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COVID-19 RESPONSE

COVID-19 Q&A: A Handbook for Government Contractors During the Coronavirus Pandemic

Updated: April 21, 2020

UPDATE: This Handbook has been updated to add discussion and links for new guidance and memoranda issued by federal agencies. Updated Sections are shown with BLUE highlight.

The COVID-19 pandemic has presented unique challenges for companies performing federal government contracts. The operating landscape is constantly shifting and the communication and directives from federal agencies and state and local governments are often vague and contradictory. In response to a flood of information, advisories, memoranda, and alerts, we put together the following topics in a question-and-answer format to provide simple answers addressing some of the pressing issues and questions we are seeing from industry.

TOPICS DISCUSSED

1. Recent Guidance by Federal Agencies

Q What guidance have federal agencies issued relating to COVID-19 and its impact on government contracts?

Multiple federal agencies have issued memoranda regarding contract performance in the wake of COVID-19. The memoranda address agency expectations, and the Department of Defense (DoD) and civilian agency guidance differ slightly. Contractors should consider guidance specific to their customers, which include:

- **Department of Defense,** *Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act*, April 9, 2020

On April 8, 2020, DoD Defense Pricing and Contracting released guidance implementing Section 3610 of the CARES Act, Pub. L. 116-136 provision. Section 3610 of the CARES Act provides:

> Notwithstanding any other provision of law, and subject to the availability of appropriations, funds made available to an agency by this Act or any other Act may be used by such agency to modify the terms and conditions of a contract, or other agreement, without consideration, to reimburse at the minimum applicable contract billing rates not to exceed an average of 40 hours per week any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, but in no event beyond September 30, 2020. Such authority shall apply only to a contractor whose employees or subcontractors cannot perform work on a site that has been approved by the Federal Government, including a federally-owned or leased facility or site, due to facility closures or other restrictions, and who cannot telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for COVID–19: Provided, That the maximum reimbursement authorized by this section shall be reduced by the amount of credit a contractor is allowed pursuant to division G of Public Law 116– 127 and any applicable credits a contractor is allowed under this Act.

The DoD guidance explains first and foremost, that "contractors are struggling to maintain a mission-ready workforce due to work site closures, personnel quarantines, and state and local restrictions on movement related to the COVID-19 pandemic that cannot be resolved through remote work. It is imperative that we support affected contractors, using the acquisition tools available to us, to ensure that, together, we remain a healthy, resilient, and responsive total force." The guidance reinforces that other relief is available to some contractors from other sections of the CARES Act or other relief bills, and the government must be cautious not to duplicate payment to contractors and contractors should not seek relief under Section 3610 when available elsewhere. Allowable amounts under Section 3610 are specifically reduced by amounts available to the contractor from other relief measures. The onus is placed on the contractor to document claimed costs, identify alternate sources of payment that could reduce reimbursement under section 3610, and submit affirmative representations "that the contractor has not or will not pursue reimbursement for the same costs accounted for under their request." Contracting officers are cautioned to consider the immediacy of each contractor's need for relief given the circumstances of that contractor's business. The allowability of costs is regardless of contract type and should not require additional contractor consideration.

The guidance includes a new cost principle, DFARS 231.205-79, which provides for reimbursement of "costs of paid leave (including sick leave)" "at the appropriate rates under the contract for up to an average of 40 hours per week," if incurred for the purpose of "(i) Keeping contractor employees and subcontractor employees in a ready state, including to protect the life and safety of government and contractor personnel, notwithstanding the risks

of the public health emergency declared on January 31, 2020, for COVID-19, or (ii) Protecting the life and safety of Government and contractor personnel against risks arising from the COVID-19 public health emergency." The cost principle applies to contractors "whose employees or subcontractor employees: (A) Cannot perform work on a government-owned, government-leased, contractor owned, or contractor-leased facility or site approved by the federal government for contract performance due to closures or other restrictions, and (B) Are unable to telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020, for Coronavirus (COVID–19)." Costs of paid leave that would otherwise have been incurred are not covered by this new cost principle. To be allowable, costs "must be segregated and identifiable in the contractor's records so that compliance with all terms of this section can be reasonably ascertained. Segregation and identification of costs can be performed by any reasonable method as long as the results provide a sufficient audit trail." Covered paid leave is "limited to leave taken by employees who otherwise would be performing work on a site that has been approved for work by the federal government, including on a government-owned, government-leased, contractor-owned, or contractor leased facility approved by the federal government for contract performance; but (i) The work cannot be performed because such facilities have been closed or made practically inaccessible or inoperable, or other restrictions prevent performance of work at the facility or site as a result of the COVID-19 national emergency; and (ii) Paid leave is granted because the employee is unable to telework because their job duties cannot be performed remotely during public health emergency declared on January 31, 2020, for COVID-19."

- **Department of Justice,** *Memorandum for All United States Attorneys*, April 8, 2020

Attorney General William Barr issued a memorandum for all United States Attorneys, providing guidance on the effect of state and local travel restrictions on federal contractor employees. The memorandum asserts that state and local shelter-in-place, stay-at-home, and lockdown orders "cannot prevent federal employees and contractor employees from traveling to their work sites or other locations when that is necessary for them to perform their federal functions and duties." The memorandum directs US Attorneys to notify state and local law enforcement leaders in their regions that federal employees may be required to travel to perform their duties. Further, US Attorneys are instructed to request that state and local law enforcement partners ensure that all local law enforcement officials enforcing travel restrictions are made aware that "federal employees *and contractor employees* must be allowed to travel and commute to perform their work and should not be prevented from doing so, even when travel restrictions are in place. Such individuals may present either federal identification or federal agency authorization letters, as appropriate."

- **Department of Defense**, *Change to the Delegation of Authority for Use of Other Transactions for Prototype Projects in Response to Coronavirus Disease 2019*, April 6, 2020

On April 6, 2020, Kim Herrington, Acting Principal Director of DoD Defense Pricing and Contracting, issued a memorandum temporarily amending approval authority for executing Other Transaction Agreements ("OTA") for prototype projects under 10 U.S.C. § 2371b.

