

THE GOVERNMENT CONTRACTOR®



THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 62, No. 14

April 8, 2020

FOCUS

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FEATURE COMMENT: CARES Act: Changes To Government Contracting Authority

The newly enacted Coronavirus Aid, Relief, and Economic Security Act (CARES Act or Act), P.L. 116-136, provides economic relief to many businesses, nonprofits, states and municipalities, and individuals impacted by COVID-19. In addition, the Act includes provisions that alter or expand federal contracting authority to address critical needs associated with the COVID-19 pandemic. This Feature Comment provides an overview of key provisions in the CARES Act that address federal contracting authority.

Reimbursement of Contractor Paid Leave and Sick Leave—Section 3610 provides federal agencies the authority to modify contracts or agreements, without consideration, to reimburse contractors, under limited circumstances, for paid or sick leave a contractor provides employees or subcontractors to maintain a “ready state,” including to protect the life and safety of Government and contractor personnel. This authority is subject to several notable requirements or restrictions: (1) reimbursement by the Government is discretionary, not mandatory; (2) subject contracts must be modified to provide for reimbursement; (3) reimbursement is limited to the minimum contract billing rates and cannot exceed an average of 40 hours per week for paid leave, including sick leave; (4) the reimbursed expense must be used to retain employees (or subcontractors) in a ready state, including to protect the life and safety of Government and contractor personnel; (5) reimbursable expenses are limited to those incurred between Jan. 31, 2020

and Sept. 30, 2020; (6) reimbursable expenses are limited to those employees or subcontractors that cannot perform work on a federally approved site, 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; and (7) the contractor must offset reimbursements under the authority of § 3610 by the amount of any credits the contractor receives under other sections of the CARES Act and under the recently enacted Families First Coronavirus Response Act, P.L. 116-127.

Because the authority is limited to circumstances where employees or subcontractors cannot perform work at an approved work site due to facility closures or “other restrictions,” and cannot telework, it is unclear what “restrictions” will be considered qualifying. Notably, it is unclear whether restrictions contained in state or local COVID-19-related declarations or orders that impact contractor employee or subcontractor access to qualifying facilities will trigger this authority. Moreover, since this authority is discretionary, satisfaction of the criteria set out in § 3610 of the Act does not guarantee that a contracting officer will utilize this authority and provide the permitted reimbursement. It will be important to review subsequent agency guidance on this subject and possibly to educate contracting officials about this provision. Reimbursement is subject to availability of appropriations under the CARES Act or any other act.

Due to the ambiguity on whether contractors who provide paid leave will be able to recoup their costs, contractors should exercise caution in relying solely on § 3610 in deciding how to best proceed. Until further guidance is issued, contractors may consider proceeding as if they are facing a compensable delay, constructive change or the like, i.e., notify the CO of the impact of the change and potential delays, carefully document the impact of the delay/change, attempt to mitigate the impact, and

carefully segregate costs. As always, communication with the CO is crucial.

Expanded Authority under the Defense Production Act—Section 4017 of the CARES Act amends the Defense Production Act (DPA) to expand certain existing DPA authority. The DPA provides the president with broad emergency procurement (and other) powers to respond and recover from public health emergencies. See Alert entitled *The Impact of Recent Stafford Act and Defense Production Act Declarations on COVID-19 Procurements*, www.gtlaw.com/en/insights/2020/3/the-impact-of-recent-stafford-act-and-defense-production-act-declarations-on-covid19-procurements. In an Executive Order dated March 18, 2020, the president invoked the DPA in response to the COVID-19 pandemic. See <https://www.whitehouse.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-covid-19/>. At present, it appears that the powers of the DPA are being utilized in limited and targeted circumstances. See Presidential Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use (April 3, 2020), <https://www.whitehouse.gov/presidential-actions/memorandum-allocating-certain-scarce-threatened-health-medical-resources-domestic-use/>; Presidential Memorandum on Order Under the Defense Production Act Regarding the Purchase of Ventilators (April 2, 2020), <https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-purchase-ventilators/>.

