

## **Alert** | Health Emergency Preparedness Task Force: Coronavirus Disease 2019



**March 2020**

### **Actions Federal Government Contractors Should Consider in Response to COVID-19**

With the Coronavirus Disease 2019 (COVID-19) spreading across the globe, efforts to contain it and to mitigate its serious health consequences are causing increasing disruptions to international and domestic business. Travel restrictions, social distancing, and quarantines are causing increased supply chain, workforce, and other performance disruptions that are impacting business operations worldwide. Businesses performing government contracts face substantial COVID-19 impacts and consequences that can differ in several key respects from those faced by businesses operating in a purely commercial context. The following discussion highlights several key considerations and steps that government contractors should consider to prepare for and potentially mitigate the impacts of COVID-19 disruptions.

#### **Identify and Assess Potential Impacts**

COVID-19 will likely impact the performance of government contracts for a variety of reasons. Impacts to supply chains, subcontractors or vendors, government personnel, and a contractor's own workforce (including its ability to perform) may cause delays in contract performance. Government contractors should identify all existing government contracts (and subcontracts), and identify all subcontractors, vendors, and contractor personnel critical to continuing performance under each existing government contract. Contractors should regularly coordinate with critical subcontractors and vendors under each government contract to assess potential or actual COVID-19 impacts or delays in contract performance. Contractors should also consider identifying potential alternative working arrangements for their own employees, as well alternative subcontractors or sources of supply to potentially mitigate any anticipated

impacts. In some circumstances, a contractor may have an obligation to seek subcontracted supplies or services from another source when existing subcontractors or suppliers may be unable to perform. Early and continuing coordination with subcontractors and vendors may help contractors anticipate and minimize potential impacts, while also creating an important record of the contractor's reasonable efforts to avoid and/or mitigate potential contract performance delays or defaults.

It is also critical for government contractors to stay, as much as possible, in regular contact with their government customers. Discuss with (preferably) the contracting officer his/her agency's plans concerning access to its facilities, availability of its personnel, and ability to test, inspect or accept deliveries, and ensure appropriate contingency plans are in place. Explain your company's plans and understandings to determine whether additional actions are necessary. Communications with the government (and, in particular, the contracting officer) should be memorialized in writing (e.g., in emails).

### Identify and Assess Relevant Contractual Provisions

- Delays and Defaults

Contractors should carefully examine the clauses in their government contracts, subcontracts, and related vendor agreements to assess the contractual consequences of delays that might result from COVID-19. Although most commercial contracts include a *force majeure* clause that excuses performance under extreme and unforeseen conditions, government contracts do not typically include this type of commercial language. Instead, government contractors are likely to find clauses similar to FAR 52.249-14, Excusable Delays, or FAR 52.212-4(f) in their contract(s) that address delays in contractor performance. The operative language in these clauses provides that contractors should not be held in default or liable when their failure to perform “**arises from causes beyond the control and without the fault or negligence of the Contractor,**” including “(1) **acts of God** or of the public enemy, (2) **acts of the Government** in either **its sovereign** or contractual **capacity**, (3) fires, (4) floods, (5) **epidemics**, (6) **quarantine restrictions**, (7) strikes, (8) freight embargoes, and (9) unusually severe weather.” Similar language in FAR 52.249-8 and FAR 52.249-10 mitigate the liability of contractors that might default on their contractual obligations due to the circumstances enumerated above. *See also* DFARS 252.217-7009(b). The pervasive spread of COVID-19 may constitute a “cause beyond the contractor's control and without [its] fault or negligence” that may create an excusable delay. However, contractors should be aware that some clauses require that the contractor provide the contracting officer timely notice of any such delays in performance, and contractors should ensure that they promptly prepare and provides all required notices regarding disruptions.

- Prioritization/ Mission-Essential Services

Contractors should also identify any government contracts (or subcontracts) related to military support, homeland security, public health, emergency preparedness, first responders, critical infrastructure requirements and energy that might be subject to “prioritization.” The Defense Production Act allows the government to prioritize its needs under the Defense Priorities and Allocation System (DPAS). *See* FAR Subpart 11.6. Contracts subject to prioritizations are known as “rated orders,” and generally require that contractors (and, sometimes, subcontractors) prioritize sales to the government over any conflicting contractor obligations to consumer or commercial customers. Similarly, businesses entering into contracts (or subcontracts) supporting government efforts to respond to the COVID-19 pandemic should examine the clauses in any such contract to determine whether the agreement obligates the contractor to prioritize government requirements over those of other customers. Attention to prioritized contracts (and subcontracts) is necessary because severe remedies are available to the government; for example, willful

failure to perform can constitute a criminal violation punishable by imprisonment up to one year and a fine of up to \$10,000. *See, e.g., 15 C.F.R. § 700.74.*

Contractors performing contracts for the Department of Defense could also be subject to “Mission-Essential” requirements if their contracts include DFARS 252.237-7023, Continuation of Essential Contractor Services. This clause, which was promulgated partially in response to the H1N1 influenza pandemic in 2009, requires contractors to develop and implement mission-essential service plans to ensure continued performance in crisis circumstances, including pandemics. Contractors subject to this clause should carefully review its requirements concerning plan activation, plan modifications, cost segregation, notice, and equitable adjustments to which the contractor might be entitled if plan activation is required.

