering award.

Congratulations to the following:

Replace Boilers at the Basic Sciences Building located at the SUNY Downstate Health Sciences Center.
RMF Engineering Inc.
Dynamic US, Inc.
Jacobs Project Management Co.
Genesys Engineering
Downstate Health Sciences Center
SUCF

D264158 Region 6 – Highway and Culvert Repairs – Job Order Contracting located in Various Locations, Region
6
C.P. Ward, Inc
NYSDOT

D264050 Tompkins County Sub-Residency located at the Ithaca Tompkins Regional Airport
Streeter Associates, Inc.
Clough Harbor Associates
Foit-Albert Associates
NYS OGS
NYSDOT

Government Affairs News

STATE NEWS

New York State Paid Sick & Safe Leave Law – Information for Employers & Employees

All private sector workers in New York State are now covered under the state's new sick and safe leave law, regardless of industry, occupation, part-time status, overtime exempt status, and seasonal status.

On **September 30, 2020**, [covered employees](#) in New York State began to accrue leave at a rate of one hour for every 30 hours worked. On **January 1, 2021**, employees may start using accrued leave.

Employees must notify their supervisor prior to the employee's regularly scheduled work time if they will be using paid sick and safe leave. Employees are free to exercise their rights under the employer's paid sick and safe leave plan without fear of discrimination, retaliation, or harassment.

More information about the New York State paid sick and safe leave including accruals, eligibility, permitted uses, and recordkeeping is available at these links. *Check the links frequently for updates.*

[New York State Paid Sick Leave Law](#)

[New York State Paid Safe Leave](#)

[Paid Sick Leave Details](#)

[Paid Sick Leave FAQs](#)

[Paid Sick Leave Law for Employers](#)

[Paid Sick Leave for Union Employers](#)

[New York City may continue to enforce the provisions of the New York City Paid Safe and Sick Leave Law to the extent that such provisions meet or exceed the end standard or requirements for minimum hour and use set forth in the New York State Paid Sick.](#)*

Governor Signs Legislation to Expand Definition of Substantial Completion

Governor Cuomo signed legislation (A.9117/S.7664), strongly supported by AGC NYS, to expand the definition of substantial completion on public works construction contracts. In his approval message the Governor supported the goals of the bill but has secured an agreement with the Legislature to make technical changes to the bill. AGC NYS has reviewed and supports the proposed technical changes to the bill.

Governor Cuomo Signs Legislation to Prevent Large Scale Illegal Waste Dumping

Governor Cuomo signed legislation (S.6758-B/A.10803-A) to strengthen penalties against the illegal disposal of construction debris, demolition debris, and other hazardous substances. The legislation also designates fraudulent schemes involving the disposal of solid waste as a new crime. With this signing, a number of technical changes to legislative language have been agreed to following negotiations with the legislature. The law goes into effect on January 1. The bill was in response to a special grand jury report from the Suffolk County District Attorney and garnered front-page coverage in Newsday. Despite the opposition from AGC NYS and our industry partners, the bill was passed by the Legislature during a July legislative session and approved by Governor Cuomo. AGC NYS will keep you informed about the proposed technical changes.

Governor Cuomo Vetoes "Long Island Sand Mining" Bill

Governor Cuomo vetoed legislation (S.8026/A.10001), opposed by AGC NYS, known as the "Long Island Sand Mining Bill". The bill would have decimated the Long Island sand mining industry and would have caused irreparable harm to the entire construction industry. AGC NYS members from across New York State, supported our colleagues in the Long Island/NYC region by sending opposition letters to Governor Cuomo. In a compromise, it is expected that the Governor and Legislature will agree to a study of the Long Island mining industry.