Section 4017 modifies the language of the DPA to remove certain funding limitations on purchases and commitments to create, maintain, protect, expand or restore domestic industrial base capabilities. Specifically, for a two-year period beginning March 27, 2020, the CARES Act modifies the DPA to (1) eliminate a \$50 million limit on aggregate outstanding industrial resource shortfall actions, 50 USCA § 4533(a)(6)(C), and (2) suspend requirements that DPA fund balances in excess of \$750 million at the end of a fiscal year be remitted to the Treasury. 50 USCA § 4534(e).

Similarly, for a one-year period beginning March 27, 2020, the CARES Act modifies DPA loan authority to (1) eliminate a \$50 million limit on aggregate outstanding amount of loans, 50 USCA § 4532(d)(1), and (2) eliminate congressional notification requirements and a 30-day waiting period when actions to correct a domestic industrial-base shortfall would cause the aggregate outstanding

amount of all such actions to exceed \$50 million. 50 USCA § 4533(a)(6)(B). These amendments to the DPA may remove potential barriers, limits or delays that could hinder effective use of DPA authority to respond to the COVID-19 pandemic.

Expanded BARDA Other Transaction Authority and Funding—Section 3301 provides expanded Other Transaction Agreement (OTA) authority to the Department of Health and Human Services' Biomedical Advanced Research and Development Authority (BARDA). See *BARDA Other Transaction Agreements*, www.phe.gov/about/amcg/otar/Pages/default.aspx. BARDA uses OTAs, a type of flexible, strategic partnership between the Government and industry, to foster innovation and promote collaboration on efforts to develop and procure needed medical countermeasures, including vaccines, therapeutics, diagnostics and non-pharmaceutical countermeasures, against a broad array of public health threats. Unlike procurement contracts, OTAs are generally exempt from the Federal Acquisition Regulation, including the FAR's competition requirements. BARDA has been seeking partnerships, soliciting proposals, and entering into contracts and OTAs to respond to the COVID-19 pandemic.

Section 3301 alters BARDA's statutory authority under the Public Health Service Act, 42 USCA § 247d-7e to remove the requirement for a written determination to approve OTAs expected to cost more than \$100 million during a public health emergency. This change will likely speed up the solicitation and execution of larger OTAs critical to COVID-19 countermeasures. The Act also provides that not less than \$3.5 billion of the \$27 billion Public Health and Social Services Emergency Fund approved by the Act shall be available to BARDA for necessary expenses of manufacturing, production and purchase of various supplies and services.

Relaxation of DOD Other Transaction Authority Requirements—Section 13006 relaxes statutory restrictions and requirements applicable to certain Department of Defense OTAs. Statutory authority for DOD OTAs for prototype projects (10 USCA § 2371b) includes a requirement that high-level DOD officials authorize high-dollar value OTAs in writing and provide 30-day advance written notice to Congress of any OTA award in excess of \$500 million. 10 USCA § 2371b(a)(2). Section 13006 relaxes these requirements by authorizing DOD to delegate OTA approval authority to

lower level officials and requiring congressional notification only “as soon as practicable after the commencement” of performance when the OTA is related to the COVID-19 pandemic national emergency. By relaxing these requirements, the Act could lead to the more rapid award of OTAs in response to the COVID-19 pandemic.

Expansion of Strategic National Stockpile Procurements—Section 3102 amends existing statutory authority providing for procurements for the Strategic National Stockpile and Security Countermeasure. 42 USCA § 247d–6b. The Act expands the statutory definition of materials to be maintained in the National Stockpile to specifically include “personal protective equipment, ancillary medical supplies and other applicable supplies required for the administration of drugs, vaccines and other biological products, medical devices, and diagnostic tests.” This amendment clarifies that certain procurements for personal protective equipment (PPE) and other identified supplies and equipment will be mandatory moving forward, to the extent determined to be appropriate and practicable by the secretary of HHS. 42 USCA § 247d–6b(a)(1).

