



**KLEHR HARRISON
HARVEY BRANZBURG_{LLP}**

Coronavirus (COVID-19) Task Force

What You Need to Know and Do Before Construction Resumes on May 1

Presented by:

Gaetano P. Piccirilli, Partner
gpiccirilli@klehr.com | 215.569.3699

Peter J. Norman, Of Counsel
pnorman@klehr.com | 215.569.3596

Stephan L. Cutler, Partner
scutler@klehr.com | 215.569.4199

Ronald J. Patterson, Partner
rpatterson@klehr.com | 215.569.4585

April 29, 2020



Gaetano P. Piccirilli

Partner, Litigation and Construction



**KLEHR HARRISON
HARVEY BRANZBURG^{LLP}**

Agenda

Operating at the intersection of executive and legislative authority, state and local concerns, and contracts and projects:

State of play



Construction is re-opening



Impacts & Contracts



Local considerations, permitting



Payment Act(s) considerations



Timeline of Relevant Executive Orders

Emergency disaster declarations: PA 3/6, NY 3/7 and NJ 3/9

Closure of non-essential or non-life sustaining businesses: PA 3/19, NY 3/20 NJ 3/21

Changes to construction aspects of order: NY and NJ become more restrictive, PA refined definition (e.g. medical and emergency repairs)

- PA most restrictive
- NY and NJ allow construction to proceed

- 4/23 – PA issues guidance for reopening of construction
- Expected NY and NJ will follow



Governor Wolf's Orders were an exercise of the police power

Police power rests with the states

“Inherent power of the government to enact and enforce laws for the promotion of health, safety, and general welfare”

We see the police power every day (building codes)

Proper exercise is a “broad and inclusive” power



Executive orders + closures were legal *Devito v. Wolf*

Gov. Wolf's orders were lawful exercises of the police power

PA Constitution

Emergency Management Code

Advance notice not required given unique circumstances

Procedural due process still required

Waiver program satisfied procedural due process concerns



Why are we talking about (recent) history?

Easing of restrictions will come in phases

It's unlikely the government will be responsible for losses (takings)

Until there is a COVID-19 vaccine, history may repeat itself

Also: Continued emergency health and safety protocols

More refined waiver process going forward

Focus on the duration of emergency





Peter J. Norman

Of Counsel, Litigation and Construction



**KLEHR HARRISON
HARVEY BRANZBURG LLP**

Pennsylvania – The Shutdown

March 19, 2020

- Governor Wolf issues Order requiring all Non-Life Sustaining Businesses to Cease Operations. Residential and Commercial Construction not considered Life Sustaining.

Wrap Up Activities

- Although ordered to close, construction activities in the nature of safety and protection of existing in-place construction allowed to proceed for several days before enforcement of shutdown.

Waiver Process

- Although likely seen by State Government as a means to allow a fair opportunity for businesses to explain why they should be deemed life sustaining, the website was immediately overwhelmed with waiver requests, especially from contractors.



Pennsylvania – The Shutdown (Cont'd)

Waiver Process Abuse

- Other than allowing for construction related to health care facilities to proceed, as well as legitimate project site safety activities, the waiver process seen as uneven and unfair. Alleged “all project” waivers supposedly issued to certain contractors to proceed smacked of political favoritism and were later denounced by the State as deliberate misconstruing the State policy, i.e., Ain’t no such thing. School Districts given the power to decide their own ability to proceed with construction exercised caution and did not typically permit work to proceed.

‘Life-sustaining’ casino? Construction continued in South Philly despite Gov. Wolf’s coronavirus shutdown. At least two workers have tested positive.

by William Bender and Angela Couloumbis of Spotlight PA, Updated: April 7, 2020



Inquirer’s April 7, 2020 article on the Gilbane/Casino Project is an easy example of the problem of trying to establish safe working conditions on the fly, and likely caused blanket rejection of other construction project waiver requests. Negative impact of that project on the delay for state-wide construction startup not firmly established, but widely speculated.