OTAs are enforceable government contract vehicles not subject to the Federal Acquisition Regulation ("FAR") or other onerous laws and regulations applicable to federal contracts, such as the Cost Accounting Standards, Truth in Negotiations Act, and Competition in Contract Act. federal government agencies, including DoD, use OTAs to expedite the acquisition process and entice nontraditional contractors to conduct business with the U.S. government by providing flexibility and allowing for procurements that more closely resemble commercial agreements. DoD acquisitions account for the largest volume of OTA use by the U.S. government.

Under 10 U.S.C. § 2371b, DoD can use its other transaction authority to "carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms,

systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces."

The changes authorized by the memorandum apply to OTAs related to the President's COVID-19 national emergency declaration:

- For prototype project agreements, follow-on production contracts, or OTAs in excess of $100 million, the Directors of the Defense Agencies/Field Activities with contracting authority, Commanding Officers of Combatant Commands with contracting authority, and the Director of the Defense Innovation Unit now have temporary authority to execute OTAs;

- For prototype project agreements, follow-on production contracts, or OTAs in excess of $500 million, the Senior Procurement Executives ("SPE") of the Military Departments, Director of the Defense Advanced Research Projects Agency ("DARPA"), and Director of the Missile Defense Agency ("MDA") now have temporary authority to execute OTAs; and

- For OTA prototype actions exceeding $100 million but not exceeding $500 million, authority to execute OTAs may be delegated from the SPE or Director to officials as the SPE or the Director sees fit under section 13006 of the CARES Act.

DoD's changes for authority to execute OTAs will remain in effect until the President rescinds the COVID-19 national emergency declaration.

- **Department of Defense**, *Determining and Making Commercial Item Procurements to Respond to the Coronavirus Disease 2019 (COVID-19)*, March 31, 2020

On March 31, 2020, Kim Herrington, Acting Principal Director for Defense Pricing and Contracting, issued a memorandum circulating a class Commercial Item Determination (CID) made by the Defense Contract Management Agency (DCMA) Commercial Item Group on March 27, 2020, finding that listed items are deemed to be "commercial items" under FAR 2.101 when procured for purposes relating to the COVID-19 emergency. The DCMA CID is not exhaustive and will be continuously updated as the emergency continues.

The DCMA CID establishes "that supplies and services such as the ones listed" meet the definition of commercial item when procured in response to COVID-19. The listed items include: "efforts associated with R&D or procurement of FDA approved COVID-19 vaccination(s) or anti-viral medication(s)"; "efforts associated with establishing and setting up temporary booths, testing stations, or hospitals for possible COVID-19 surges" (other than real property); "emergency medical supplies (e.g. ventilators, masks, gloves, disinfectants, thermometers, beds, blankets) and services for COVID-19 relief efforts"; and "facility related services such as contracts for orderly shutdown, and associated building and equipment maintenance such as deep cleaning efforts." The CID includes examples of the categories of commercial items identified, with links to retailers of the commercial items. However, because terms can change for service contracts and the CID was issued without reference to a specific solicitation, the CID cautioned that "current and future use of this determination for services is dependent upon the services remaining the same and the terms and conditions being similar to those offered to the general public."

The CID further encourages Contracting Officers to review the applicability of FAR Part 18, pertaining to emergency acquisitions, and consider OMB guidance that permits use of FAR Part 13 procedures for commercial item procurements up to $13 million.

- **Department of Defense**, *Managing Defense Contracts Impacts of the Novel Coronavirus*, March 30, 2020

Kim Herrington, Acting Principal Director for Defense Pricing and Contracting, issued a memorandum providing guidance on managing the impacts of COVID-19 on Defense Contracts. The memorandum acknowledged that the "effects of COVID-19 will affect the cost, schedule, and performance of many DoD contracts," and summarized the regulatory tools available to ensure advised that the "vital industrial base that support[s] us remain[s] healthy," including FAR provisions excusing performance delays and FAR changes clauses. Requests for equitable adjustment "must be considered on a case-by-case basis, in consideration of the particular circumstances of each contract, impacts realized from COVID-19, applicable law, and regulations, and inclusive of any relief that may be authorized by laws enacted in response to this national emergency." Contracting officers considering REAs were further directed to consider "among other factors, whether the requested costs would be allowable, allocable and reasonable to protect the healthy and safety of contract employees as part of the performance of the contract." Further, a contractor's REA or reliance on an excusable delay provision "should not negatively affect contractor performance ratings."

Finally, the memorandum acknowledged Section 3610, Federal Contractor Authority, of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which "provides discretion for the agency to modify the terms and conditions of the contract to reimburse paid leave where contractor employees could not access work sites or telework but actions were needed to keep such employees in a ready state." The reference to Section 3610 was "included for information only," and DPC stated it would provide implementing guidance for that section as soon as practicable.

- **Department of Defense**, *Defense Industrial Base Essential Critical Infrastructure Workforce*, March 20, 2020

On March 20, 2020, Ellen Lord, DoD Undersecretary for Acquisition and Sustainment, issued a memorandum for distribution to the defense industrial base regarding application of a March 19, 2020 memorandum from the Department of Homeland Security (DHS). DoD explained that the defense industrial base, a critical infrastructure section, "is defined as the worldwide industrial complex that enables research and development as well as design, production, delivery, and maintenance of military weapons systems/software systems, subsystems, and components or parts, as well as purchased services to meet U.S. Military requirements." The memorandum urged that if you are part of the defense industrial base, "you have a special responsibility to maintain your normal work schedule." This includes but is not limited to: "aerospace; mechanical and software engineers; manufacturing/production workers; IT support; security staff; security personnel; intelligence support, aircraft and weapon systems mechanics and maintainers; suppliers of medical supplies and pharmaceuticals, and critical transportation."

The DoD memorandum, like other agency memoranda discussed below, is not contractually binding, and explains that contractors should follow guidance from state and local government officials. While the states that have issued shelter in place orders have largely exempted the defense industrial base, the memorandum provides no guidance in the event a state or locality fails to make the exemption.

