Public Constructions Issues in Light of COVID-19

Challenges, Opportunities, and Impacts
Introduction

- Discuss Public Construction Issues Related Coronavirus & COVID-19
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No Zoom, but you can imagine me
Overview

- CARES ACT re Construction Specific
- Contract and Procurement Issues
  - Stay at Home Orders
  - Essential Business Exception
  - Stop Work
  - Extensions & Tolling
  - Performance Excuses
  - Exceptions to Full and Open Competition
    - Emergency
    - Unsolicited Proposals
Corona Virus Disease - COVID-19

- United States Cases – 928,619
- Total Deaths – 52,459
- Total Jurisdictions – 55 (50 states, District of Columbia, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S Virgin Islands)

Government Programs

- CARES Act (Coronavirus Aid, Relief and Economic Security)
- Paycheck Protection Program (1-500 employees)
- Emergency Economic Injury Disaster Loan (EIDL) (1-500 employees)
CARES ACT – Construction Specific

- $156,000,000 for National Institute of Health for vaccine and infectious diseases research
- $3,500,000,000 for Biomedical Advance Research and Development manufacturing facilities
- $1,500,000 for non-federally owned facilities for production of vaccines, therapeutics, and diagnostics
CARES ACT – Construction Specific

- $150,00,000 – Grants for Construction of State Extended Care Facilities
- $275,000,000 – GSA Real Property Activities Federal Buildings Fund for costs incurred “to prevent, prepare for, and respond to coronavirus, domestically and internationally
CARES ACT – Community Development Fund

- $5 Billion
  - $2,000,000,000 per Sec. 106 of the Housing Community Development Act of 1974
  - $1,000,000,000 allocated directly to States “to prevent, prepare for, and respond to coronavirus with the State” for, among other things, housing market disruptions
CARES ACT – Construction Loans

- Construction Loans expressly excluded from some of the provisions intended to offer protection to homeowners and renters
  - Sec. 4023 – Forbearance of Residential Mortgage Loan Payments for Multifamily Properties with Federally Backed Loans
  - Sec. 4024 – Temporary Moratorium on Eviction Filings
CARES ACT – Net Operating Losses

- 2017 Tax Cuts and Jobs Act (TJCA) – NOLs can only reduce 80% of taxable income
- CARES Act eliminated this restriction
- 2018-2020 NOLs permitted to carry back 5 years (other than taxable income from Section 965, Transition Tax)
CARES Act – Excess Business Losses

- Repealed Excess Loss Limitation of Section 461(l) of TCJA
- Non-corporate taxpayers may be permitted to use business losses in excess of $250k ($500k joint taxpayers)
Part of the formula for business interest deduction limitation of Section 163(j) has been increased from 30% of Adjusted Taxable Income to 50%

Taxpayers can elect to use 2019 ATI to calculate 2020 limitation
CARES Act – Employee Retention Credit

- Maximum $5k per employee (50% of maximum of $10k of qualified wages, including allocable health plan expenses)
- For businesses that have suffered significant decline in gross revenues (less than 50% of gross receipts from same quarter in prior year) or partially or completely suspended
- 100 or less Eees, all wages
- 100+, only wages for those not working due to above
CARES Act – Social Security Tax

- Most taxpayers may delay payment of the employer share of Social Security Tax for the year 2020.
- 50% of the delayed payment must be paid by December 31, 2021 and remaining by December 31, 2022
- Corporate Alternative Minimum Tax Credit – AMT for corps made refundable for 2018
Additional time and/or money to contract should its project schedule be encumbered by delays beyond its control.