- **Stop Work and Terminations**

Depending on COVID-19 impacts to agency priorities and the federal workforce, the government may stop, suspend, or simply terminate performance under certain existing contracts. Contractors that anticipate COVID-19 disruptions to government contract performance should examine the clauses in their government contracts that address the government’s ability to stop or suspend work or terminate the contract for convenience. Most government contracts include clauses like FAR 52.242-14 or FAR 52.242-15 that allow the government to stop or suspend part or all work under the contract. Contractors receiving such notice should carefully comply with directions received from the contracting officer and diligently track associated costs for inclusion in a request for equitable adjustment.

Contractors should also familiarize themselves with the termination clauses included in existing government contracts. Most government contracts include a clause like FAR 52.249-1, FAR 52.249-4 or FAR 52.212-4(l) that allow the government to terminate the contract in whole or in part for the convenience of the government. In the event of such termination, the contractor must immediately stop all work and cause all of its suppliers and subcontractors to cease work. Typically, breach of contract damages are not available to the contractor, and the government is only required to pay to the contractor the contract price for completed supplies/services accepted by the government, reasonable costs incurred in the performance of the terminated work, a reasonable profit on the performed work but no profit on the terminated work, and reasonable costs of settlement of the terminated work.

- **Changes**

Government contractors should also identify contract clauses in existing government contracts that could allow the government to issue change orders. Most government contracts include clauses like FAR 52.243-1, FAR 52.243-2 or FAR 52.243-3 that permit the government to make unilateral changes within the general scope of the contract. Depending on COVID-19 impacts, agencies may potentially utilize this clause to alter or adjust the contractor’s obligations in a variety of ways. Contractors receiving change orders under one of these clauses should carefully assess whether the changes are within those identified as permissible under the applicable clause (i.e., within the scope of the contract), take actions to carefully track all cost impacts associated with the change, and prepare and timely submit requests for equitable adjustment.

### **Other Potential Relief**

Contractors should also consider: (i) seeking relief through the doctrines of impracticability, impossibility, frustration of purpose and other related (e.g., constructive change) theories, *see* GT Alert, [Risk Allocation for Economic Losses from Coronavirus Disease 2019](#), and (ii) carefully reviewing their insurance policies, which may cover force majeure or other applicable circumstances. *See* GT Alert, [Coronavirus and Force](#)

**Majeure Contract Clauses.** Finally, certain relief may be or could become available under: (a) Public Law 85-804, which authorizes (in support of national defense) certain federal agencies to, among other things, 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, e.g.*, Pub. L. No. 85-804, codified at 50 U.S.C. §§ 1431-35; FAR Part 50; DFARS Part 250; and (ii) the Public Readiness and Emergency Preparedness Act (“PREP Act”), codified at 42 U.S.C. § 247d-6d. On March 10, the HHS Secretary issued a PREP Act Declaration (retroactively effective to February 4, 2020) to provide certain liability immunity for activities (including under government contracts) related to medical countermeasures against COVID-19.

### **Document COVID-19 Impacts and Mitigation Measures & Confirm Government Instructions with the Contracting Officer**

As noted above, government contractors that experience COVID-19 impacts should carefully document all efforts to avoid and mitigate performance disruptions. In addition, contractors should document all interactions with contracting officers regarding any anticipated or actual impacts, as well as similar interactions with subcontractors and vendors. Significantly, if a government contractor receives instructions or changes from any government official other than the contracting officer, the contractor must confirm such instructions/changes (in writing) with the contracting officer before proceeding or risk not being paid. Finally, contractors should carefully track all costs associated with any COVID-19 related delays, or any costs associated with COVID-19 related stop work or contract terminations, and retain these records. This will not only help contractors to adequately substantiate any requests for equitable adjustment or claims, but also to respond to audits and investigations, which often come years after emergency contracting actions. Whether a contractor’s claim, request for equitable adjustment or response to an audit or investigation is successful will depend, in large part, on how well the contractor has contemporaneously documented the issues.

By considering these steps, government contractors may be able to anticipate and mitigate many potential COVID-19 impacts and disruptions to government contract revenue streams.

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