- **Department of Defense**, *Class Deviation—Progress Payment Rates*

Kim Herrington, Acting Principal Director of DoD Defense Pricing and Contracting (DPC), issued a DFARS

class deviation, effective immediately, permitting increased progress payments in response to COVID-19. The class deviation increased progress payments "to 90 percent for large business concerns and 95 percent for small business concerns." The class deviation included clauses for Contracting Officers to use in lieu of the existing progress payment clauses. Contracts must be amended in order to benefit from this change. On April 3, 2020, DPC issued a second Memorandum regarding the "Implementation of Class Deviation 2020-O0010—Progress Payment Rates" providing information and an enclosed "Frequently Asked Questions" document relating to the implementation of the progress payment class deviation.

- **Department of Veterans Affairs**, *Granted Broad Procurement Authority under P.L. 85-804*.

On April 10, 2020, the President issued a Memorandum to the Secretary of the Department of Veterans Affairs ("VA") granting the agency broad authority under Public Law 85-804, 50 U.S.C. §§ 1431-35. (See Memorandum on Authorizing the Exercise of Authority under Public Law 85-804.) P.L. 85-804 is a rarely used law with expansive powers where circumstances such as the COVID-19 pandemic require "extraordinary contractual actions." *See* FAR Part 50.

Under the law as authorized by the April 10 Memorandum, the VA is granted broad and otherwise prohibited contractual powers, as long as the contractual action "facilitate[s] the national defense." FAR 50.101-1(a). For example, the authorization allows the VA to modify or circumvent the FAR and to determine price adjustments without consideration. Additionally, the law allows for an exception to the general prohibition on government indemnification agreements pursuant to the Anti-Deficiency Act.

The Obama Administration used P.L. 85-804 in 2014 by granting the Administrator of the United States Agency for International Development the authority to indemnify contractors from lawsuits related to performance in Africa responding to the Ebola outbreak. In addition to the SAFETY Act of 2002 and the PREP Act of 2005), P.L. 85-804 affords companies the ability to engage with the government with protections not typically afforded to contractors.

- **Office of Management and Budget**, M-20-22, *Preserving the Resilience of the Federal Contracting Base in the Fight Against the Coronavirus Disease*, April 17, 2020

On April 17, 2020, Michael J. Rigas, OMB's Acting Deputy Director for Management, issued a memorandum to the heads of the Executive branch departments and agencies supplementing M-20-18 (discussed above). The supplement includes guidance for implementing Section 3610 of the CARES Act, which provides discretionary authority for agencies to reimburse costs of paid leave to federal contractors and subcontractors. OMB provides guiding principles for agencies to "determine the appropriate role of section 3610 in supporting the needs of their contractors and subcontractors," including:

- Carefully consider if reimbursing paid leave to keep the contractor in a ready state is in the best interest of the government for meeting current and future needs;
- Be mindful of challenges faced by small businesses;
- Maintain mission focus and evaluate use of section 3610 in the broader context of all strategies to promote contractor resiliency;
- Work with the contractor to secure necessary documentation to support reimbursement and prevent duplication of payment;

- **Department of Homeland Security**, *DHS Chief Procurement Officer Message for the DHS Contractor Workforce for Implementing CARES Act Section 3610*, April 16, 2020

  On April 16, 2020, DHS's Chief Procurement Office issued a message to the DHS contracting community stating DHS has regulatory flexibility to assist in modifying contracts and reminding contractors they "may be entitled to an equitable adjustment to contract price using the standard FAR changes clauses, FAR 52.243-1 or FAR 52.243-2." DHS confirmed it is implementing Section 3610 of the CARES Act, which allows agencies to modify contract terms and conditions without consideration to reimburse at the minimum applicable contract billing rates up to an average of 40 hours per week any paid leave, including sick leave, contractors provide to keep employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, up to September 30, 2020. DHS stated it will require contractors "to segregate and report any amount billed under" Section 3610 of the CARES Act.

- **Office of Management and Budget**, M-20-18, *Managing Federal Contract Performance Issues Associated With the Novel Coronavirus (COVID-19)*, March 20, 2020

  On March 20, 2020, the Deputy Director for Management of OMB issued a memorandum directing agencies to manage contractors to ensure continuous government operations and the health and safety of contractors. OMB further directed agencies to maximize telework to the extent possible, and where not possible, to show flexibility in extending performance delivery dates. Additionally, OMB directed agencies to consider the necessity "to keep skilled professionals or key personnel in a mobile ready state for activities the agency deems critical to national security or other high priorities" and determine whether existing contracts can be "retooled for pandemic response consistent with the scope of the contract." The memorandum further encouraged agencies to use special emergency procurement authority where appropriate; to modify contracts as necessary to permit telework; and generally, to employ discretion in a reasonable fashion recognizing the exigent circumstances. The memorandum also notes that SAM registrations expiring before May 17, 2020 will be afforded a one-time extension of 60 days.

- **General Services Administration**, MV-20-05, *Placing Rated Orders Under the Defense Priorities and Allocation System for Novel Coronavirus Disease 2019 (COVID-19)*, March 19, 2020

  On March 19, 2020, the Senior Procurement Executive for the GSA Office of Acquisition Policy issued a memorandum to the Commissioner and Assistant Commissioner of the Federal Acquisition Service providing guidance on placing orders rated under the Defense Priorities and Allocations System (DPAS) to ensure continuity of government operations during the COVID-19 crisis. The memorandum identified a non-exclusive list of commercial supplies that could be subject of rated orders, such as "(1) hand sanitizer, disinfectants, cleaning gloves, and so forth to keep buildings safe and habitable to the public, and (2) laptop computers, accessories, and other IT products to support sharply increasing levels of telework." The memorandum contains instructions on how agencies can use existing sources of supply, identify required delivery dates, and use appropriate ratings.

