

Massachusetts Construction Projects: Full Steam Ahead?

By Bradley L. Croft on March 26, 2020



Governor Baker Seems to Overturn COVID-19 Municipal Construction Work Stoppages in the Commonwealth, But Mayor Walsh Balks

In the fast-moving environment of “Can v. Can’t” and “Do v. Don’t” resulting from COVID-19 and governmental shutdowns, it is a challenge to keep track of what business activities are permitted to continue and who can perform them. Notwithstanding industry-wide construction shutdowns in certain municipalities (Boston, Cambridge, Somerville, and others), Governor Baker issued **further guidance on March 25, 2020** which expressly overruled any previously-issued municipal shutdown of construction projects and allows construction state-wide to continue. Just a few hours after the issuance of this guidance, however, Mayor Marty Walsh extended the pause on non-essential construction work in the City of Boston indefinitely, placing Boston at odds with the Governor’s Order and creating confusion among owners and contractors.

The tension between these governmental directives underscores the broader conflict between economic and health/safety concerns that COVID-19 has introduced to the construction industry. Reconciling these competing interests will be a challenge for owners and contractors, as will implementing and adapting to the new safety regulations, if and when construction does proceed.

On March 23, 2020, Governor Baker issued an Essential Services and Revised Gatherings Order (**the “Order”**) requiring all businesses and organizations to close their physical workplaces to employees, customers, guests, and the public except for those designated as “essential.” On its face, the Order seemed to designate certain construction projects, as well as all construction workers, as “essential.” In the weeks leading up to issuance of the Order, however, several municipalities, including notably Boston and Cambridge, had issued stop work orders which shuttered nearly all construction projects, public and private, in those places.

Whether as a result of union pressure, to address the housing shortage in the Commonwealth or merely to keep this critical sector of the economy active and progressing, the Governor’s office issued further guidance which appeared to clear-up any apparent conflicts by specifically ordering that all construction projects could proceed, subject to new “safe practices” requirements applicable to all such projects.

The clarification specifically provided: “Accordingly, the Order provides that all construction projects are to ‘continue operations during the state of emergency, but to do so with allowance for social distancing protocols consistent with guidance provided by the Department of Public Health.’ Local policies, regulations, or directives that provide

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otherwise are in direct conflict with the Order and should be withdrawn.”

Adding more drama and confusion, seemingly in response to the Governor’s March 25, 2020 guidance, Mayor Marty Walsh responded by extending the Order applicable to the City of Boston which paused all non-essential construction work in Boston. The press release can be found here:

<https://www.boston.gov/news/mayor-walsh-extends-order-pausing-non-essential-construction-work-boston>. In light of these competing directives, contractors and owners doing work within the City of Boston will need to confirm that such construction activities are permitted to continue before recommencing any such operations.

As to the safety protocol, the revised guidance clarified that each project sponsored or managed by a municipality or state agency was required to follow the health safety practices required for the continued operation of Commonwealth construction projects. For private construction projects, the “Administration encourages all cities and towns to issue similar requirements for construction projects undertaken by private owners.” How, when and whether cities and towns choose to follow such guidance will become clear in the coming weeks. For now, the safety protocol includes:

- Daily self-certification of each employee that he/she is healthy and has not been in contact with anyone diagnosed with COVID-19
- Temperature screening of all employees working within a confined space or closed building envelope
- No handshaking
- Posting of jobsite cleaning and decontamination procedures
- Limitations on on-site meetings and observance of social distancing protocols
- Requirements for 100% glove policies for all construction workers
- Installation of on-site wash stations (with hot water and soap)

The full listing of all safety protocol can be found through the Commonwealth of Massachusetts COVID-19 Guidelines and Procedures for all Construction Sites and Workers at all Public Work. The March 25, 2020 letter clarifying the Order applicable to construction projects can be found [here](#).

In addition to safety, cost and schedule are issues of universal importance to owners and contractors alike and the Order and its clarifying guidance are certain to impact both of these considerations. Notwithstanding the newly-issued guidance, the construction industry is still facing many open questions which could have an enormous and far-reaching impact on projects, including:

- Which party bears the additional costs associated with implementing the safety protocol?
- Do current insurance coverages appropriately measure and cover the additional jobsite risks posed by COVID-19 related issues?
- Who is responsible for schedule-related issues that result from work-stoppages, lost-productivity, supply-chain interruptions, inspectional and delivery delays, and other logistic impacts on construction?
- Is continuation of construction mandatory? What about workers who decline to work over legitimate health-concerns? Or companies whose workforce or back-office is short-staffed due to illnesses or quarantined family members?

These and countless other questions will need to be answered in the coming weeks as construction projects steam ahead. To the extent possible, prudent owners and contractors should discuss these issues and attempt to reach agreement prior to forging ahead with work so as to minimize future disputes. And, of course, taking all reasonable steps to

ensure and protect the safety and welfare of employees and the public is of utmost importance.

In addition to these stop-and-go questions related to shovels-in-the-ground projects, new legislation was filed this week to address the need to continue those construction projects which are in the permitting stage after the pandemic. This legislation included:

- Ensuring that all permits granted and active when the state of emergency took effect will not expire during the emergency.
- Creating a safe-harbor so that no permit is automatically granted, approved or denied due to a local permitting authority's inability to act within a time period required by law.
- Permitting applications for permits to be filed electronically so as to avoid in-person filing.
- Suspending any timing requirements for hearings on permit applications until 45 days after the end of the state of emergency.

*RIW's **Construction Industry Group** will continue to monitor these developments as this situation continues to unfold. If you have any questions, please contact **Bradley L. Croft** at bcroft@riw.com or 617-570-3506.*

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