

What if.....?

Answers to the Most Common COVID-19 Contracting Questions

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Agenda

1. What if a government customer has an emergency need?
2. What if the Government doesn't need my contract during the shutdown?
3. What if the Government doesn't need my supplies or services at all?
4. What if I can't make timely delivery or continue contract performance?
5. What if my subcontractor/supplier can't or won't perform?
6. What if the government insists that I continue performance?
7. What if I get a "Rated Order" under the Defense Production Act?
8. Miscellaneous "What ifs....?"

Introduction

- Secretary, HHS declared COVID-19 a public health emergency on January 31, 2020
- The World Health Organization declared COVID-19 a pandemic on March 11, 2020
- President declared COVID-19 a national emergency on March 13, 2020
- All states have declared various states of emergency, issued work at home orders, etc.

Essential Critical Infrastructure



Government Contract Legal Concepts

- The **Christian Doctrine** protects the government from drafting errors
 - “Important” FAR clauses are ALWAYS part of your contract...
- The Government is only bound by **Actual Authority**
 - Only “warranted” contracting officers can change the contract...
- **Sovereign Immunity**: You can’t sue the government unless the government says you can sue the government!
 - No one would contract with the government unless they could sue...

What if a government customer has
an emergency need?

Contract Flexibilities for Agencies

18.202 Defense or recovery from certain events.

(a) *Micro-purchase threshold.* The threshold increased from \$10,000 to \$20,000 “to support response to an emergency or major disaster.”

(b) *Simplified acquisition threshold.* The threshold increased from \$250,000 to \$750,000 “to support response to an emergency or major disaster.”

(c) [allows commercial item procedures for nuclear attacks, etc.]

(d) *Simplified procedures for certain commercial items.* The threshold limit is increased to \$13 million “to support response to an emergency or major disaster.”

Standard FAR Emergency Authorities

- Exception to competition, urgent requirements, FAR 6.302-2
- Exemption from SAM registration, FAR 4.1102(a)
- Waiver of some Ability One procedures, FAR 8.712(d)
- Waiver of Qualification List Requirements, FAR 9.206-1(b)
- Retroactive overtime approval, FAR 22.103-4(i)
- Waiver of EFT requirements, FAR 32-1103(e)
- Waiver of preference for US-flagged vessels, FAR 47.502(c)

GSA Non-availability Determination

- On April 3, 2020 the GSA made a “non-availability determination” for certain products under the TAA and Buy American statute

“At present, American lives and way of life face a grave challenge.”

- Until July 1, 2020 you can sell the following products to the government that are not US-made:
 1. N-95 Masks
 2. Disinfectant, beach and wipes
 3. Soap and hand sanitizer

What if the Government doesn't need my supplies or services during the shutdown?

What happens if a government worksite is unavailable?

- Funding available for contract, but a government worksite or (critical government employee) is unavailable.
- Communicate in advance with agencies to provide notice of impact if either is unavailable.
- Find tasks that can be completed without a worksite available
- Contractors may also be entitled to wind-down and start-up costs if performance is not possible due to the government's unavailability

Suspension of Work

- FAR 52.242-14, *Suspension of Work* (Construction)
- Contracting officer may unilaterally suspend work for the convenience of the government.
- Contract completion date automatically extended
- If the delay is unreasonable, contractor entitled adjustment of the contract price, through a contract modification
- Contractor can recover additional costs, **but not profit**

Suspension of Work

- Contractor must give notice, within 20 days, of impact of suspension
- Contractor must file claim, in specific amount, “as soon as practicable” after suspension ends
- No claims allowed after final payment
- No adjustment in contract price if performance would have been delayed anyway – including contractor-caused delays
- No adjustment under this clause if another clause applies

Suspension of Work

- *Farr Bros., Inc.*, ASBCA No. 42658, 92-2 BCA ¶ 24,991
- Construction contract where contractor claimed costs of delay from COR order suspending work
- Government argued that COR didn't have authority to order suspension
- ASBCA granted partial relief based on acts of COR:
 - Actual authority determined by viewing a contracting officer's warrant or a COR's letter of appointment
 - COR's authority to order suspension of work not specifically prohibited by appointment letter