- **Department of Homeland Security**, *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*, March 19, 2020

  On March 19, 2020, Christopher Krebs, Director of the Cybersecurity and Infrastructure Security Agency, issued a memorandum providing strategic guidance to "help State and local officials as they work to protect their communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security." The memorandum includes a list of 16 sectors that should continue normal operations to maintain critical infrastructure, including "medical and healthcare, telecommunications, information technology systems, defense, food and agriculture, transportation and logistics, energy, water and wastewater, law

enforcement, and public works."

The memorandum and accompanying list caution they are *not* a federal directive. The list is not authoritative or exhaustive and states must exercise independent judgment in their application.

- **Department of Labor**, *Contracts for Coronavirus Relief Efforts*, March 17, 2020

On March 17, 2020, Craig E. Leen, Director of the Office of Federal Contract Compliance Programs ("OFCCP") for the Department of Labor, issued a memorandum to all contracting agencies granting waivers and exemptions relating to certain procurement requirements administered by OFCCP. OFCCP waived "all affirmative action obligations of supply and service and construction contracts" entered into specifically to provide COVID-19 relief from March 17, 2020 to June 17, 2020, "subject to an extension should special circumstances in the national interest so require." Specifically, the memorandum waived portions of FAR 52.222-26, FAR 52.222-35, and FAR 52.222-36, providing preambles to include with all three clauses identifying those portions of the clauses that are inapplicable.

- **Acquisition.gov COVID-19 Resource Page**

The federal government has set up a "Coronavirus Acquisition-Related Information and Resources" website at https://www.acquisition.gov/coronavirus. The page provides recent memoranda and communications from federal agencies relating to COVID-19, including those discussed above.

2. The Defense Production Act and DPAS Rated Orders

Q What does it mean to contractors that the President invoked the Defense Production Act?

The Defense Production Act ("DPA"), 50 U.S.C. Ch. 55, grants the President broad authority to direct private industry in the interests of the national defense, expansively defined to include national emergencies. The DPA permits the government to require that performance under certain contracts take priority over all other contractual obligations, both governmental and private. The government does so by issuing rated orders using two types of ratings: DX, which have highest priority, and DO.

In addition to specifying priority, the DPA permits the government to ***direct*** that orders be accepted by industry, subject to certain exceptions and limitations. Rated orders ordinarily must be accepted unless certain enumerated exceptions apply, in which case, the contractor must notify the government that the order cannot or will not be accepted. *See* 15 C.F.R. 700.13; *see also* Overview of the Defense Production Act and Implications for government Contractors. If a contractor receives a rated order, it must quickly determine whether it can meet the requirement and how that will impact its existing contractual obligations.

Q How do DPAS rated orders impact compliance with state-ordered shelter in place requirements?

This largely depends on state law and supremacy considerations of the federal government. The Department of Defense, Department of Homeland Security, and General Services Administration have issued memoranda addressing DPAS ordering and critical sectors the government deems vital to national security. *See, e.g.*, GSA Memorandum re Placing Rated Orders Under the Defense Priorities and Allocation System for Novel Coronavirus Disease 2019 (COVID-19); CISA Guidance on Essential Critical Infrastructure Workers. Those memoranda are consistent on one point: they contain guidance to the states and local governments, and do not constitute direction from the federal government that takes precedence over state law.

California, following the direction of the federal government, exempted from its shelter in place orders those employees needed to maintain continuity in the 16 critical sectors identified by the Department of Homeland Security. Guidance may vary from state to state. Contractors must coordinate with their state's executive office to ensure they can or should remain in operation. Even if the contractor does not currently have a DPAS rated order, if it receives one due to the industry in which it operates, it may be advisable to remain open for the security of the nation.

3. Contractor Immunity and Government Indemnity

Q Is the Federal government providing immunity to contractors that may be tasked with novel or dangerous work relating to the current crisis?

Yes, there are two widely available mechanisms for contractor immunity.

The first is under a provision of the Public Readiness and Emergency Preparedness ("PREP") Act, 42 U.S.C. § 247d-6d, a 2005 law that includes a section entitled "Targeted Liability Protections for Pandemic and Epidemic Products and Security Countermeasures." *See* Pub. L.109-148. The PREP Act authorizes the Secretary of the Department of Health and Human Services to issue an emergency declaration that establishes liability immunity against any claim of loss caused by, arising out of, relating to, or resulting from the manufacture, distribution, administration, or use of "Covered Countermeasures," except for claims involving "willful misconduct" as defined in the PREP Act. The Secretary made such declaration on February 4, 2020 regarding COVID-19, determining that the definition of "Covered Countermeasures" includes drugs and devices. Whether the PREP Act applies to a particular product depends on the declaration of the Secretary.

The second potential source of immunity is Public Law 85-804, which authorizes the President to permit "any department or agency of the government which exercises functions in connection with the national defense" to undertake certain contractual actions irrespective of other federal laws if the President deems those actions "would facilitate the national defense." Included in the authority is permission for federal agencies to provide extraordinary contractual relief and to hold harmless and indemnify contractors for losses, claims, and damages arising from unusually hazardous risks under government contracts. *See* 50 U.S.C. §§ 1431-35; FAR Part 50; DFARS Part 250. Agencies need authorization from the President to use this authority and its scope is narrowly delineated. This authority was used to address the Ebola epidemic in Africa and could be used to address COVID-19. Contractors that cannot obtain insurance for what may be extremely hazardous COVID-19 related contractual requirements should press their customers regarding the applicability of this basis for immunity. As discussed at Section 1 above, the President granted the VA this authority on April 10, 2020. Companies working with the VA should inquire about this authority when negotiating new contracts.

4. Work Site Access Issues

Q What if government officials prevent performance by prohibiting a contractor from performing at a site specified in the contract?

Quarantines and public health warnings have led to individuals avoiding contact with each other and to directions from government officials that contractors should avoid work sites. State of federal government officials may

also issue travel restrictions or prohibitions, or deny contractor employees access to critical facilities, such as military bases.

