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**PRACTICAL TIPS FOR YOUR CONSTRUCTION PROJECT FOLLOWING THE ISSUANCE
OF PUBLIC HEALTH SHELTER IN PLACE ORDERS (COVID-19)**

On March 16, 2020, seven Bay Area counties issued Public Health Shelter in Place (“SIP”) Orders. The seven SIP orders, which are all substantially similar to each other, went into effect at 12:01 a.m. on March 17, 2020. The orders (referred to in this Alert as the “SIP Orders”) are intended to slow the spread of COVID-19 by requiring that individuals self-isolate in their place of residence to the maximum extent feasible, while allowing certain “essential services” to continue. The following counties have issued a SPI Order as of March 16, 2020: Marin, Contra Costa, San Francisco, San Mateo, Santa Clara, Alameda and Santa Cruz. By their terms, the SIP Orders will remain in place until April 7, 2020, subject to being cancelled sooner or extended. As of the afternoon of March 17, the Press Democrat was reporting that Sonoma County would also issue a shelter in place order. Some media reports had indicated that Napa County would order that individual shelter in place, but instead Napa County adopted an ordinance restricting gatherings of more than 50 persons and requiring certain measures to be taken for smaller groups.

The SIP Orders require that persons may leave their residences only (a) to provide or receive certain Essential Services or (b) to engage in certain Essential Activities, where the persons work for or operate Essential Businesses (c) to provide Essential Governmental Functions. (SIP Order, ¶ 2.) These terms are defined in Paragraph 10 of the SIP Order and discussed below.

Non-Essential Businesses Must Cease Most Operations

All businesses with a facility in the county issuing the SIP Order, except Essential Businesses as defined, are required to cease all activities at facilities located within the county except Minimum Basic Operations, as defined in Section 10 of each SIP Order. (SIP Order, ¶ 3.) To find out if your facility (or the project at which you are performing work) involves essential business or essential services that may allow you to carry on your regular operations, read on.

Exceptions to Sheltering in Place – *Essential Activities*

“*Essential Activities*” include:

- *The furnishing of essential products and services at an **Essential Business***; and/or
- Activities or tasks “essential to” the health and safety of a person or their family or household members, including pets;
- Activities necessary to obtain or deliver services or supplies for a person or their family or household members such as food or household consumer products, and products necessary to maintain the safety, sanitation, and essential operation of residences;
- Outdoor activities such as running, hiking, or walking, so long as individuals comply with Social Distancing Requirements; and
- Caring for a family member or pet *in another household*.

(SIP Order, ¶ 10.a.)

“Essential Business” Defined

For a complete list of business that constitutes an “Essential Business,” please review the SIP Order. Essential Business that may relate to construction activities includes:

- ***Essential Infrastructure***, including public works of construction and construction of housing (public or private works) – see further discussion below;
- “Plumbers, electricians, exterminators, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, Essential Activities, and Essential Businesses;”
- Businesses that supply other Essential Businesses with the support or supplies necessary to operate (for example, this may include suppliers of equipment or materials to electricians or plumbers); and
- Professional services, such as legal or accounting services, when necessary to assist in compliance with legally mandated activities.

(SIP Order, ¶ 10.f.)

“Essential Infrastructure” Includes Public Works of Construction, Construction of Housing (Public and Private), and Certain Other Work

According to the SIP Orders, “Individuals may leave their residence to provide any services or perform any work necessary to the operations and maintenance of ‘Essential Infrastructure,’ including, but not limited to, *public works construction, construction of housing* (in particular affordable housing or housing for individuals experiencing homelessness), *airport operations, water, sewer, gas, electrical, oil refining, roads and highways, public transportation*, solid waste collection and removal, internet, and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services, business infrastructure, communications, and web-based services), provided that they carry out those services or that work in compliance with Social Distancing Requirements as defined in this Section, to the extent possible.” (SIP Order, ¶ 10.c.)

Work on commercial projects, private industrial projects, etc. likely will not be deemed “essential.”

Contractors may therefore be required to maintain operations in order to continue working on public works of improvement and public or private housing projects, yet maybe be required to stop work on private works of improvement that do not include housing projects.

There is some debate how broadly or narrowly the language of the SIP Orders should be read and, of course, there is no case law to provide guidance. In practice, we expect most issues relating to whether an activity falls within the “Essential Infrastructure” exception will be worked out cooperatively.

Keep in mind that even work on “Essential Infrastructure” is prohibited if it cannot be carried out in compliance with Social Distancing Requirements.