Guidance (with a stick)

“Guidance” issued by Gov. Wolf & Secretary of Health on April 23, 2020.

All construction businesses in the Commonwealth – new construction, renovation, repair, land subdivision, design related field activities - authorized to conduct in-person operations “so long as their activities strictly adhere to this guidance.”

Translation – Guidance means Regulations. Think OSHA requirements with teeth, and criminal enforcement by law enforcement officers (note - no editorial on Dept. of Health Order or Disease Prevention and Control Law or actual fine limits under both)

Projects Subject to Guidance



All Commercial, Public and Residential Construction Projects



Projects operating under Existing Waivers – applies May 1. Until then, working under current waiver conditions



Projects stopped March 19th – applies May 1. Until then, no activity allowed



New Projects – applies May 1st



Note – If Contractor does not commit to comply with Guidance, Construction Activities are not permitted



Local Jurisdictions – More Stringent?

Guidance specifically allows for “Local Political Units” to “elect to impose more stringent guidelines.”

1. Philadelphia – Elected to Issue (April 28)
 - a. Highlights
2. Other?



Guidance – Requirements

1. Provide Appropriate PPE – masks/face coverings

2. Establish procedures for workplace upon discovery that job site exposed to possible/confirmed COVID-19

- Close off area where employee worked
- 24 Hour wait before Cleaning
- Massive Clean - Follow CDC protocols
- Identify possible other persons in Close Contact with Employee (within 6 ft for 10 plus minutes) within last two days
- Isolate such other persons
- Notify Employees of occurrence

3. Establish Cleaning Plan for job site and staffing

4. Establish Security Plan for job site and staffing

5. Temperature Screening of Employees/Health Questions at Gate – fever, cough, shortness of breath



Guidance – Requirements (Cont'd)

6. Social Distancing

- a. Exceptions – unless required by safety of activity
 - Drywall
 - Team Lifting

7. Hand washing stations

- At entrances, break areas, offices trailers, egress, etc.

8. Regularly clean and disinfect high traffic or common areas

9. Limit meeting size – 10 or less with distancing



Guidance – Requirements (Cont'd)

10. Stagger shifts/breaks/work areas/stacking of trades (where feasible to minimize workers on site)

11. Limit site visitors and delivery

- a. PennDot – Delivery tickets/Work sheets kept in 24-hour quarantine

12. Limit tool sharing

13. Limit access to enclosed spaces

14. Separate Travel to Worksite by Employees (no carpool)

15. Identify “Pandemic Safety Officer”

- a. Large project – One for Contractor and each Subcontractor
- b. Enforces social distancing
- c. Enforces Other Project Requirements



Commercial Construction – Staffing Limitations

Limited to 4 persons per 2000 sq. ft. (exception for delivery/inspectors)

1 additional person every 500 additional sq. ft.

All areas under roof with active construction

Written Safety plan required.



Residential Construction Restrictions

Residential Construction – detached 1-2 family dwelling not more than 3 stories in height and their accessory structures.

Limited to 4 persons on the Job Site:

1. This includes supervision and subcontractors.
2. This does not include temp site visits by code inspectors, delivery persons, and not persons not directly engaged in the construction activity (architects, lender review, etc.)



Public Construction

Guidance suggests that public entities seek to limit ongoing construction to “critical projects”

Not defined, but thought to include schools that need to be opened (?) for start 2020-2021 School Year

State delegates to local political units the ability to determine critical projects, and requires adherence to the Guidance, as well as a notice to proceed issued by the applicable government unit.



Inspections Can Go Forward

Guidance specifically allows for the resumption on May 1 of the following construction related activities on job sites:

- In-person inspection and appraisals related to construction financing loans.
- UCC building code plan review.
- Inspection services.