If a contractor is denied access to a work site because of the COVID-19 epidemic, quarantine restrictions, or the actions of the government in its sovereign or contractual capacity, such restrictions may excuse the contractor from any resulting delays or other performance issues. *See, e.g.,* FAR 52.249-14, Excusable Delay. If the Contracting Officer issues an explicit direction modifying a contract's requirements, the Changes clause provides for an equitable adjustment to the contract schedule or price. *See* FAR 52.243-1 to -4. Contractors should ensure compliance with notice provisions in the clause by providing timely notice that the contractor considers the direction to be a change. Even if the contractor and government fail to agree that the direction constitutes a change – or to the amount of any equitable price or schedule adjustment – contractors must continue to perform pending resolution of the change.

Additionally, Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act empowers – but does not require – federal agencies to use funds appropriated for that agency to modify the terms and conditions of a contract and compensate contractors for certain costs related to keeping their employees and subcontractors in a ready state when those employees or subcontractors are unable to perform work on a federally-approved site and cannot telework. Contractors barred from work sites, and whose employees cannot telework, should carefully review the Section 3610 guidance issued by their contracting agency to determine if they are eligible to submit a request for equitable adjustment for such costs.

Q How should contractors address the effect of orders from government officials -- other than the Contracting Officer -- that disrupt work site performance?

Federal and state departments of transportation, or foreign governments, may issue orders restricting travel or the flow of goods, or preventing personnel or materials from reaching the project site. Typically, a contractor's ability to recover under the Change clause requires a direction from the Contracting Officer.

If an order from a federal, state, or foreign official negatively affects the contractor's ability to complete the work, a contractor's failure to perform may be excused under FAR 52.249-14, Excusable Delays (Apr. 1984) or the applicable Default clause. Contractors working at a government facility who are prohibited from accessing the site due to restrictions related to COVID-19 are entitled to schedule extensions stemming from delay beyond the contractor's control. The delay will entitle a contractor to an extension of time, but the clause does not entitle contractors to a price adjustment under standard FAR provisions. However, agencies may opt to compensate contractors for certain costs related to contractor employees being barred from federal work sites under the new authority granted by Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

Contractors seeking extensions of time must submit the request to the cognizant contracting officer. If the request is refused, contractors must preserve their rights by filing a claim under the Contract Disputes Act.

Q If government officials issue orders that restrict travel or the flow of goods, what steps should contractors take?

Declaration of a national emergency in response to COVID-19 and related acts by government officials are "sovereign acts" and do not entitle contractors to increased costs. However, such orders may give rise to excusable delay regardless of their characterization as sovereign acts. If an order issued by a state, federal, or foreign government causes delay, contractors should immediately contact the Contracting Officer and begin compiling documentation of the effects of the delay.

5. Force Majeure, Excusable Delays, and Changes

Q What should a contractor do if its contract performance is delayed or otherwise negatively affected by COVID-19?

Global supply chains have been interrupted, domestic and international travel has ground nearly to a halt, workplaces have closed, and tens of millions of Americans are subject to quarantine or shelter-in-place orders. As the virus continues to spread, many individuals may become sick and unable to work.

A contractor facing these or other types of delay or performance issues should carefully review the Excusable Delay and Default term(s) in its contract. These clauses may include:

- FAR 52.212-4(f) Contract Terms and Conditions – Commercial Items
- FAR 52.213-4 Terms and Conditions – Simplified Acquisitions (Other Than Commercial Items)
- FAR 52.249-8 Default (Fixed-Price Supply and Service)
- FAR 52.249-9 Default (Fixed-Price Research and Development)
- FAR 52.249-10 Default (Fixed-Price Construction)
- FAR 52.249-14 Excusable Delays

These clauses each contain protections similar to Force Majeure provisions in commercial contracts. Although the exact wording differs, each clause excuses a contractor from a failure to perform that arises from causes beyond the control and without the fault or negligence of the contractor. Specific examples include "acts of the government in either its sovereign or contractual capacity…epidemics…[and] quarantine restrictions." *See, e.g.*, FAR 52.249-8(c). A contractor may also be excused from the default of its subcontractor if the default was beyond the control and without the fault or negligence of either party. In certain circumstances, however, a contractor will not be excused from its subcontractor's default if the supplies or services were available from another source in time to permit the contractor to meet its contract schedule.

The mere existence of an epidemic or quarantine does not automatically excuse a contractor from default. The contractor bears the burden of proving that the default was actually caused by the epidemic or quarantine and was outside of the contractor's control. A contractor will not be excused if it could have overcome the difficulties posed by COVID-19 and completed its work on time by reasonable efforts.

To gain the protection offered by these clauses, a contractor should:

- Promptly notify the Contracting Officer of any anticipated delay or other performance issues, taking care to review and comply with any notice requirements set forth in the applicable FAR clause(s).

- Carefully document the effect that the epidemic has on its ability to perform. For construction contractors or others required to provide regular schedule updates to the government, those updates should provide a realistic projection of the time required to complete performance based on current and anticipated conditions.

- If the parties are unable to reach an amicable agreement on a time extension, submit a formal claim for a time extension to preserve the defense against a potential termination for default or assessment of liquidated damages.

Q Is a contractor entitled to recover increased costs as a result of COVID-19?

Although standard FAR Default and Excusable Delay clauses recognize epidemics and quarantines as excusable delays meriting a time extension, they do not allow for additional compensation for increased costs resulting from the delay. Similarly, actions taken by the government in its sovereign capacity, such as closing borders to international travel to slow the spread of COVID-19, may excuse a contractor from default or entitle the contractor to a time extension, but do not entitle a contractor to additional compensation.

However, if the Contracting Officer refuses to grant a valid request for time extension and insists that it comply with the original contract schedule, the direction could support a monetary claim for constructive acceleration. Further, if the Contracting Officer modifies the contract's requirements in response to the COVID-19 outbreak – such as the time or place of performance, quantities or specifications, or place of delivery – that modification may entitle a contractor to an equitable price adjustment under the applicable Changes clause.

Additionally, Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act empowers – but does not require – federal agencies to use funds appropriated for that agency to modify the terms and conditions of a contract and compensate contractors for certain costs related to keeping their employees and subcontractors in a ready state when those employees or subcontractors are unable to perform work on a federally-approved site and cannot telework.