FEDERAL NEWS

AGC NYS Urges House Republican Leader McCarthy to Appoint Mailliotakis to T&I Committee

AGC NYS sent a letter to House Republican Leader Kevin McCarthy, AGC NYS urging him to appoint Representative-elect Nicole Malliotakis (NY-11) to the influential House Committee on Transportation and Infrastructure. The letter stated, New York State's vast transportation and infrastructure network is a combination of the largest mass transportation system in the United States, highly traveled roads and bridges, major and regional airports, Amtrak, waterways, ports and is a key driver of the economy serving as hub for domestic and international trade and travel. As a member of the New York State Assembly and former New York City mayoral candidate, Representative-elect Malliotakis has the policy and budgetary experience making her uniquely qualified to serve as a member of the House Committee on Transportation and Infrastructure. [A copy of the letter is available here.](#)

President-Elect Biden Nominates Pete Buttigieg as Transportation Secretary

[President-elect Joe Biden has nominated former South Bend, Indiana mayor and 2020 Democratic Presidential candidate Pete Buttigieg as the United States Secretary of Transportation.](#) The Biden administration views the affable Buttigieg as an important Presidential Cabinet member to achieve a bipartisan infrastructure bill. President-elect Joe Biden said, "Mayor Pete Buttigieg is a patriot and a problem-solver who speaks to the best of who we are as a nation. I am nominating him for Secretary of Transportation because this position stands at the nexus of so many of the interlocking challenges and opportunities ahead of us. Jobs, infrastructure, equity, and climate all come together at the DOT, the site of some of our most ambitious plans to build back better. I trust Mayor Pete to lead this work with focus, decency, and a bold vision — he will bring people together to get big things done."

NEW YORK CITY NEWS

Council Approves Plan to Create Special Flushing Waterfront District

The New York City Council approved a plan to create a new Special Flushing Waterfront District alongside Flushing Creek in Queens, NY. The new waterfront district will transform and clean up a dilapidated, contaminated area into a new publicly accessible, two million square foot plus neighborhood with residential, hotel and commercial spaces as well as a new public privately funded waterfront esplanade, road network and open space for the downtown Flushing community. As part of the new district, a new Mandatory Inclusionary Housing area will be established to provide affordable housing for the Flushing area. [A press release about the project is available here.](#)

Education News

AGC Student Chapter, SUNY Delhi Looking for AGC Members to Host Internships

SUNY Delhi who has been turning out some of the top construction management students in the northeast is in search of a few AGC NYS member firms who would like to host some of their students for a 2021 Summer-Fall internship program this coming year (May/June-December). If the intern works out, many of the students will be finishing up their bachelors degree with this internship and graduating in December 2021.

SUNY Delhi prides itself on their hands on approach to learning where their students physically build in labs to reinforce their coursework. SUNY Delhi has an average class size of 50 students and requires an 800 hour Internship (traditionally during their Junior year) as part of our graduation requirements. The intent of the internship is for the students to experience multiple sides of the construction industry.

In order to ensure this, they require that they complete at least 100 hours in four of the following categories: field supervision, estimating & cost control, scheduling & planning, surveying / site layout, hands-on building experience, project engineering, documentation and procurement. The balance of the hours can be filled in any category.

If your company is looking for interns for the upcoming year, traditional start times are January and May, please reach out to the Internship Coordinator, Sarah Poole at poolesa@delhi.edu.

SAVE THE DATES - Killer Contract Clauses, 8-week Webinar Series

Beginning January 19 the AGC NYS, NESCA and ECA will be holding a joint online educational series on Killer Contract Clauses. This has been a very well attended program through the years (in-person) and features some of the top construction attorneys in New York. Please join us for this informational series of webinars. The registration link will be posted shortly. The programs include:

January 19, 2021 – -"Vague/Open-Ended Scope of Work Provisions" and "Dispute Resolution Provisions"
-Kevin Laurilliard – O'Connell and Aronowitz

January 26, 2021 – “Incorporation by Reference Provisions” and “Changes & Extra Work” -Walter Breakell – Hinman, Howard & Kattell, LLP

February 2, 2021 – “Conflicts & Ambiguities in Contract Documents” and “Waiver Provisions” -Michael Catania – Catania, Mahon & Rider, PLLC

February 9, 2021 – “Notice & Recordkeeping Provisions” -Joel Howard – Couch White, LLP

February 16, 2021 – “Indemnification Provisions” and “Additional Insured Provisions” -William Greagan – Goldberg Segalla, LLP

February 23, 2021 – “Retainage Provisions” and “Prohibition Against Stopping Work for Non-Payment” -Frank Brennan – Nolan, Heller & Kauffman, LLP

March 2, 2021 – “DBE, MBE & WBE Provisions”- Jennifer Harvey – Couch White, LLP

March 9, 2021 – “Contingent Payment Provisions” and “Contract Termination Provisions” -Gregory Spaun – Welby, Brady & Greenblatt, LLP

Registration will be posted shortly to the AGC NYS website.