Anticipated Restart Construction Timelines

Pre-May 1, 2020

Any suspended project – notice to proceed issued by Owner in compliance with Construction Contract requirement

May 1, 2020 and forward

1. Contractor/Owner project site walks/meetings on means and methods of Contractor compliance with Guidance

- a) Finalize site plans for wash stations, egress, health monitoring, PPE gear, cleaning services
- b) Written plan drafted up and prepared to be given to subcontractors
- c) Delivery and access issues included.

2. Contractor/Subcontractors project site walks/meeting on coordination of various sub activities and staffing

- a) Review Written Plan with subcontractors
- b) Prepare 5-10-day work schedule for subcontractor review and staffing confirmation.
- c) Solicit further coordination from subcontractors for work



Anticipated Restart Construction Timelines

3. Finalize Contractor/Owner startup cost issues

- a. Most contracts require agreement by Owner and Contractor before proceeding with work on Change Order issues
- b. New Means/Methods to comply with Guidance should be the subject of Change Order
- c. Schedule Impact issues of going forward work likely not ripe, parties can agree to proceed in compliance with Guidance, and review necessary schedule impacts at a later date.

4. Walkthrough with Subcontractors on proposed construction start-up sequencing for workday, and subcontractor sign off on compliance with contractor written plan

5. Staggered starts with Subcontractors on 1st day on job site work, all subcontractor employees given notice of requirement to follow written plan



Resources

- [20200423-Construction-Industry-Guidance.pdf](#)
- [OSHA3990.pdf – Guidance on Preparing Workplaces for COVID-19](#)
- [202000405-SOH-Building-Safety-Measures.pdf](#)
- [PennDot-PTC Guidance for Restarting Construction Projects Final Updated 200420.pdf](#)
- Supplemental COVID-19 Safety Plan Implementation (PennDot)





Stephan L. Cutler

Partner, Real Estate & Finance – Co-Chair

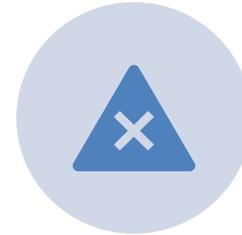


**KLEHR HARRISON
HARVEY BRANZBURG**LLP

Force Majeure



A French phrase that in English translates to “superior force.”



An event or effect that can be neither anticipated nor controlled.



A force majeure contract clause allocates risk between or among the contracting parties if performance becomes delayed, impossible or impracticable because of such an event, and may allow for suspension or termination of the contract.



But the phrase “force majeure” does not appear in the AIA contract series of documents.



A201[®]-2017 (General Conditions of The Contract For Construction)

§ 8.3.1 IF the Contractor is delayed at any time in the commencement or progress of the Work by

- (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor;
- (2) by changes ordered in the Work;
- (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control;
- (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or
- (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, THEN the Contract Time SHALL be extended for such reasonable time as the Architect may determine.



A201[®]-2017 (General Conditions of The Contract For Construction) (Cont'd)

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents



A201[®]-2017 (General Conditions of The Contract For Construction) (Cont'd)

§ 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section 15.1.3 shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

§ 15.1.5 If the Contractor wishes to make a Claim for an increase in the Contract Sum, notice as provided in Section 15.1.3 shall be given before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4. Failure to submit claims in accordance with this Paragraph 15.1.5 shall be deemed a waiver thereof.



A201[®]-2017 (General Conditions of The Contract For Construction) (Cont'd)

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.