A contractor experiencing changes to its contract requirements resulting from COVID-19 should:

- Ensure that the direction to modify contract requirements or comply with the original delivery schedule was received in writing from the Contracting Officer. If the direction was provided orally by the Contracting Officer, or from another government employee, the contractor should request that the Contracting Officer provide written confirmation.

- Provide prompt written notice to the Contracting Officer that the contractor considers the direction a contract change that merits an adjustment to the contract price, schedule, or other terms. Be mindful of any timing requirements for the submission of notice (typically within 30 days for non-commercial contracts).

- Continue performing the Contract consistent with the Contracting Officer's instructions. The Changes clause requires a contractor to continue performance of the work as changed, whether or not the parties cannot reach agreement on an equitable adjustment.

- Thoroughly document all cost and schedule changes. The contractor should establish separate cost codes to track its increased costs.

- If the contractor's employees or subcontractors cannot perform work on a federally-approved site, and cannot telework, the contractor should carefully review any guidance issued by their contracting agency regarding Section 3610 of the CARES Act to determine if it is eligible for reimbursement for reimbursement for certain costs related to keeping its employees and subcontractors in a ready state.

6. Supplier Management

Q What should a contractor do if its subcontractor or supplier's performance is delayed or otherwise negatively affected by COVID-19?

Typically, a contractor may be excused from a failure to perform caused by the default of a subcontractor, provided the cause of default is beyond the control of the contractor and subcontractor, and without the fault or negligence of either. However, some FAR Default and Excusable Delay clauses impose additional obligations on the contractor to attempt to obtain replacement supplies or services from other sources. The FAR Default clause typically applicable to fixed-price supply and service contracts, for example, states that default is not excused if "the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule." FAR 52.249-8(d). In contrast, the Excusable Delays clause applicable to most cost-reimbursement, time and materials, and labor-hour contracts states that delay is excusable unless (1) the subcontracted supplies or services were obtainable from other sources; (2) the Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and (3) the contractor failed to comply reasonably with the order. FAR 52.249-14(b). Other clauses are silent on whether the contractor has a duty to obtain replacement supplies and services from another source if it is possible to do so.

In addition to the steps recommended above, a contractor faced with delays from its subcontractor or supplier should:

- Promptly notify the Contracting Officer in writing of the problems its subcontractor is encountering because of COVID-19 and the anticipated effect on the contractor's performance of the prime contract.
- Work with the subcontractor or supplier to ensure it thoroughly documents impacts to its performance from COVID-19.
- If the subcontract contains a flowed-down DPAS priority rating, ensure the subcontractor or supplier understands its obligation to prioritize rated orders.
- Assess whether replacement supplies or services are available from another party in time to allow the contractor to meet its delivery schedule. The contractor should also determine whether any other contract provision requires approval from the Contracting Officer before replacing a subcontractor, supplier, or material.
- To the extent reasonably possible, comply with any instruction from the Contracting Officer to obtain replacement supplies or services from another source.

Q What should a subcontractor do if it faces delays or other performance challenges due to COVID-19?

Subcontract terms and conditions are subject to negotiation between the prime and the subcontractor, are largely ungoverned by the FAR, and are more varied than prime contracts. It is essential for a subcontractor to carefully review all terms in its subcontract related to delay, default, and force majeure to understand its rights and obligations. This review should include not only the subcontract's legal terms and conditions, but any flow-down clauses as well. Subcontracts may incorporate the same FAR Default or Excusable Delay clauses included in the prime contract, which affect the rights and defenses available to the subcontractor and offer protection from the defaults of lower-tier subcontractors. At a minimum, and subject to the specific requirements of the subcontract's

terms, a subcontractor should promptly notify the prime contractor if it is delayed due to a force majeure event, and the anticipated duration of the delay. The subcontractor should also note that under certain FAR Default or Excusable Delay terms, a prime contractor faced with a subcontractor delay or default may be obligated under its prime contract to obtain replacement supplies or services from another source.

Q How can prime contractors protect themselves when ordering supplies and issuing subcontracts during the COVID-19 pandemic?

As noted above, the standard FAR Default and Excusable Delay clauses provide for excusable delays in circumstances of "epidemics" and "quarantine restrictions." Nevertheless, companies can modify their supplier and subcontract force majeure clauses to require more advanced notice, alternative sources, or other assurances if the supplier or subcontractor cannot perform. Also, it is prudent to keep the customer/Contracting Officer appraised of supplier selections, particularly for volatile supplies such as medical equipment or foreign supplies that may be subject to trade restrictions.

7. Suspensions of Work, Stop-Work Orders, Terminations

Q Can the government Suspend or Stop Work?

Yes. FAR 52.242-14, Suspension of Work is a mandatory clause in fixed-price construction and architect-engineer contracts. The clause empowers the Contracting Officer to instruct a contractor in writing to suspend, delay, or interrupt all or part of the contract work "for the period of time that the Contracting Officer determines appropriate for the convenience of the government." The clause provides for a price or schedule adjustment if performance is suspended, delayed, or interrupted "for an unreasonable period of time." The clause applies if the unreasonable suspension, delay, or interruption is due to (1) an act of the Contracting Officer in administration of the contract, or (2) the Contracting Officer's failure to act within the time specified by the contract (or within a reasonable time if not specified). Under the clause, contractors ***may*** be able to recover for delays if the government restricts access to the project site. *Blinderman Constr. Co., Inc. v. United States*, 695 F.2d 552, 557 (Fed. Cir. 1982).

In addition to written suspensions of work, the clause permits recovery for "constructive suspensions." "Constructive suspension occurs when work is stopped absent an express order by the Contracting Officer and the government is found to be responsible for the work stoppage." *P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1359 (Fed. Cir. 2002), *citing* Cibinic & Nash, *Administration of government Contracts* 589-90 (3d ed. 1995). To establish a constructive suspension, a contractor must show that the delay (1) was for an unreasonable length of time, (2) was proximately caused by the government's actions, and (3) resulted in some injury to the contractor. *Mega Constr. Co. v. United States*, 29 Fed. Cl. 396, 424 (1993).