Stop Work Order

- FAR 52.242-15, *Stop-Work Order*
- Supply and service contracts by negotiation
- KO may order contractor to stop work for up to 90 days
- After 90 days, Contracting Officer shall either:
 - (1) Cancel the stop-work order; or
 - (2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience, clause of the contract
- Contractor entitled to adjustment in price and/or performance time if impacted by stop work and timely notice – within 30 days

Government Delay of Work

- FAR 52.242-17, *Government Delay of Work*
- Supply and service contracts (other than commercial item contracts)
- If performance of contract is delayed (1) by unauthorized act of Contracting Officer in the administration of the contract, or (2) by a failure of Contracting Officer to act within the time specified in this contract/reasonable time
- Then an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption and the contract shall be modified in writing accordingly
- Adjustment shall also be made in the delivery or performance dates and any other contractual term or condition affected by the delay or interruption.

Government Delay of Work

- 52.242-17 Government Delay of Work
- No adjustment for any delay or interruption that would have been delayed or interrupted by any other cause, including the fault or negligence of the Contractor
- A claim under this clause not allowed:
 - (1) For any costs incurred more than **20 days** before the Contractor notified the Contracting Officer in writing of act or failure to act involved; and
 - (2) Unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the delay or interruption, but not later than the day of final payment under the contract

Contract Modification – Types

- Unilateral – signed only by Contracting Officer
 - Administrative changes
 - Issue change orders
 - Changes authorized by clauses *other than* Changes (e.g., stop work, options)
 - Issue termination notices
- Bilateral – signed by Contracting Officer and contractor
 - Definitize “letter contracts”
 - Negotiated EA resulting from change order
 - Other agreements changing terms of contract

Contract Modification – Content

- Contract clause authorizing modification
- Description of reason for modification and changed work
- Increase or decrease in contract price
- Revised Schedule, if applicable
- Funding citation to pay for new work

Contract Modification – Release Language

- Release language:

“Contractor releases and discharges the government for and from all claims, damages, and causes of action arising from events described in this modification...”

“Contractor releases and discharges the government for and from all claims, damages, and causes of action arising from events or changes occurring prior to the date of this modification...”

What if the Government doesn't need my
supplies or services at all?

Termination for Convenience

- Inherent authority of government to terminate for own convenience
- FAR 52.249-1 thru 52.249-7 – supply, service, construction, etc.

“The Contracting Officer, by written notice, may terminate this contract, **in whole or in part**, when it is in the Government’s interest. If this contract is terminated, the rights, duties, and obligations of the parties, including compensation to the Contractor, shall be in accordance with part 49 of the Federal Acquisition Regulation in effect on the date of this contract.”

Termination for Convenience

- FAR Part 49 principles, Contractor Actions:
 - Stop work and order no more goods or services
 - Terminate all subcontracts and settle liability
 - Turn over all WIP and finished goods and IP to the government
 - Protect government property and follow KO instructions

Termination for Convenience

- FAR Part 49 principles, Contractor Settlement:
 - Contract becomes “cost type” – up to original K price
 - Entitled to reasonable profit – unless K in a “loss position”
 - Legal, accounting fees for preparing settlement proposal
- Commercial item contract unique settlement formula:
 - Payment for “percentage of the work performed”, plus
 - Charges resulting from the termination...
- “T4C” is different from “no cost” settlement....

What if I can't make timely delivery or continue contract performance?

Contractor Delays and Late Performance

- Ordinarily late performance leads to Default Termination
 - FAR 52.249-8, Default (Fixed-Price Supply and Service)
 - FAR 52.249-10, Default (Fixed-Price Construction)
- A drastic remedy most often used for late delivery, but also failure to:
 - Make satisfactory progress, or
 - Comply with any other provision of contract(these two require 10-day cure period)

Contractor Delays and Late Performance

- Contractor loses right to finish contract
- No right to further payment
- Liable for “excess re-procurement costs”
- “Black mark” on permanent record – PPIRS/CPARS
- Has been called “death sentence” for a government contractor

Contractor Delays and Late Performance

- Termination for Default clauses excuse delays for:
 - Acts of God or the public enemy,
 - Government acts: “sovereign” or “contractual” capacity
 - Fires, floods
 - Epidemics, quarantine restrictions
 - Strikes
 - Unusually severe weather, and
 - Delays of common carriers

OK, there's a pandemic. So what?