A201[®]-2017 (General Conditions of The Contract For Construction) (Cont'd)

§ 1.6.2 **Notice of Claims** as provided in Section 15.1.3 shall be provided **in writing** and shall be deemed to have been duly served only if delivered to the **designated representative of the party** to whom the notice is addressed **by certified or registered mail, or by courier providing proof of delivery.**



A201[®]-2017 (General Conditions of The Contract For Construction) (Cont'd)

Other provisions that might apply to projects affected by the Coronavirus pandemic:

- Section 10.4 (Emergencies)
- Section 14.1 (Termination by the Contractor)
- Section 14.3 (Suspension by the Owner for Convenience)
- Section 14.4 (Termination by the Owner for Convenience)
- Section 15.1.4 (Continuing Contract Performance)
- Section 15.2.1 (Role of IDM)
- Section 15.3 (Mediation)
- Section 15.1.7 (Waiver of Claims for Consequential Damages)



A201[®]-2017 (General Conditions of The Contract For Construction) (Cont'd)

§14.1 Termination by the Contractor

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, for any of the following reasons:

.1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;

.2 An act of government, such as a declaration of national emergency, that requires all Work to be stopped;

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, as well as reasonable overhead and profit on Work not executed, and costs incurred by reason of such termination.



A201[®]-2017 (General Conditions of The Contract For Construction) (Cont'd)

§14.3 Suspension by the Owner for Convenience

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work, in whole or in part for such period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay, or interruption under Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent

- .1 that performance is, was, or would have been, so suspended, delayed, or interrupted, by another cause for which the Contractor is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Contract.



A201[®]-2017 (General Conditions of The Contract For Construction) (Cont'd)

§14.4 Termination by the Owner for Convenience

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 14.4.2 Upon receipt of notice from the Owner of such termination for the Owner's convenience, the Contractor shall

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In case of such termination for the Owner's convenience, the Owner shall pay the Contractor for Work properly executed; costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.



Other Relevant AIA Contracts

B101[®]-2017 (Standard Form of Agreement Between Owner and Architect) - §2.2, §3.1.3, §3.6.1.1, §3.6.2.5, §4.2.1, §8.1.2, §9.2, §9.3, and §10.2.

A401[®]-2017 (Standard Form of Agreement Between Contractor and Subcontractor) - §1.3, §2, §3.3.6, §7.4.1, §11.1.7.2.2, and §11.1.7.2.3.

C401[®]-2017 (Standard Form of Agreement Between Architect and Consultant) - §1.3 and §10.2.



Sample Flow Down Provision

A401[®]-2017 (Standard Form of Agreement Between Contractor and Subcontractor) –

Article 2 - The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201-2017 apply to this Agreement pursuant to Section 1.3 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner under such documents assumes towards the Contractor, and the Subcontractor shall assume towards the Contractor all obligations and responsibilities that the Contractor under such documents assumes towards the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies, and redress against the Subcontractor that the Owner under such documents has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies, and redress against the Contractor that the Contractor, under such documents, has against the Owner insofar as applicable to this Subcontract. Where a provision of the documents is inconsistent with a provision of this Agreement, this Agreement shall govern.



Future Projects

Typically, delays need to be “unforeseeable” or, at a minimum, outside of the party’s reasonable control to trigger a delay claim.

Now that the Coronavirus pandemic is well known, parties will likely negotiate appropriate language for future potential delay claims associated with future pandemics.



Conclusion

Consult

Consult your contract.

Consult

Consult with your attorney.

Communicate

Communicate with all the parties involved in the project to discuss potential adverse impacts collectively and determine the appropriate path forward.





Ronald J. Patterson

Partner, Real Estate and Zoning & Land Use



**KLEHR HARRISON
HARVEY BRANZBURG** LLP

L&I conversion to electronic filing – Eclipse

Allows for
an array of
applications:

- Zoning
- Building
- Plumbing and electrical
- Licenses
- Certain appeals



What other offices are open and operating electronically?