Similarly, if incorporated into the contract, FAR 52.242-15, Stop-Work Order authorizes the Contracting Officer to issue a "stop-work" order. This is an optional clause in contracts for supplies, services, or research and development. The clause empowers the Contracting Officer to instruct a contractor in writing to stop all or part of the contract work for up to 90 days, or for a longer period if mutually agreed by the parties. If the Contracting Officer issues a stop-work order, contractors are entitled to equitable price and schedule adjustments. In response to a "stop-work" order, contractors must assert their right to price or schedule adjustments "within 30 days after the end of the period of work stoppage." FAR 52.242-15(b)(2).

Q What should a contractor do if its work is suspended or a stop-work order is issued?

If a contractor's work is suspended or a stop-work order is issued, the contractor should:

- Determine whether its contract contains FAR 52.242-14 or FAR 52.242-15, and carefully review the requirements of the applicable clause.
- Confirm that the instruction to suspend or stop work was provided in writing by the Contracting Officer. If the instruction was provided orally by the Contracting Officer, or in any form by anyone else, the contractor should notify the Contracting Officer and request written confirmation of the instruction.
- Promptly comply with the instructions in the suspension or stop-work order and instruct all affected subcontractors or suppliers to suspend or stop work as well.
- Take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage.
- Track and document any increased costs or other impacts resulting from the suspension or stoppage of work.
- Provide prompt notice to the Contracting Officer in accordance with the requirements of the applicable clause.
    - Under FAR 52.242-14, Suspension of Work, a contractor must submit a claim for increased costs resulting from the suspension "in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract." However, where there is no written suspension order, the contractor must provide notice within twenty days of the act or failure to act that constitutes a constructive suspension to recover all of its resulting costs.
    - Under FAR 52.242-15, Stop-Work Order, a contractor must assert its right to an equitable adjustment "within 30 days after the end of the period of work stoppage."
- Promptly resume work upon the cancellation or expiration of the suspension or stop-work order.
- Submit a request for equitable adjustment or claim for any increased costs or schedule impacts resulting from the Suspension of Work or Stop-Work Order.

Q How long does a Suspension of Work or Stop-Work Order continue?

A suspension of work under FAR 52.242-14 may last "for the period of time that the Contracting Officer determines appropriate for the convenience of the government." The Suspension of Work clause does not contain a maximum length of time for which the work may be suspended. A stop-work order under FAR 52.242-15, in contrast, may not last for longer than 90 days unless the parties mutually agree to a longer time period. If the parties are unable to reach agreement on a longer stop-work period, at the end of the 90-day period the Contracting Officer must cancel the stop-work order or terminate the work for convenience or default.

Q Can a contractor recover increased costs incurred as a result of a Suspension of Work?

Under certain circumstances, a contractor may recover increased costs, but not profit. However, the work must have been suspended, delayed, or interrupted for an ***unreasonable*** period of time by (1) an act of the Contracting Officer in the administration of the contract; or (2) the Contracting Officer's failure to act within the time specified in the contract (or within a reasonable time if not specified). Further, a contractor may not obtain an equitable adjustment for its increased costs resulting from a suspension "to the extent that performance would have been so suspended, delayed, or interrupted by any other cause."

Given the widespread disruptions to nearly every facet of life and business caused by COVID-19, Contracting Officers facing requests for equitable adjustments or claims under FAR 52.242-14 will likely argue that even if no Suspension of Work had been issued, contractors would not have been able to timely perform. Contractors should carefully document their ability to continue performance of work in the absence of a government Suspension of Work.

Q Can a contractor recover increased costs resulting from a Stop-Work Order?

The FAR Stop-Work Order clause requires the Contracting Officer to make an equitable adjustment to the delivery schedule or contract price if (1) the stop-work order results in an increase in the time required for, or in the contractor's cost properly allocable to, the performance of any part of the contract; and (2) the contractor asserts its right to an adjustment within 30 days after the end of the period of work stoppage (or a longer period as the Contracting Officer may allow). Unlike the FAR Suspension of Work clause, the Stop-Work Order clause allows for a contractor to recover profit on its increased costs. Further, the Stop-Work Order clause allows for an equitable adjustment regardless of the length of the stop-work period and does not require a showing that the contractor could have completed its work on time but for the stop-work order.

Q What should a contractor do if all or part of its contract is terminated for convenience?

A contractor that receives a full or partial termination for convenience should review the Notice of Termination and the terms of the applicable FAR Termination clause. At a minimum, a contractor terminated for convenience should:

- Stop performing the terminated portions of the work immediately, or as otherwise specified in the Notice.
- Continue performance of any portions of the contract that have not been terminated.
- Refrain from placing any further subcontracts or orders, except to the extent necessary to complete any portion of the work that has not been terminated.
- Terminate all subcontracts to the extent they relate to the work terminated.
- If directed by the Contracting Officer, assign to the government all right, title, and interest of the contractor under the subcontracts terminated. Where subcontracts are assigned to the government, the government will have the right to settle or pay any termination settlement proposals submitted by the subcontractors.

- To the extent terminated subcontracts are not assigned to the government, settle all outstanding liabilities and termination settlement proposals relating to terminated subcontracts. Where required to do so by the Contracting Officer, the contractor should obtain approval or ratification for any settled subcontractor claims.

- Follow Contracting Officer instructions regarding the disposition, transfer, preservation, or sale of parts, works in progress, completed work, supplies, other materials, plans, drawings, or other government property.

- Carefully track all costs arising from the termination for convenience.

- Submit a detailed termination settlement proposal within the time allowed by the applicable FAR Termination clause.

A contractor may recover its costs arising from a termination for convenience, as well as a reasonable profit. However, the exact nature and scope of recoverable costs depends on the contract type and the specific Termination clause incorporated into the contract. A terminated contractor should review the applicable Termination clause to determine what costs are recoverable and ensure that it is adequately tracking all recoverable costs for inclusion in its termination settlement proposal.