Building News

What Might NYC Legislation Creating New Type of Certificate of Occupancy (ICO) Mean For Contracts? How Does It Relate to Other Parts of NY?

As we reported last week, the NYC Council passed a law recently to allow for a new type of temporary Certificate of Occupancy for buildings in the city, the Interim Certificate of Occupancy (ICO) can be issued for newly constructed portions of buildings that are deemed safe for occupancy prior to the completion of the entire project. [Our notice can be found here](#). This is surely good news but it made me wonder whether there is a contractual value to this process. In my reviews of contract documents I frequently note provisions for owners to occupy portions of the project that are complete such that they may be used for their intended purpose prior to completion of the entire building. I often comment that the contract documents should make clear that retainage should be released and the warranty clock should start ticking for that portion of the project. I wonder whether the ICO creates a brighter line in this regard and whether contracts should be modified to incorporate the ICO. I also wonder how this new Cert squares with other parts of the State and whether there is anything that can or should be done to incorporate the practice statewide. I'd love to hear your thoughts on this.

Construction Sector Adds 27,000 Jobs in November, But Project Cancellations, Looming PPP Tax Bill Will Undercut Future Job Gains

Industry Unemployment Hits Highest November Level since 2012 as Sluggish Nonresidential Building and Infrastructure Construction Lags, While Residential Employment Nears Pre-Pandemic Peak

Construction employment increased by 27,000 jobs in November, as continuing robust gains in residential categories masked more sluggish increases in nonresidential jobs, according to an analysis by the Associated General Contractors of America of government data released today. Association officials cautioned, however, that pandemic-induced project cancellations and looming tax bills for firms that used Paycheck Protection Program loans to save jobs threaten to undermine future job growth in the sector.

“The construction industry recovered a bit in November, but the future is far from certain for the industry,” said Ken Simonson, the association’s chief economist. “The nonresidential building and infrastructure segments are likely to shed jobs again amid an increase in coronavirus case counts unless Congress acts quickly to provide needed relief.”

Construction employment climbed to 7,360,000 in November, an increase of 0.4 percent compared to October.

However, employment in the sector remains down by 279,000 or 3.7 percent since the most recent peak in February. The pandemic initially triggered widespread project cancellations and interruptions that resulted in the loss of 1.1 million construction jobs in March and April.

The disparity between residential and nonresidential construction widened in November, Simonson noted. Residential building and specialty trade contractors added 15,400 jobs in November and have now recouped 96 percent of the employment losses they incurred in March and April. In contrast, nonresidential construction employment—comprising nonresidential building, specialty trades, and heavy and civil engineering construction—increased by only 11,900 jobs in November and has recovered only 56 percent of the jobs lost in March and April.

The industry's unemployment rate in November was 7.3 percent, compared to 4.4 percent in November 2019. A total of 732,000 former construction workers were unemployed, up from 428,000 a year earlier and the highest November total since 2012.

Highway News

NYS DOT Offers Free Bid Quote Preparation Software

AASHTOWare Project Bids™ is offered free of charge for download and installation to all bidders on NYSDOT Capital Construction projects. In order to submit the most accurate bid document possible and to avoid costly bid errors, firms that submit hard copy bids, either bids in person or by mail, are encouraged to prepare their paper bids using the AASHTOWare Project Bids™ software (.ebxs files). This is the software used for bids submitted through Bid Express, and allows paper bidders to enjoy the same quality bid quotes as those submitted electronically. Once your bid quote has been entered, save the .ebxs file to a cd/dvd or flash drive, and include with your printed itemized bid. Additional information is available at [Electronic Bid System](#), or contact Robert.Kitchen@dot.ny.gov, (518) 457-2124.