Under CARES Act, contractor may be provided recovery of paid leave to its employee that could 1) not access work sites, 2) telework and 3) actions were “needed to keep such employees in a ready state”.
Contractual and Procurement Issues

- Stay at Home Orders
- Essential Business Exception for Construction
- Stop Work Orders
- Extensions or Tolling
- Force Majeure, Impossibility, etc.
- Exceptions to Competitive Procurements
  - Emergency
  - Unsolicited Proposals

Massachusetts (exceptions for some areas)
Construction Deemed Nonessential

- Six States
  - Michigan
  - New Jersey
  - New York
  - Pennsylvania
  - Washington
  - Vermont
- Exceptions for public infrastructure, housing, and healthcare projects
No Statewide Order, but

- Some Localized Restrictions with Construction Deemed Essential
- 3 State:
  - Oklahoma
  - Utah
  - Wyoming
Florida Helpful Website

- The below link is a very useful tool for tracking local orders / closures relating to COVID-19. You are able to click on the Florida County, and it pulls up a hyperlinked list of the orders (everything from emergency declarations to event and school closures).

Construction is on the list of essential services:

- Open Construction sites irrespective of the type of building;
- Contractors and other service providers necessary to maintaining the safety, sanitation, and essential operation of residences and other structures;
- Architectural, Engineering, or Land surveying services.
Strict Enforcement

- Even where essential, local jurisdictions have broad police powers to regulate
- Miami Beach issue stop work orders to at least three work sites for “failure to comply with the CDC safety regulations during the COVID-19 emergency period.”
- Failed to maintain proper health logs, i.e., demonstrating daily checks for symptoms

Open construction sites, irrespective of the type of building (Fla. Emergency Order)

Some jurisdictions limiting meaning

Florida Municipal Examples
- Re-roofs essential
- Interior improvements non-essential
- No construction on occupied buildings unless “necessary”

Consult with CO or Building Official
Opportunity Due to Stay at Home

- Emptier Roads
- Lessen the Economic Damage
- FL Governor directed acceleration of $2.1 billion worth of targeted roadway projects
Stop Work Orders

- Make sure contract terms complied with, i.e., notice, writing, term
- Notify subcontractors – importance of flow down provisions
- Document paper trail especially as to impact as to time and money
- Abandonment Issues when lifted
Emergency Extensions or Tolling

- State Statutes Provide tolling for certain deadlines due to natural emergencies
  - Permit rights
  - Other authorizations
  - Extends rights for an additional 6-months

Fla. Stat. § 252.363(1)(a)
Force Majeure

- Uncontrollable events that *prevent* performance
- Acts of God (earthquakes, hurricanes, floods)
- Unplanned human events (war, labor strikes, terrorism)
- Contract specific and strictly construed
- Notice provisions
Other Performance Excuses

- Doctrine of impossibility, frustration or commercial impracticability
- Common law
- Elements
  - Unforeseeable
  - Risk could not have been provided for by language or custom
  - performance of the contract must be impossible or commercially impracticable – not just more expensive or difficult
Emergency Contracting

- “immediate danger to the public health, safety, or welfare or other substantial loss to the state requires emergency action” (general goods and services)
- Other than full and open competition
- Two vendors, unless will increase danger

Fla. Stat. § 287.057(3)(a)
Other Emergency Exceptions

- “valid public emergencies certified by the agency head” (professional services)
- Authorized to negotiate with best qualified (Fla. Stat. § 287.057(3)(a) & (9)(c)6.)
Emergency Contracting – Local Construction

- Sudden unexpected turn of events such as an act of God, riot, fire, flood, accident, or other urgent circumstances causes
  - An immediate danger to the public health or safety;
  - Other loss to public or private property which requires emergency government action; or
  - An interruption of an essential governmental service.

- Replace, reconstruct, or repair
Unsolicited Proposals

- Construction of facilities used for a public purpose
- Unsolicited proposal
- If wants to accept, publish its intent to accept others for two weeks
- Proposals due within 21-120 days

Fla. Stat. § 255.065

- Similar rules for State and County Road Projects

Fla. Stat. § 334.30 and § 336.71
Unsolicited Proposals (con)

- For Roads, can accept with receiving proposals from others
  - May accept after public hearing with 14 days notice
  - Is it in public’s best interest
  - Significant cost savings