Coordinate Decisions to Stop or Continue Operations With the Project Owner

Decisions to suspend or stop work have legal consequences, even if you believe that the SIP Order leaves your business no other choice. Even if the owner is the party that directs the suspension of the work, legal issues may arise. For example, does the directive to stop work include a time extension? If not, does your contract require you to give notice of an intent to seek a time extension? How quickly must you give such notice? When in doubt, consult your attorney.

- ***What if We Are Directed to Suspend or Stop Work?***

Confirm in writing any direction given to you to suspend or stop work. If you are directed to suspend or stop work pursuant to the SIP Order, make sure that such direction is given in writing. If you cannot confirm direction in writing from the owner or upstream entity, write an email confirming the direction you were given. Communicate with the owner or upstream entity about questions like whether a date been identified for the resumption of the work, who is responsible for the security of the site, or who is responsible to protect work at the site. Check the terms of your contract.

Protesting or disputing a stop work order. Even if SIP Orders authorize construction work to continue, check with the project owner whether the work will in fact continue, as the owner may nevertheless choose to suspend or stop work. For example, the owner who is considering having work go

forward may not have considered whether inspectors, surveyors, testing agencies, construction managers, and other parties needed for the work will in fact be available. The absence of such persons may preclude you from working. Building departments, DOSH, etc. may not have anyone to inspect your work. The San Francisco Department of Building Inspections, for example, is closed until April 7, 2020.

If you disagree with a directive to suspend or stop work, or with the owner's right to stop the work, check your contract to determine whether a notice of potential claim, notice of protest, or other written notice is required as a condition precedent to asserting a claim for time or money. Usually some type of notice will be required. Subcontractors should also obtain and review the prime contract for notice provisions. It is almost always the case that a subcontract will incorporate prime contract notice provisions. Check the project specifications – usually the general conditions and/or special provisions – for notice requirements. If you do not have the prime contract, send an email asking for it, and make sure to keep a copy of the email.

- ***Communicating With Your Subcontractors, Tier Subcontractors, or Suppliers in the Event of a Directive to Suspend or Stop Work***

You will need to decide whether or not to remind subcontractor(s) or tier subcontractor(s) to submit timely notices, requests for a time extension, or change order requests for costs associated with a suspension. Depending on the contract documents, it is likely that subcontractors performing work for you, and any tier subcontractors under you, are tied to the same notice requirements that you are, as well as to the same claim requirements and alternative dispute requirements.

Confirm in Writing Any Agreements and Terms Relating to Time Extensions

If the project is suspended in whole or in part, make sure that you have a clear understanding of whether a time extension will be granted, and if so, whether you will be compensated for demobilization/remobilization, general conditions costs, and other costs that you may be incurring while work is at a standstill. Consider issuing a Request for Information designed to resolve uncertainties about time extensions. An RFI will sometimes elicit a clear directive, but not always. Consider submitting a change order request. If the project closure threatens to impact your work, be sure to satisfy any provisions that require written notice if you are impacted or delayed. At a minimum, try to reach an agreement with the owner or other upstream entity reserving rights to claim time and/or money, even if the parties are in disagreement about such rights.

Check Time Extension, Change Order, Suspension of Work, and Other Relevant Contract Provisions

- ***Owner Directs You to Stop Work***

If you are directed stop work (as opposed to having to stop work because of a government order such as a SIP Order or because you lack workers because they have called in sick or refuse to come to work), you will need to refer to the contract documents for the particular project to determine what it states about owner suspensions of time. If there is a specific provision governing suspensions of time (as there usually is, for example, in AIA forms, such as AIA A201 Section 14.3), then you would follow that provision. If not, you would follow the time extension and change order provisions. Remember to submit

all appropriate notices, etc. required by the contract.

- ***Circumstances Cause You to Stop Work – Owner Does Not Direct Work to Stop***

If you are not directed to stop work, but circumstances nevertheless require you to suspend your operations on site, then you may be able to obtain a time extension under various types of time extension clauses. For example, the current AIA Document A201 time extension provision states:

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, *unusual delay in deliveries, unavoidable casualties*, adverse weather conditions documented in accordance with Section 15.1.6.2, *or other causes beyond the Contractor's control*; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) *by other causes that the Contractor asserts, and the Architect determines, justify delay*, then the Contract Time shall be extended for such reasonable time as the Architect may determine. [emphasis added.]

Whether a time extension is owed under a particular contract will always depend on the facts in any given case and on what the language of the contract says. This Alert is not an exhaustive discussion of suspension, time extension, and change order clauses. Generally speaking, a force majeure clause may excuse a party to a contract from performing under the contract due to suffering an “unforeseeable circumstance” that is outside of that party’s control. The unforeseeable event or circumstance may be a defense to a breach of contract claim asserted by another party.

