

# General Conditions Refresher, the Construction Shutdown and Preparing for the Resumption of Work



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# This webinar will . . .

Review basic general conditions,  
using the AIA 201-2017 as a  
reference.

Report on the status of New York  
State restrictions on construction  
work and phase-in plan for  
reopening

Look at how some general condition  
have been impacted by the  
shutdown or limitation in  
construction work.

Consider what actions owners and  
contractors might take before the  
resumption of work.

# General Conditions - Overview

- The layout of the general conditions asks . . .
  - Who are the parties and what are their roles in the project?
  - How is the project to proceed?
  - What happens if there are issues between the parties?
- The purposes of the general conditions are to . . .
  - Recite the obligations of the parties to each other
  - Recite the obligations of the parties to the site
  - Recite how issues and disputes are to be addressed
- And remember three basic elements . . .
  - Tailor the conditions to the project
  - Read the conditions in conjunction with the remaining contract documents
  - Consider it binding!

# 1. General Conditions - The Parties

- Owner (Article 2)
  - Financing disclosures
    - Ability to pay on contract at outset of work
    - Evidence of ability to continue if fails to pay
    - Disclosure change in financing
    - Deal with contractor stopping work
  - Right to stop work (different than “termination”)
  - Right to retain separate contractors (Article 6)
- Contractor (Article 3) In addition to performing the work . . .
  - Pre-commencement
    - Review contract documents, field conditions; unsafe conditions and alternatives
    - Provide schedules, apportion values, completion time
  - During the work
    - Warrants workmanlike; obtains permits; complies with all laws
    - Notifications to owner or representative
  - Protect the Work
    - Provides warranties, insurance and indemnifications
- Architect (Article 4) – not really a party to the agreement, but . . .
  - Owner’s representative until final certificate of payment
  - Inspects, interprets and reports
  - Certifies payments

## 2. General Conditions - Changes/Corrections

- Change Orders (Article 7)
  - Agreement to make a change to the contract work, amount or time
  - Get it signed!
  - May have effect on schedule and completion – stay tuned!
- Construction Change Directive
  - Changes work only, amount and time to be adjusted
  - Architect may adjust if contractor does not object
  - Contractor to provide itemized accounting of item
  - Contractor can raise Article 15 claim of disagreement
  - Contractor paid under directive for completed work with total cost later determined
- Corrections (Article 12)
  - Before substantial completion – contractor corrects rejected or non-conforming work
  - After substantial completion – if within 1 year, contractor to correct non-conforming work:
    - If owner fails to give notice, owner waives right to correct
    - If contractor fails to correct, owner may correct on 10 day notice and charge contractor
    - 1 year period extended for original work after substantial completion but not for corrective work

# 3. General Conditions - Payments/Completion

- Payment and Completion (Article 9)
  - Before first payment application:
    - Give schedule of value for entire stipulated sum or guaranteed maximum price contract
  - After work commences:
    - Submit request 10 days before due; include supporting information with back-up and in proper form
    - Architect certifies all or sum, withholds all, and gives reasons
      - No representation of exhaustive site visit, means/methods or use of prior funds
    - Reasons to withhold:
      - defects, third-party claims, subcontractor non-payments, potential completion issues
    - Contractor pays subcontractors within 7 days
      - Owner/architect may verify payments; joint checks on failure to pay
  - Contractor may stop work on 7 day notice of non-payment
- Substantial completion
  - When owner can occupy or utilize work for intended use
  - Submit punch list items
  - Architect to inspect and certify final application for payment
    - Include affidavit of payments; insurance in effect, any sureties consent to final payment
    - Include warranty documents and showing of satisfactory payments (lien waiver, releases)
  - Contractor may bond uncooperative subcontractors
- Owner's waiver on final payment, except for:
  - Lien waivers, failure to perform, special warranties, audit if contract permits.

