



COVID-19

California and COVID-19: Common Questions Concerning the Impact on the Construction Industry

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Written by Michael J. Baker

Shelter-in-Place (SIP) - A Shelter-in-Place order means just that, stay and shelter in the place you typically shelter, i.e., living quarters. The State of California has determined that construction is an "Essential Business" exempt from SIP but local authorities have restricted the definitions to narrow the exemptions to the SIP. Consider checking often your state and local rules and consulting counsel if there are questions.

Is it a violation of law to not Shelter-in-Place in California? Yes, under the current statutory law cited by authorities you would be responsible for disobeying a public health order, a misdemeanor (like a citation/ticket); and, in an extreme case, the health department could shut your operations down. The rules are tightening, and authorities are being more aggressive. There is a lack of clear precedent to guide actions.

Does my project need to shut down? Not necessarily. According to many orders, certain construction work – public works, commercial and residential – is deemed to be essential and may continue and for purposes of the health orders, individuals may leave their residence to provide any service or any work necessary to the operations and maintenance of "Essential Infrastructure," or if engaged in

an Essential Business (construction) including, but not limited to, public works construction, construction of housing or shelter (in particular affordable housing or housing for individuals experiencing homelessness), airport operations, water, etc. The key issue here is whether the construction business would be considered an Essential Business under the various definitions. The orders are confusing because most general contractors work on a variety of projects, some may qualify, and some may not, depending on the project.

What are the contractual obligations to protect persons or property if the project is determined to be nonessential construction? Using AIA A201 2017 as an example, Section 10.2 – Safety of Persons and Property, requires you to take “reasonable protection to prevent damage, injury, or loss to employees on the Work and other persons who may be affected thereby.” This section applies whether your project qualifies as Essential Infrastructure, so you may need to take appropriate reasonable steps going forward to protect employees and the sub’s employees from the coronavirus. If the project is determined to be “nonessential”, meaning it does not qualify as Essential Infrastructure, then you may be contractually required pursuant to 10.2.2 to “comply with and give notices required by applicable laws, statutes, ordinances, codes rules and regulations, and lawful orders of public authorities, bearing on the safety of persons or property or their protection from damage, injury or loss.”

The health orders here may be “lawful orders of public authorities” until determined otherwise. In such case,

according to AIA A201, Section 10.2.7 the contractor “shall not permit any part of the construction or site to be loaded so as to cause damage or create an unsafe condition.” Thus, by contract you may be required to shut down the work if it is determined to be nonessential construction. To shut down the work, you may want to take reasonable precautions for safety and provide reasonable protection to prevent damage or injury (10.2.1; 10.2.3; 10.2.6; 10.2.7).

Essential Infrastructure vs. Non-Essential, what do the Parties do? The Owner and GC may want to have a discussion to determine if the owner and GC consider this Essential Infrastructure and thus exempt. Consider putting all ultimate determinations in writing. Unfortunately, if any dispute were to arise between the general contractor and subcontractors or between the general contractor and the owner regarding shutting down the project due to the health orders, it could likely turn on the interpretation of whether the project is Essential Infrastructure and thus exempt. If exempt, the shutdown may not necessarily be justified by the general order and therefore to the extent possible, you may want to reach an agreement among the parties on this issue.

What are the consequences to a contractor of violating the order if it is not determined to be Essential Infrastructure? The actual conviction of a violation of the order may lead to potential disciplinary action against your contractor's license. California Business and Professions Code section 7123 provides "a conviction of a crime substantially related to the qualifications, functions and duties of a contractor constitutes a cause for

disciplinary action. The record of conviction shall be conclusive evidence thereof." Presumably, conviction for refusing to honor the orders to not perform certain construction work may be substantially related to the functions and duties of a contractor and thus potentially subject to discipline.

I am a general contractor, what should we do about our subcontractors? The project manager may want to reach out to the responsible person for each subcontractor/vendor and determine what their position is regarding moving forward on the project. It may be a good idea to have a discussion with the owner as to whether the owner considers the project Essential Infrastructure. If the owner does not consider this project an Essential Infrastructure, you may want the owner to make that clear, in writing, so you can act accordingly down the contracting chain.

If the project shuts down, what must you do? It is going to depend on how the owner reacts to the order and how it decides to proceed. Initially, a general contractor is going to need to know what its subcontractors are going to do, and it will have to mitigate potential damages. If there is an agreement that this is Essential Infrastructure as noted above, that point may have to be discussed with subcontractors, and you may want to try to get the subcontractors to also agree in writing.

What are the owner's options? The options are, again using AIA A201-2017: 1) take the position that the project is Essential Infrastructure and proceed with the work; 2)

suspend the work for convenience (14.3) or; 3) terminate for convenience (14.4). All parties may want to consider hiring knowledgeable counsel to help them through these previously uncharted waters.

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