8. Employee Notification Under the WARN Act

Q What should contractors do when facing the potential prospect of mass layoffs resulting from the pandemic?

While contractors may wish to preemptively notify employees of the potential for mass layoffs if the WARN Act is applicable, contractors likely are protected from liability under the Federal WARN Act and several similar state-level WARN Acts in the current circumstances.

The WARN Act, 29 U.S.C. § 2101 *et seq.*, requires certain large contractors to notify employees at least 60 days in advance of plant closings or mass layoffs that affect more than a statutorily provided number of employees. The Act provides for fees and penalties to be assessed against contractors that fail to abide by the timing requirements. Contractors must ask whether the current situation, which could result in mass layoffs if facilities are forcibly shutdown or contracts terminated, implicates the WARN Act.

These issues are similar to those involving sequestration, where contractors feared they would be terminated for convenience without 60 days forewarning necessary to notify employees in compliance with the WARN Act. The Department of Labor and the Office of Management and Budget issued guidance in 2012 and 2013 explaining that contractors were not required to issue 60 days advance notice before sequestration was slated to go into effect, and OMB stated that if contractors followed the DOL guidance but incurred costs for violating the WARN Act, those costs should be allowable. *See* OMB Memorandum M-12-19, *Guidance on Allowable Contracting Costs Associated with the Worker Adjustment and Retraining Notification (WARN) Act* (Washington, D.C., Sept. 28, 2012); DOL, *Training and Employment Guidance Letter No. 03-12* (Washington, D.C.: July 30, 2012). The Government Accountability Office, at the request of Congressman Harold Rogers of the House Committee on Appropriations, also considered the issue, and generally concluded that WARN Act related costs would be governed by the ordinary standards for determining cost allowability. *See Office of Management and Budget*

Guidance on the Worker Adjustment and Retraining Notification (WARN) Act, B-324146, Sep. 12, 2013. The reasoning was that an exception to the WARN Act for "unforeseeable business circumstances" would likely apply in conditions where layoffs were not certain or mandated even if likely to occur.

Each situation must be analyzed separately, and the state-level WARN Acts do not all contain the "unforeseeable business circumstances" exception. Recognizing the lack of exception in California's law, for example, Governor Newsom's March 17, 20202 Executive Order N-31-20 specifically suspended the 60-day notice requirement under the California WARN Act. Contractors must monitor their state-specific laws and executive orders from their Governors to determine whether similar exemptions would apply to them.

9. Communicating with the Customer

Q With whom should contractors communicate regarding issues related to COVID-19 as it relates to contract performance?

Contractors should communicate performance issues relating to COVID-19 with their agency customers and, most importantly, the agency Contracting Officer. The Contracting Officer must acknowledge and approve in writing all agreements and changes, including all agreements, changes, and directions from other government personnel, related to COVID-19. Obtaining the Contracting Officer's written acknowledgment and approval will help avoid disputes regarding the authority of others such as the Contracting Officer's representative, and the enforceability of any agreement, change, or direction.

Contractors should also continue to follow standard contracting procedures. In addition, contractors should remain in communication with government personnel, even if the Contracting Officer does not respond to communications. Contractors should provide government personnel with periodic updates, including updates that include the Contracting Officer as a "cc" recipient on all communications.

Q If the Contracting Officer fails to provide written acknowledgment should contractors comply with directions from other government employees?

Even if government employees other than the Contracting Officer lack actual authority to change the scope of a contract, agreements may be ratified by officials with authority and knowledge of the agreement, change, or direction. If the Contracting Officer has actual or constructive knowledge of an agreement between a contractor and another government employee, the Contracting Officer's knowledge may serve to ratify the agreement. *Catel, Inc.*, ASBCA No. 54627, 05-1 BCA ¶ 32,966.

For this reason, even if a Contracting Officer does not respond to a communication or otherwise acknowledge a direction or change, contractors should include the Contracting Officer as a "cc" recipient on all emails or other communications. Including the Contracting Officer as a "cc" recipient on all communications will support a contractor's position that a government official with authority had actual or constructive knowledge of an agreement, change, or direction. That knowledge may be sufficient to prove a government representative with contractor authority ratified the agreement.

Q If government employees other than the Contracting Officer provide directions, will those directions bind the government?

The default rule is that a government agent, such as the Contracting Officer, "must have actual authority to bind the government." *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339, 1344 (Fed. Cir. 2007). If another

government employee provides direction, actual authority to bind the government "may be implied from the circumstances." *D&F Mktg., Inc.*, ASBCA No. 56043, 09-1 BCA ¶ 34,108. "Implied actual authority . . . will suffice" to hold the government "bound by the acts of its agents." *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989).

The actions of government employees other than the Contracting Officer can bind the government if the employee exercised authority consistent with the duties assigned to that employee. For example, if interpreting plans and specifications is an integral part of a project engineer's assigned duties, the project engineer's interpretation and direction to a contractor can bind the government.

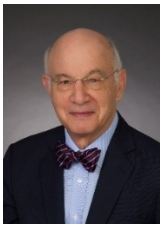
Contractors receiving directions from government personnel other than the Contracting Officer should confirm, in writing, that the employee has authority to issue the order.

10. Maintaining Documentation

Q What documentation should contractors maintain?

Contractors are already required to maintain adequate records relating to the performance of their contract. *See e.g.*, FAR 52.215-2 Audit and Records-Negotiation. However, in light of the extraordinary circumstances associated with the COVID-19 pandemic, contractors should ensure that they maintain adequate records relating to all cost and schedule impacts, including employee sick leave, supplier and subcontractor delays and disruption, impacts to corporate and general and administrative costs, costs related to complying with agency directives and orders, and orders or recommendations from state and local officials.

We will continue to monitor the COVID-19 situation closely and will update this handbook regularly.
For more information, please contact:



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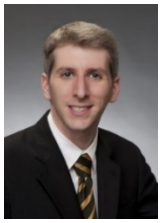

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