

NEW YORK STATE EXEMPTS MUNICIPAL CONSTRUCTION FROM BLANKET BAN, BUT CALLS FOR AVOIDANCE OF NON-ESSENTIAL PROJECTS

Hodgson Russ Municipal Alert
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The Empire State Development Corporation (“ESDC”) issued guidance over the weekend clarifying the status of local government construction work, including municipalities and school districts. This followed from the uncertainty created Friday, March 28, 2020 with the issuance of a directive from the ESDC shutting down all non-essential construction in New York State, which did not clarify whether non-utility municipal construction was or was not essential.

The new guidance specifically exempts local governments from last Friday’s shut-down order. However, the guidance directs that, “to the greatest extent possible,” municipalities postpone any non-essential projects, and continue at this time with essential projects only. Under the ESDC guidance, local governments must determine whether current or near-term construction work qualifies as “essential” on the basis that it (a) has a nexus to health and safety, (b) is in response to the COVID-19 crisis or (c) supports the “broader essential services required to fulfill critical operations.”

Municipal utility construction projects are deemed essential, as are highway construction projects. In addition, it appears reasonable to include any current work that, if not completed, could present a safety or health risk to visitors of municipal facilities.

In the absence of any additional guidance from ESDC on the intent or applicability of these categories, each local government should exercise good faith in determining what construction work qualifies under these standards, and in making that determination should consult with its project professionals and legal counsel to the extent appropriate.

Please note that ESDC has made the continuation of essential construction work contingent on implementing appropriate social distancing and cleaning/disinfecting protocols. Local governments should ensure that all contractors who are continuing work are aware of these requirements. A review of your on-going contracts is essential. For example, the standard contract documents used by many local

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governments frequently place the responsibility for ensuring the safety of contractor employees on the contractor itself. However, actual contract documents should be reviewed to confirm responsibility for complying with the workplace safety requirements of the ESDC guidance.

Finally, in order to avoid contractor claims and delays, local governments should ensure that current contractors receive prompt notice as to whether and to what extent they have determined work will continue consistent with the ESDC guidance.

The ESDC guidance is expected to be formally incorporated into the ESDC webpage implementing Governor Cuomo's Executive Orders regarding workforce reduction. We will keep you apprised of any further developments, and if you have questions meantime please contact Charles Malcomb or Aaron Saykin in our Municipal Law practice group.

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