# 4. General Conditions - Insurance

- Contractor's responsibility
  - Maintain contract-required insurance policies; name additional insured
    - Various policies; align contract requirements with insurer
  - Owner may stop work on 3 day notice of potential or actual cancelation/expiration
  - May waive covered loss regardless of indemnification language
- Owner's responsibility
  - Maintain contract-required insurance policies; contractor may suspend work if not
  - Contractor may stop work and adjust contract sum or time on 3 day notice
  - May obtain business interruption or completion delay insurance and waive claims
  - May waived covered loss regardless of indemnification language
- Settlement of insured loss
  - Owner notifies contractor how insurance proceeds to be allocated
  - Contractor objects within 14 days; raise Article 15 claim if owner settles loss
  - Owner issues construction change directive for reconstruction/remediation

# 5. General Conditions - Termination

- Contractor's right to terminate (Article 14)
  - work stops 30 or more consecutive days due to other's acts
    - Government, non-certification or payment, financing proof lacking
  - work stops 60 or more consecutive days
    - Owner not meeting progress obligations
  - delay aggregate of greater of 100 % of scheduled completion or 120 days in 365 day period
  - days measured by calendar, not "work" days
- Owner's right to terminate for cause:
  - Certain acts under the contract (e.g. breach, etc.)
  - 7 day notice where architect certifies justification
  - If so, Contractor requests accounting for remaining work
    - Contractor entitled to excess balance over cost to finish
- Owner's right to suspend or terminate for convenience:
  - If suspends, adjust contract sum/time unless delay anyway due to contractor
  - If terminates, contractor protects work, owner pays due with any termination fee
    - What about a termination fee?



# 6. General Conditions - Claims/Disputes

- Claim is a demand to change payment, time or contract relief (Article 15)
  - Was condition requiring change discovered before Article 12 correction period expires?
    - Notice to other party and initial decision maker (architect or owner's representative)
  - Was condition discovered after correction work period expires?
    - Notice to other party without initial decision maker
- Claims to increase contract amount
  - Give notice before affected work starts
- Claims to increase contract time
  - Give notice with estimated cost and effect on progress
  - Where weather-related, include data and showing not reasonably anticipated
- Initial review within 10 days; accept, reject, compromise or request information
- Dispute resolution
  - After 30 days, party may mediate or demand other party file mediation; waiver if none
  - Binding arbitration follows; may file concurrently; if neither files within 60 days, waived.

# Executive Orders and EDC Guidelines

- Executive Order 202.6, issued March 18, reduced workforce to 50%, then 75%
  - Construction is essential business, provides essential services/functions; EDC guidelines
- EDC first defines essential construction, but not clear
  - Skilled trades “such as electricians, plumbers”, firms and professions for essential infrastructure or emergency repair/safety purposes
- Exec. Order 202.8, “Pause”, issued March 23, increased nonessential to 100%
  - Essential services or functions may continue for essential or non-essential business
- Other state agencies follow (DOT, Office General Services Design/Construction)
- Exec. Order 202.13, issued March 30, says only “certain” construction exempt
- EDC updates guidelines:
  - Non-essential shut down except “emergency construction”
  - Essential construction defined to include specific work
  - Site safety and social distancing requirements remain
  - Single worker construction work may continue
- Local enforcement including up to \$10,000 fine per violation

# New York's Phase-in Plan to Re-Open

- Four phase for the reopening of businesses
  - Phase One - construction, manufacturing, whole suppliers, some curbside retail
  - Phase Two - storefronts and professional services
  - Phase Three - restaurants, gyms and spas
  - Phase Four – schools, theaters and recreational places
- Ten Regions of New York State
  - New York City, and Mid-Hudson Regions
- Seven Benchmarks Each Region to Pass Each Phase
  - Region reports to Albany for approval to advance phase
  - Estimated two weeks per phase
- Current Status (as of May 22, 2020)
  - Seven of ten regions in Phase One
  - NYC at 4 of 7, Mid-Hudson and Long Island at 5 of 7
- See <https://forward.ny.gov/regional-monitoring-dashboard>
- The upshot: region may already be in Phase One!

# Impact of the shutdown on general conditions and preparing for the resumption of work

1. Scope of Work
2. Time and Completion
3. Protection/Oversight
4. Payment/Cost

# Scope of Work Issues

## Issue or Problem

- Contractor performed non-essential work during shutdown, violating 3.5.2 (no work contrary to law)
- Uncertainty of other trade contractors (6.1)
  - Ability to resume work? Timeliness?
  - Separate labor issues
- Correction work not yet performed
  - Potential delay issues
  - Change in needed correction

## Response

- Review extent of work and consequence
  - Investigate work performed
  - Investigate who directed
- Consider effect on progress
  - Contractor proposes revised schedule (6.1.1.)
  - Notify architect of any defects/issues (6.2.2.)
  - Owner may replace (6.1.4)
- Pre or post substantial completion? (12.1)
  - If pre, contractor to promptly correct (12.2.1)
  - If post, determine if owner has waived or accepted, or no notice given (12.2.2.)

