

NEW YORK EXEMPTS SCHOOL CONSTRUCTION WORK FROM SHUT DOWN ORDER, BUT CALLS FOR SCHOOLS TO POSTPONE NON-ESSENTIAL WORK

Hodgson Russ Education Alert
March 30, 2020

The Empire State Development Corporation (“ESDC”) issued guidance over the weekend clarifying the status of school district construction work. 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 school district construction was covered.

The new guidance specifically exempts school districts from last Friday’s shut-down order. However, the guidance directs that, “to the greatest extent possible,” school districts postpone any non-essential projects, and continue at this time with essential projects only. Under the ESDC guidance, school districts must determine whether current or near-term school 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.”

It appears reasonable to include within these qualifying categories any work that is necessary to allow for the delivery of the school district’s programs for the remainder of this school year or for the upcoming 2020-21 school year. In addition, it appears reasonable to include any current work that, if not completed, could present a safety or health risk for District students, staff or visitors.

In the absence of any additional guidance from ESDC on the intent or applicability of these categories, each school district 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. School districts should ensure that all contractors who are continuing work are aware of these requirements. The Standard Form AIA contract documents used by many districts generally place the responsibility for ensuring the safety of contractor employees on the contractor itself. However, school districts should

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review actual contract documents to confirm responsibility for complying with the workplace safety requirements of the ESDC guidance.

Finally, in order to avoid contractor claims and delays, each school district should ensure that current contractors receive prompt notice as to whether and to what extent the district has determined that 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 in the meantime, please contact any member of our Education practice.

Please contact Jeff Swiatek if you need further guidance on as to if your school can continue any current construction projects.

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