There is no universally accepted definition for events which constitute an excuse for nonperformance. Work stoppages, extreme weather, epidemics, gasoline shortages, war, and inclement weather have been found to excuse performance under contract clauses of this type (which sometimes are referred to as “force majeure” provisions). A California Appellate Court has held that force majeure is not necessarily limited to the equivalent of an act of God, but the test is whether under the particular circumstances there was such an insuperable interference occurring without the parties’ intervention as could not have been prevented by prudence, diligence and care. *Horsemen’s Benevolent & Protective Ass’n v. Valley Racing Ass’n*, 4 Cal. App. 4th 1538, (1992).

The burden of proving impossibility of performance or excuse due to an unforeseen condition outside of the party’s control is on the party asserting the defense. The force majeure clause upon which you intend to rely must encompass the claimed force majeure event. Force majeure clauses are usually construed narrowly and only applied to the events listed on the face of the contract. Catch-all language will only bring into the clause events of the same character or class as the specific events mentioned. If in doubt, consult an attorney.

In many instances, a force majeure clause may limit available relief to a time extension, but may not permit the recovery of related delay damages. Many owners may be receptive to time extension requests, but possibly not to paying for extended overhead. One approach would be to seek to have the owner pay reasonable general conditions and mobilization/demobilization costs in return for the contractor waiving claims for home office overhead. At a minimum, try to reach an agreement to reserve the issue of compensation for delay for resolution at a later date. At the end of this Alert you will find summaries of a variety of force majeure provisions that may be found in public and/or private works contracts.

Impacts to the Manner in Which the Work is Performed

Sooner or later you may find that the manner in which you anticipated performing the work materially changed due to COVID-19, the SIP Orders, or related conditions. For example, perhaps you cannot use the same crew size because you were required to maintain a six foot distance between workers. Or, someone is limiting elevator occupancy per cab ride, and workers are moving slowly as a result. Or, your work is piecemealed because no inspectors are available and so you are moving throughout the project non-sequentially to find work that can be performed. The same notice issues exist with respect to the increased cost of performing the work due to such impacts.

The Clock is Ticking – Timely Submission of Notice of Delay, Impact, Protest, or NOPC

Most time extension, change orders, and claims provisions, and even force majeure provision, require formal written notice stating that you are being delayed or impacted and that you are seeking a time extension and, if applicable, delay damages. It is critical that you check your contract documents to determine if notice is required, and if so, in what format, and via what delivery method. If your contract requires a particular method of service, make sure to use the specified method.

Doctrines of Impossibility or Impracticability as a Basis for a Time Extension and/or Recovery of Damages

In the absence of language in a contract that specifically authorizes a time extension under these circumstances, the *doctrines of impossibility and impracticability* may excuse a contractor from having to meet contractual deadlines to the extent of delays caused by a publicly declared emergency.

Indirect Consequences of COVID-19 SIP Orders

The SIP Orders may result in delays to payment even if you continue work in the field. Payment may be held up if nonessential employees who work for the owner or general contractor, such as accounts payable clerks, labor compliance personnel, and others whose signoff is needed to process payment, are not in the office. You may want to not undertake a lot of work at this moment if you cannot be guaranteed timely payment and if delays in payment would create cash flow issues.

Cessation of Work for More Than 60 Days

Cessation of work for more than 60 days can constitute completion and may trigger mechanic's lien, stop payment notice, and bond claim rights. (Civ. Code § 8180(c) (private works); Civ. Code § 9200(a) (public works, except for state projects.) If you are approaching the 60 day mark, consult an attorney to ensure your lien, stop payment, and/or rights will not expire.

Additional Information

Copies of SIP Orders may be viewed via these links:

- San Francisco: <https://www.sfdph.org/dph/alerts/files/HealthOrderC19-07-%20Shelter-in-Place.pdf>
- Contra Costa: <https://cchealth.org/coronavirus/pdf/HO-COVID19-SIP-0316-2020.pdf>
- Santa Clara: <https://www.sccgov.org/sites/phd/DiseaseInformation/novel-coronavirus/Documents/03-16-20-Health-Officer-Order-to-Shelter-in-Place.pdf>
- Alameda: <http://www.acgov.org/documents/Final-Order-to-Shelter-In-Place.pdf>
- Marin: <https://coronavirus.marinhhs.org/sites/default/files/Files/Shelter%20in%20Place/Shelter%20in%20Place%20Order%2016%20March%202020.pdf>
- Santa Cruz: <https://www.santacruzhealth.org/Portals/7/Pdfs/Coronavirus/Shelter%20in%20Place%20Order%20March%2016%202020.pdf>
- San Mateo: https://cmo.smcgov.org/sites/cmo.smcgov.org/files/HO%20Order%20Shelter%20in%20Place%2020200316_0.pdf

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