Recent Engineering Issuances Posted by NYSDOT

EB 20-059 Revisions to the Environmental Manual (TEM) § 4.4.12.11 Historic and Cultural Resources Appendix G: Cultural Resources Desk Reference, Section 106 and 14.09 Processes

Effective Date: November 30, 2020

Revisions to TEM § 4.4.12.11 Historic and Cultural Resources (Appendix G) update existing procedures to incorporate review by the Office of Environment (OOE) / Environmental Science Bureau (ESB) of any draft Section 106 Memorandum of Agreement (MOA) or Section 106 Programmatic Agreement (PA); any draft Section 14.09 Letter of Resolution (LOR); and any individual Draft Section 4(f) evaluation for historic sites. Review by the OOE/ESB is also required for Programmatic Section 4(f) evaluations and Section 4(f) de minimis findings when there are identified issues of concern requiring resolution to obtain the approval of the Federal Highway Administration (FHWA).

EI 20-024 Revisions to Section 619 Temporary Structures and Approaches

Effective Date: May 1, 2021

The section under Construction Details provides guidance on the use of used materials and welding requirements. It also clarifies what is to be included in the Temporary Structures and Approaches item and provides more guidance on requirements for temporary structure submittals. The pay unit was changed from Each to Lump Sum. Disapproved Item: 619.06nn.

EI 20-027 Design Related Document Record Retention

Effective Date: December 9, 2020

Revises the policy for using the ProjectWise folder/directory structure for the retention of approved Design Approval Documents (DADs) and related documents of value after completion of construction.

Safety News

AGC NYS's Safety Award Winners Recognized at the Virtual Construction Industry Conference

The 2020 AGC NYS Chapter Safety Award winners were recognized last week at our Annual Construction Industry Conference for their outstanding accomplishments maintaining a safe workplace. The Safety Excellence Award recognizes and honors AGC NYS Members for having and implementing an outstanding safety program. Winners must meet stringent minimum criteria, criteria which exceeds industry standards, and that demonstrate excellent safety practices in the field. Not only were the award recipients honored during the VIRTUAL 2020 AGC NYS Construction Industry Conference, they will also be recognized for their efforts in the Winter edition of the AGC NYS Cornerstone Magazine. The 2020 AGC NYS Safety Award winners are as follows:

Andron Construction Corp.
BBL Construction Services, LLC.
Bette Cring, LLC.
Charles A. Gaetano Construction Corp.
EW Howell Company, LLC
Hueber-Breuer Construction Co., Inc.
Lehigh Construction Group, Inc.
Turner Construction.
Wainschaf Associates, Inc.

AGC NYS would like to once again congratulate the winners of the 2020 AGC NYS Safety Award. We would also like to thank Marco Rodriguez and Milwaukee Tools who recognized these select winners for their efforts toward achieving safety excellence. Milwaukee is going to outfit these companies with free PPE! AGC NYS and the winners appreciate their generous offer.

NOW OPEN: 31st Annual National AGC Safety Awards (NASA) Applications

The Associated General Contractors of America (AGC) announces its 31st Annual National AGC Safety Awards (NASA) Program. The deadline for submission of your Chapter entries to AGC is **February 15, 2021**. A Chapter must submit an entry on behalf of the AGC member company. Each chapter will be e-mailed an electronic application form on or before **January 6, 2021**. For more information, [click here](#).

The National AGC Safety Awards (NASA) program has been an ongoing effort since 1991 to offer AGC members an opportunity to evaluate their safety record. The NASA compares an AGC member's safety record with other AGC members according to the member size and construction type. Additionally, the NASA provides a great opportunity for members who have excellent safety records to compete for nationally recognized awards. For the application, [click here](#).

2020 NYCDOT Holiday Construction Embargo

A special Holiday Construction Embargo shall be in effect from 6AM to 11:59PM starting Tuesday, November 24, 2020 through Sunday, December 27, 2020. As a result, all routine work shall be suspended during the embargo period unless approval for the work is granted by the New York City Department of Transportation's (NYCDOT) Office of Construction Mitigation and Coordination (OCMC). Such suspension shall not apply to emergency work for which an emergency number is obtained by the permittee pursuant to the provisions of section 2-11 of NYCDOT's Highway Rules.

It shall be a violation of NYCDOT's Highway Rules to perform any work on the street during this embargo period without the prior approval of OCMC or the receipt of an emergency number. NYCDOT will strictly enforce this embargo and violators are subject to penalties. A map of the affected locations is available on NYCDOT's [website here](#). This policy supersedes any and all previously issued policies regarding NYCDOT's Holiday Construction Embargo.