Relaxation of Undefined Contract Action Limits and Restrictions—Sections 13004 and 13005 include provisions relaxing restrictions on the use of undefinitized contract actions (UCAs) to respond to the COVID-19 pandemic. A UCA is a procurement action for which price, the contractual terms or specifications are not agreed upon before performance begins. Agencies use UCAs to authorize contractors to begin performance before the contract is finalized for the purposes of meeting an urgent need. During performance, a UCA becomes “definitized” when the agency and contractor agree to all contract terms. Statutory authority includes restrictions on how long UCAs may remain undefinitized and what percentage of a UCA’s ceiling price an agency may obligate before the UCA is definitized. 10 USCA § 2326(b). For UCAs related to the COVID-19 pandemic national emergency, § 13004 of the Act waives the requirement that an agency obligate no more than 75 percent of a UCA’s ceiling price before definitizing the contract. In turn, § 13005 authorizes the head of an agency to waive all deadlines and spending caps for UCAs set out in 10 USCA § 2326(b), if the agency head determines that the waiver is necessary due to the COVID-19 pandemic national emergency. These changes provide greater flexibility and reduce admin-

istrative burdens for agencies using UCAs to respond to COVID-19.

Possible Contracting Opportunities Resulting from the CARES Act—The CARES Act provides various federal agencies and state/local governments significant cash infusions to address the COVID-19 pandemic. For example, the Act appropriates \$45 billion to the Federal Emergency Management Agency’s Disaster Relief Fund to support federal response operations and Stafford Act disaster relief reimbursements to state and local governments and nonprofit organizations. The Act further appropriates \$10.5 billion for DOD, including \$1.45 billion for Defense Working Capital Funds and \$3.4 billion for the Defense Health Program. A significant percentage of these (and other) infusions may be used to fund Government contracts (e.g., purchase of medical/pharmaceutical supplies and equipment, advancing R&D on vaccines and treatments, etc.).

For example, among the many COVID-19 related procurement opportunities, BARDA has issued a Broad Agency Announcement for advanced development and licensing of COVID-19 diagnostics, vaccines or medicines. See beta.sam.gov/opp/7c72ff2e5c514b2faa15765e78294128/view. Several agencies have already issued traditional solicitations for supplies needed to respond to the COVID-19 pandemic, such as PPE. E.g., Department of Interior Solicitation No. 140A1620Q0032 for COVID-19 PPE for BIA, <https://beta.sam.gov/opp/27a658f39e2a4e08b0fbc6986b9e3d7e/view>. In addition, the U.S. Army Corps of Engineers has requested vendors with the ability to “build-out” or retrofit existing space into alternate care facilities, supply field medical units or supply temporary medical enclosures to email capabilities statements to COVID-Contracting@usace.army.mil. See www.usace.army.mil/Business-With-Us/Contracting/. For state and local procurements, FEMA has created a web-portal with contact information for state emergency management agencies seeking to procure supplies and services needed to respond to COVID-19. See www.fema.gov/emergency-management-agencies.

Opportunities for both “traditional” and “non-traditional” Government contractors are available. For non-traditional or new Government contractors, registering now with the System for Award Management (SAM), see www.sam.gov; FAR subpt. 4.11, and the SAM Disaster Response Registry, see FAR 4.1104;

FAR 26.205; see *Acquisition.gov's* Disaster Response Registry, www.acquisition.gov/disaster-response-registry, may expedite their ability to receive a subsequent award. Accepting federal funds under a procurement contract, grant or other agreement comes with unique compliance risks and requirements. The U.S. Government can impose harsh remedies for non-compliance with contracting and grant requirements that may pose significant financial and reputational harm. For more information and updates on the developing situation, visit Greenberg Traurig's Health Emergency Preparedness Task Force: Coronavirus

Disease 2019, www.gtlaw.com/en/general/covid19/coronavirus.



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