

# Public Works Projects in the Bay Area May Proceed Under COVID-19 Orders

COVID-19 related Executive Orders from Governor Newsom and shelter-in-place orders from County Health Officers in the Bay Area have restricted construction activities during this healthcare emergency. These restrictions apply to private projects and public works construction projects, although public works projects have broader flexibility to proceed. This alert will summarize how public works projects in the Bay Area can continue under the current orders.

## State Guidance Appears to Permit Construction

Guidance from the Governor on this question has been somewhat ambiguous but appears to allow construction to continue. The clearest direction from the State comes from the Governor's [webpage featuring FAQ's on the statewide Stay at Home order](#). That page states that the order "exempts activity as needed to maintain continuity of operation of the federal critical infrastructure sectors, critical government services, schools childcare, *and construction, including housing construction.*" Unfortunately, other Executive and Public Health Orders from the State are not as clear with regard to permitting construction across specific industries.

## Bay Area County Health Orders Specifically Authorize Some Construction Projects to Continue

Local county health orders issued on March 31 allow the following types of construction to continue despite shelter-in-place orders:

1. "Projects immediately necessary to the maintenance, operation or repair of Essential Infrastructure."
2. "Project associated with Healthcare Operations, including creating or expanding Healthcare Operations, *provided that such construction is directly related to the COVID-19 response.*"
3. "Affordable housing that is or will be income-restricted, including multi-unit or mixed-use developments containing at least 10% income-restricted units."
4. "Public works projects if specifically designated as an Essential Governmental Function by the local governmental agency."



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5. "Shelters and temporary housing, but not including hotels or motels."
6. "Projects immediately necessary to provide critical non-commercial services to individuals experiencing homelessness, elderly persons, persons who are economically disadvantaged, and persons with special needs."
7. "Construction necessary to ensure that existing construction sites that must be shut down under this Order are left in a safe and secure manner, but only to the extent necessary to do so."
8. "Construction or repair necessary to ensure that residences and buildings containing Essential Businesses are safe, sanitary, or habitable to the extent such construction or repair cannot reasonably be delayed."

(Mar. 31 Local Public Health Orders, §§ 13.f.v.1-8)

## Designating a Project an "Essential Governmental Function"

Of these categories, the first provides clear authority for agencies to award construction projects related to the maintenance, operation or repair of existing infrastructure. However, this category does not seem to authorize projects for new construction. Fortunately, however, the fourth category provides agencies with significant flexibility to award projects for new construction by designating them as "Essential Governmental Functions." This ambiguity seems to provide local agencies with the discretion to have their Executive Director, General Manager, CEO, or similar officers designate a project as an "Essential Governmental Function" in those jurisdictions. Agencies can then bring the designation to their Board for ratification, or choose to have the Board itself make the designation.

## Social Distancing Measures Still Required

"Social distancing requirements nevertheless apply to both Essential Businesses (contractors) and Essential Governmental Functions (government agencies)." The form and substance of those protocols can be found in § 13.h and Appendix A of the March 31 local Public Health Orders.

For Essential Governmental Functions, "each governmental entity and its contractors must employ all necessary emergency protective measures to prevent, mitigate, respond to and recover from the COVID-19 pandemic, and all Essential Governmental Functions shall be performed in compliance with *Social Distancing Requirements* to the greatest extent feasible." These requirements include:

1. Six-foot distancing
2. Washing hands with soap and water for at least 20 seconds
3. Covering coughs and sneezes with tissue or fabric, or if not possible, into the sleeve or elbow (but not into hands)
4. Avoiding all social interaction outside the household when sick with a fever or cough

Agencies should also continue to monitor construction best practices under COVID-19 orders. For example, the City and County of San Francisco recently published [guidelines for public works contractors](#). The guidelines require contractors to submit safety plans, which include measures such as screening workers entering the jobsite, task-specific PPE requirements, and additional hand-washing stations, among others. While the guidelines do not apply directly to projects outside of San Francisco, they are nonetheless a potentially useful resource to agencies elsewhere looking to implement similar measures.

## Conclusion

Bay Area public agencies have the ability to move forward with public works projects that are pending or underway. If the project does not fall under one of the other seven specified categories of construction allowed under local public health orders, the agency can designate the project an "Essential Governmental Function." In doing so, agencies should pay special attention to the following issues:

1. Drafting change order and force majeure clauses to address COVID-19 and health orders;
2. Requiring the Contractor to post and comply with the Social Distancing Protocol;
3. Maintaining Contractor responsibility for means and methods of complying with all health safety requirements, including County Health Order;
4. Asking for a Site Specific Health and Safety Plan, which incorporates COVID-19 Best Practices, such as the guidelines from the City and County of San Francisco.

The COVID-19 health emergency has imposed unique challenges on public works projects. Agencies should approach these challenges with the goals of maintaining health and safety, achieving project goals, and treating contractors fairly. Extra flexibility may be required.

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