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COVID-19 ALERT: CONSTRUCTION - NEWEST DEVELOPMENTS & NOTICE!, NOTICE!, NOTICE!

April 09, 2020

New Jersey Governor Murphy just issued an Executive Order that would shut down many parts of the construction industry in New Jersey. Like similar executive orders in Pennsylvania and New York, the Governor's Executive Order provides that all non-essential construction must cease indefinitely by 8:00 p.m. on Friday. Projects involving hospitals, schools, transportation sector, utility sector, affordable housing, and certain single family housing sites that can adhere to strict limits on number of workers can still proceed. Emergency work can still proceed as can work needed to safely secure a construction site.

With these increasing limitations on construction projects, (whether the project has been stopped or simply slowed) all parties in the construction industry – owners, developers, contractors, construction managers, subcontractors, suppliers and design professions - need to carefully revisit the rights and obligations in their contracts and purchase orders.

Of significant importance are the provisions requiring sending written notice of different events and conditions. Even where the contract or purchase order may be silent, there may be language from an upstream contract that was incorporated by reference that requires notice, there may be statutory notice requirements pertaining to delays such as may be found in Consumer Residential Home Improvement statutes or Prompt Payment laws, or simply exercise of "best practices" to assure that rights are reserved could require sending written notices.

Notice requirements on the following, among others, should be reviewed to assure that the other parties involved in the project are on notice of problems and issues or to otherwise protect rights under the contract documents:

- Invoking rights under a force majeure clause
- Notice by the owner/developer or their representative requiring the contractor to perform
- Notice of delay, whether compensable or not
- Notice of project suspension, if that is determined to be an appropriate step
- Notice of anticipated manpower, materials, equipment or delivery shortages resulting from COVID restrictions
- Notice of cost increases due to material cost increases, transportation cost increases, productivity impacts due to COVID restrictions, acceleration or constructive acceleration costs
- Notice of Safety violations



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- Notice on Non-payment

It may not be enough to simply assume that everyone knows that there are issues on the project. It is also inadequate to simply have verbal exchanges about these topics. That may be contrary to the contract requirements, but also fails to properly document the particular issue.

While hopefully all parties are cooperating as much as possible during these extraordinary times, continued cooperation cannot be guaranteed after COVID restrictions are behind us. The impacts of this period of stopped projects, delayed projects and cost impacts are likely to lead to disputes, arbitration demands and litigation. Failure to provide required and adequate Notices of the above topics and issues may affect the ability to pursue or defend claims. The Notices further allow for contemporaneous documentation of the events.

If you have any questions on the above or the impact of the Notice terms in your construction documents, please contact [James Landgraf](#) or [Mark Schiavo](#).