- *Ace Electronics Assoc.*, ASBCA No. 11496, 67-2 BCA ¶ 6456
- Contract to manufacture electronic components
- Contractor failed to deliver FAT report on time and the government terminated for default
- Contractor sought relief from default and assessment of costs based on flu epidemic
- Flu caused a 30% to 40% rate of absenteeism
- Claim denied & termination upheld: epidemic not excuse *per se* must show that it contributed to delay in delivery

Contractor Delays and Late Performance

- Note that clauses require notice to contracting officer "as soon as it is reasonably possible" and mitigation of any potential impact
- The government still has the right to terminate the contract if there is a delay; it is just that the termination may be for convenience instead of default

What happens if supplies/services are unavailable to me because of the virus?

What if a construction subcontractor refuses to work on a government site?

How are subcontracts impacted?

- Contracts between prime contractors and subcontractors are commercial contracts, even if they contain FAR/DFARS or other clauses
- Prime and subcontractors should review their agreements to determine their rights and obligations
- Most commercial contracts contain a *force majeure* clause that excuses delay
- Common law “impossibility” and “impracticability” may apply
- Force majeure clauses often allow prime contractors to seek goods and services elsewhere if a subcontractor cannot fulfill their obligations for an excused reason

Supplier Delays – Force Majeure Clauses

- Force majeure: contract clause that excuses failure to perform for “acts of God” – including epidemics/pandemics
- May only extend time performance time while act of God persists
- Sometimes one-sided: excusing landlord from providing access to leased space, but not tenant’s obligation to pay rent
- Effect depends on contract language and state law

Supplier Delays - Impossibility/Impracticability

- Common law doctrine that excuses performance if it is “impossible”
 - Includes literal impossibility
 - Legal impossibility: subject matter of contract becomes illegal
- “Impracticability” requires that performance would require excessive and unreasonable cost; not just more expensive

Supplier and Subcontractor Delays

- If faced with supplier or subcontractor delay allegedly due to COVID-19, your late performance should be excused under the Default clause
- Make record with subcontractor – “demand” performance and request written response
- Include supplier or subcontractor response in your notice to contracting officer of excusable delay

What if the contracting officer doesn't
cooperate with me?

OMB M-20-18, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)*

“The Office of Management and Budget (OMB) serves the President of the United States in overseeing the implementation of his vision across the Executive Branch. Specifically, OMB’s mission is to assist the President in meeting his policy, budget, management and regulatory objectives and to fulfill the agency’s statutory responsibilities.”

“The health and safety of all Americans, including our Federal contractors, remains the top priority.”

OMB M-20-18, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)*

- FAR 7.108 says that “agencies generally shall not discourage a contractor from allowing its employees to telecommute in the performance of Government contracts.”
- Agencies must work with contractors to maximize telework to enable contract performance IAW CDC & state/local directives
- Ask contracting officer to change the place of performance:
 - FAR 52.243-1, Changes for supply and service contracts
 - FAR 52.212-4(c), Commercial item changes clause

OMB M-20-18, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)*

- Encourages use of FAR clauses to extend or suspend performance – after discussing with contractor
- Use another contractor only for convenience of the government: termination for convenience or no-cost settlement
- “Excusable delays...should not negatively impact a contractor’s performance ratings.”
- Be “as flexible as possible in finding solutions”

What if the government insists that I
continue performance?

What if the government insists that I continue performance?

- Contractor performance delayed because supplier shuts down or employees cannot get to work because of stay at home order
- Contractor tells contracting officer that performance will be delayed, and asks for extension
- Contracting officer does not reply, or refuses to extend performance
- Contractor may have a “constructive acceleration” claim

What if the government insists that I continue performance?

1. The existence of one or more excusable delays
2. Notice of delay by the contractor to government
3. Request for an extension of time
4. Government refusal to grant extension requested
5. Express or implied order by government to accelerate; and
6. Actual acceleration resulting in increased costs

What if the government insists that I continue performance?

- Excusable delays include fires, floods, epidemics, sovereign acts and “unusually severe weather”
- Constructive acceleration orders:
 - Threat of liquidated damages
 - Delay in approval of request for extension
 - Threat of termination for failure to meet original date
- Acceleration costs include increased labor cost, cost to expedite material deliveries, and loss of efficiency

What if I get a “Rated Order” under the
Defense Production Act?