# Time and Completion Issues

## Issue or Problem

- Construction scheduled altered due to unintended work shutdown
  - Substantial completion date
  - Progress schedule toward completion
- Various conditions altered require change order, directive or architect “minor” changes
- Shop drawings affected by delay, change in financing or change in progress priorities

## Response

- Contractor should provide detailed revised schedule (3.10)
- Identify the affected condition
  - If to sum or time, issue change order (7.1)
  - If to work, architect issues construction change directive (7.3)
  - Other, architect may issue directive (7.4)
- Contractor should notify architect/owner of needed deviations (3.12.8)

# Time and Completion Issues (con't)

## Issue or Problem

- Contractor may terminate for government act on 30 days or more work stoppage (14.1)
- Owner terminate for “cause”
  - E.g., claims non-performance of “essential” work; failure to protect site;
- Owner terminates for convenience
  - Lack of financing; delays affect goal of project

## Response

- Address now and declare waived
- Should be in writing, detailed, 7 day notice
  - Contractor request detailed accounting
  - Contractor reserves right to balance of contract if cost to complete is less than contract sum
- Apply termination fee if any; consider adopting if not

# Protection and Oversight Issues

## Issue or Problem

- Site safety and protective measures applicable to all construction businesses

## Response

- Review NYS mandated guidance and review best practices
  - <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ConstructionShortGuidelines.pdf>
  - To be used in conjunction with the NYS Interim Guidelines for Construction
- Prepare Forward Safety Plan
  - [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS\\_BusinessReopeningSafetyPlanTemplate.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_BusinessReopeningSafetyPlanTemplate.pdf)
  - Not to be submitted – for internal use
  - Applies to essential and non-essential businesses
  - Checklist and question section allowing company-specific responses



# Protection and Oversight Issues (con't)

## Issue or Problem

- Uncertainty of necessary protective steps to take specific to construction industry
  - What does New York State require?
  - How are workers to be protected on the resumption of work?
- Phase-in plan not clear
  - Owner falls into two phase groups
  - Owner dependent on other services
- Adjacent properties affected by shutdown
  - Monitoring and access concerns

## Response

- Review Interim Guidance for Construction
  - <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ConstructionMasterGuidance.pdf>
  - Guidelines for people/laborers
    - Social distancing; workplace gathering
  - Guideline for places
    - Protective equipment, cleaning, communications
  - Guidelines for the process
    - Screening and testing
  - Post safety plan on site
  - Submit to link affirming review and understanding
- Provide means for progress
  - Check on partial access
  - Work out progress plan
  - Consider change directive
- Request inspection; review progress dates to adjust

# Protection and Oversight Issues (con't)

## Issue or Problem

- Owner/occupant interfered with site
  - Misused or damages materials
  - Altered site conditions
  - Allowed unauthorized access
  - Warranties affected
- Warranty and period affected (3.5)
  - Runs from substantial completion or designated portion
  - Use/access may have affected

## Response

- Inspect site for status of conditions (3.3.)
  - Notify within 14 days if different than contract description; architect makes equitable adjustment(3.7.)
  - If not, propose corrections and adjust (12.1)
  - Document for insurance and warranty
    - No warranty for damage/default caused by others (3.5)
- Identify damage due to abuse or alteration
  - Contractor not liable for other acts, improper maintenance, normal wear and tear (3.5.1)

# Payment and Cost Issues

## Issue or Problem

- Values for stipulation sum or guaranteed maximum price contract affected
  - Due to change as to materials
  - Due to change in subcontractors
  - Due to delay increase in equipment cost
- Subcontractor seeks equitable adjustment for delay exceeding 30 days (5.1)
- Owner's funding affected
  - Bank halts financing
  - Loss of revenue/rents
  - No alternative lending
- Insurance premiums and rental costs accrue

## Response

- Give adjusted values; Determine allowances
  - Change order where cost different than allowance (3.8)
  - Request architect certify payments due
  - Consider 7 day stop work notice
- Review if applicable and adjust if warranted;
- Request evidence of funding (2.2.2.)
  - Right to stop work or portion of work affected on 14 day notice
  - Consider lag time to resume payments
- Consider cost adjustments

# In conclusion . . .

☐ BE SAFE

☐ BE OPTIMISTIC

☐ BE PREPARED