Planning Commission

- Plan reviews
- ZBA appeals
- Subdivision reviews
- CDR
 - Accepting Applications
 - Informal staff reviews
 - CDR Hearings

Streets Department

- Zoning Permit Submissions – Plan reviews
- Building Permit Submissions



What other offices are open and operating electronically? (Cont'd)

City Surveyors – District Offices

Philadelphia Water Department

- Zoning Permit Submissions – Plan Reviews
- Building Permit Submission

Historical Commission

- Staff reviews
- Architectural Review Committee
- Commission hearings



What other offices are open and operating electronically? (Cont'd)

Art Commission

- Staff reviews
- Sign Committee
- Architectural Review Committee
- Commission hearings

Eclipse Applications

- Refers out to applicable Departments for review
- Correspond with examiners
- Receive permits or review/comment letters
- Submit supplemental materials or review responses
- Permits



What other offices are open and operating electronically? (Cont'd)

L&I Review Board

Board of Building Standards



Public Hearings?

Generally, no

Senate Bill 841 – April 20, 2020

- Emergency Legislation
- Authorizes Municipalities to conduct hearings
- On April 20, the Governor signed a Bill authorizing municipalities to conduct virtual hearings under so long as the COVID emergency is on place.
- So for Philadelphia, this means potential virtual hearings for ZBA, Planning Commission, Art Commission, Civic Design Review, Historical Commission, Board of Building Standards.
- RCO meetings, where applicable, would still be required. Some RCOs are already conducting virtual community meetings.



Public Hearings? (Cont'd)

Senate Bill 841 – April 20, 2020

- **The City is evaluating these options, and we are keeping in current contact with the City for the latest updates and guidance. Should the City conduct these hearings, it will include the following requirements:**
 - A quorum of board members
 - Advance notice by publication and otherwise at least 5 days prior to the hearing. And most likely we would still prepare and mail the notices of the relevant meetings to all property owners located within 250 feet of the property that is subject to the hearing.
 - The ability of interested parties and general public to participate through a telecommunication device (e.g., telephone and computer) whether audio/visual or just audio, or by mailed or emailed to the board.



Public Hearings? (Cont'd)

Normal Resumption?

- Even when we return to a state of normalcy, the City will impose social distancing practices
- Under review



Prompt Pay Considerations + COVID-19

Strict adherence to contractual or statutory deadlines

Intersection of cash flow, dependent relationships, and statutory law

Business closures will have an impact on prompt pay requirements

Goal: to avoid punitive provisions and leverage



Prompt Pay + Punitive Provisions

Each prompt pay law is different, for example:

New Jersey:

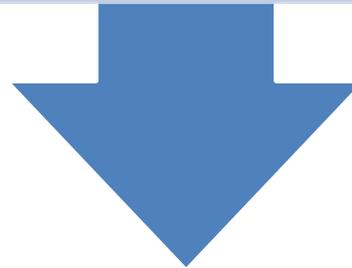
Principal + interest at prime rate plus 1% + attorneys fees + work suspension

New York:

Principal + interest at 12% per annum + work suspension and remobilization costs

Pennsylvania:

Principal + interest at 12% per annum + penalty at 1% per month + attorneys' fees



Elements of good v. bad faith, statutory defenses, and carve outs to consider



Why Address Prompt Pay?

Prompt Pay laws do not address excusing non-performance

Contractual doctrines that may forgive non-performance may be irrelevant

Prompt Pay laws are relatively new and without the benefit of substantial pandemic precedent

Easy enough to account for!



Prompt Pay and Avoiding Default Provisions

Pay attention to Prompt Pay and Contractual payment deadlines, avoid “deemed approval(s)”

Understand how the actions or inactions of others may impact payment obligations

Communicate clearly and promptly with your contracting party

Avoid “frustration” arguments related to pay if/pay when paid clauses

Thank You

For questions or more information, please contact:

Gaetano P. Piccirilli, Partner

gpiccirilli@klehr.com | 215.569.3699

Stephan L. Cutler, Partner

scutler@klehr.com | 215.569.4199

Peter J. Norman, Of Counsel

pnorman@klehr.com | 215.569.3596

Ronald J. Patterson, Partner

rpatterson@klehr.com | 215.569.4585

**Follow our Coronavirus (COVID-19)
Task Force Resource Center for all the latest guidance:
www.klehr.com/covid-19**