What if I get a DPAS “Rated Order”?

- Coronavirus has spiked demand for personal protective supplies like masks, medical supplies, medicines and testing equipment/supplies
- U.S. government has legal authority *to step to front of the line* before other customers to meet procurement needs associated with emergency preparedness, response and recovery activities
- U.S. Department of Commerce has established the Defense Priorities and Allocation System (DPAS): DoD, DHS (FEMA lead), and Dept. of Energy (15 CFR Part 700)

What if I get a DPAS “Rated Order”?

- Contractors who provide DPAS supplies or services should ensure personnel know DPAS rating process and obligations
- When a business receives a DPAS-rated order (DX, DO), it must accept the order if it normally sells the ordered material or service and can satisfy the delivery terms
- Businesses may reject DPAS-rated orders for reasons specified in the regulations, and they have a limited window of time to do so

What if I get a DPAS “Rated Order”?

- Proper order requires:
 - “DO” or “DX” rating
 - Specific delivery date (not “ASAP” or “on or before....”)
 - “This is a rated order and you must follow 15 CFR Part 700”
 - Signature of authorized official
- DX = DX > DO = DO > Commercial Orders
- Reject if you can’t meet date; otherwise prioritize work for rated orders and keep government informed
- You MUST use rated orders to suppliers to meet rated order

Miscellaneous “What ifs....?”

What if I have to pay employees to remain in “standby” status?

- OMB M-20-22, *Preserving the Resilience of the Federal Contracting Base in the Fight Against the Coronavirus Disease 2019*
- Section 3610 of the CARES Act includes discretionary authority for agencies to reimburse cost of paid leave to contractors & subcontractors – both small and large
- PPP or other SBA relief loans are intended to help businesses and shore up the national economy
- Section 3610 provides agencies a tool to ensure continuity of agency operations

What if I have to pay employees to remain in “standby” status?

- Resiliency – keep contractor in “ready state” to perform needed government functions (national security, scientific response, etc.) when telework not possible
- Agency may use “any funds” made available by Congress for leave from Mar 27 to 30 Sep 2020
- Small business emphasis – but no double dipping, no profit, etc.
- KOs directed to:
 - Work with small business to document costs and credits;
 - Consider accelerated payments – new 15-day rule under NDAA for 2020

What if I have to buy PPE for my employees?

- In some cases the government may pay for PPE needed to perform a government contract
- OMB M-20-18 suggests “allowable and reasonable costs” to protect health & safety of employees could be paid
- Must be in accordance with ordinary agency procedures – what would reasonable person do:
 - Follow CDC guidelines
 - Discuss with KO before committing resources

What if I have to conduct meetings on Zoom?

- Work from home is the new normal, including video conferencing
- Are your ZOOM, Skype and Google Hangout meetings confidential? Cybersecure? Beware “Zoombombing”
- Do you need consent to record a Zoom video conference?
 - Some states require “two party consent” – California and Illinois
 - Many states, including Minnesota, have “one-party consent” laws
- Make sure you ask for consent to record conferences!

What if I have government contracts that might be affected?

- Take inventory of contracts and personnel on those contracts – draft an action plan to meet both contract demands as well as health and safety concerns
 - Deciding whether employees on impacted contracts can be reassigned or be asked to take paid vacation or overdue training
 - If performance is impossible seek recovery of expenses as soon as possible
- Document all wind-down and start-up costs, and creating separate accounting categories for those costs
- Document all actions and communicate with all parties involved
- Mitigate costs whenever possible

Best Practices

- Pay attention to all government communications
- Give timely, accurate, written notice of delays or additional charges or requirements due to COVID-19
 - Copy contracting officer on all important emails
- Assert timely requests for equitable adjustment
- Claim all direct costs, indirect costs and profit

Pricing Modifications



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Pricing Modifications

- In most cases, an equitable adjustment includes:
 - Direct costs
 - Indirect costs
 - Reasonable profit
 - Schedule adjustment
- Some clauses specify formula for adjustments – delay/suspension of work clauses exclude profit
- Must consider added work AND subtracted work

Pricing Modifications – Special Rules

- Construction Contractors can claim home office overhead during delay under “Eichleay Formula”
 - Find daily home office overhead allocable to contract work
 - Multiply daily overhead by days of delay
- Must prove the overhead was “unabsorbed”

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