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Practical Advice and FAR Insights for Federal Contractors Facing COVID-19 Disruptions

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Introduction

- Current Reality for Contractors
 - Disjointed or little guidance on contract impacts from government
 - DHS/CISA guidelines - majority of government contracts are “Essential”
 - Safety protocols required to protect employees (employer liability)
 - Can we get “costs”
 - Think “constructive” for suspensions, stoppages, changes, and terminations
 - “Best Practices”
- Key Guidance
 - <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>
 - [https://www.secnav.navy.mil/rda/DASN-P/Shared%20Documents/-INTENT AND DIRECTION ITHHOLDS AND RETENTIONS 20200320.pdf](https://www.secnav.navy.mil/rda/DASN-P/Shared%20Documents/-INTENT_AND_DIRECTION_ITHHOLDS_AND_RETENTIONS_20200320.pdf)



Introduction

- 6 Big Picture impacts of the coronavirus on federal contractors
 - 1) Postponed/Delayed/Cancelled procurements or awards
 - 2) Suspensions or stoppages of work
 - 3) Terminations for convenience
 - 4) Terminations for default
 - 5) Proceed with contract work
 - 6) Contract changes
- Lack of comprehensive guidance on how to deal with impacts on federal contracts
- Left to rely upon contract terms and FAR provisions incorporated into contracts



Federal Contractors' Guide to Coronavirus Contract Impacts

1. Actions the Government May Take



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1. Actions the Government May Take
2. Contractor Remedies for Those Actions



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2. Contractor Remedies for Those Actions
3. Contractor Best Practices



Government Action – Postpone/Delay/Cancel Procurements or Awards

- FAR 1.602-2 (Responsibilities)
 - “Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment.”
- Many procurements will likely be pushed back, suspended or cancelled in their entirety



Government Action – Postpone/Delay/Cancel Procurements or Awards

- Government has significant discretion
 - *Snowbird Indus., Inc.*, B-226980, (1987)
 - Courts and the GAO will not question government procurement decisions “absent a clear showing that the determination was arbitrary or capricious.”
- Contractor remedy
 - Contractors should not be dissuaded from lobbying the government to continue with scheduled procurements
 - However, contractors have a heavy burden to show that the government committed procurement error or acted in bad faith



Government Action - Suspend or Stop Work

- Contracting officer has the authority to suspend or stop contract performance for the “convenience of the government”
- FAR 52.242-14 (Suspension of Work)
 - “(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the government.”



Government Action - Suspend or Stop Work

- FAR 52.242-15 (Stop-Work Order)
 - “The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage.”



Government Action - Suspend or Stop Work

- Contractor remedies - Delay

- FAR 52.249-14 (Excusable Delay)

[T]he Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (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. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

- More challenging to recover extra costs resulting from a suspension or work stoppage, but it is prudent to submit extra costs to the government



Government Action - Suspend or Stop Work

- Contractor remedies – Suspensions – Costs
 - Entitled to recover costs due to suspension of work if:
 - The suspension, delay, or interruption is “for an unreasonable period of time;”
 - The suspension, delay, or interruption was caused by an “act of the Contracting Officer in the administration” of the contract; or
 - The suspension, delay, or interruption was caused by the “Contracting Officer’s failure to act within the time specified in this contract”; and
 - Contractor provides the contracting officer reasonable notice of the cost impacts
 - Track all costs caused by the suspension and prepare to submit for reimbursement



Government Action - Suspend or Stop Work

- Contractor remedies – Stoppages – Costs
 - Entitled to recover costs due to stoppage of work once the stoppage is lifted or cancelled if:
 - The stop work order results in an increase in the contractor's cost allocable to the performance of any part of the contract; and
 - The contractor asserts its right to the cost adjustment within 30 days after the end of the stop work period.
 - Ability to seek costs related to work stoppage is more contractor-friendly than doing so under a suspension of work
 - Track all costs caused by the stoppage



Government Action - Termination for Convenience

- FAR 52.249-2 (Termination for Convenience of the Government (Fixed-Price))
 - “[t]he Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government’s interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.”



Government Action - Termination for Convenience

- Upon receiving a termination for convenience notice, contractors must:
 - Stop work as required by the notice;
 - Issue no further subcontracts or orders for goods or services;
 - Terminate all subcontracts and orders if they are related to the terminated work;
 - Settle all outstanding liabilities with approval of the government;



Government Action - Termination for Convenience

- Upon receiving a termination for convenience notice, contractors must:
 - Transfer title of any materials, products, or work to the government as directed;
 - Complete any unterminated work;
 - Take any action necessary or directed to protect and preserve the work and the government's interest in the work.



Government Action - Termination for Convenience

- Contractor remedies
 - Entitled to request the costs incurred through a Termination for Convenience Settlement Proposal
 - Must be submitted within one year of the termination date
 - Fairly complex and difficult to prepare
 - Contractors should obtain the assistance of experienced cost consultant and legal counsel



Government Action - Termination for Convenience

- Contractor remedies
 - Entitled to recover the following costs:
 - Costs incurred for performance up until the date of termination, including all initial and preparatory expenses related to that work;
 - Reasonable profit and overhead on those costs;
 - Costs of settling and paying termination settlement proposals for any subcontractors; and
 - Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data.



Government Action - Termination for Default

- FAR 52.249-10 (Default (Fixed-Price Construction))
 - “If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed.”
- FAR 52.249-8 (Default (Fixed-Price Supply and Service))
- FAR 52.249-9 (Fixed-Price Research and Development)



Government Action - Termination for Default

- Unexpected for any contracting officer to terminate a contract for default due solely due to coronavirus impacts
- Government cannot terminate a contractor for default in the event that the reasons for the default were sufficiently outside the contractor's ability to control



Government Action - Termination for Default

- FAR 52.249-10(b)(1)
 - A termination for default should not be issued where: "The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers..."



Government Action - Termination for Default

- Contractor remedies
 - Only entitled to the costs incurred to deliver the completed and accepted work
 - Not entitled to reasonable profit or overhead on the terminated work
 - Should challenge the government's termination for default and attempt to convert it to a termination for convenience
 - If successful, entitles the contractor to the costs of the work performed, reasonable profit and overhead, administrative costs



Government Action - Proceed with Contract Work as Required

- Duty to proceed with contract performance unless a suspension of work, a stop work order, or termination notice is issued
- If the government does not stop, delay work, or terminate the contract, the contractor will be required to complete on time and per budget
- Despite any impacts faced as a result of coronavirus



Government Action - Proceed with Contract Work as Required

- Contractor Remedies

- Excusable delays

- FAR 52.249-14 (Excusable Delays)

"Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (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. ***In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor.***"



Government Action - Proceed with Contract Work as Required

- Contractor remedies

- No excess costs

- FAR 52.249-8(c) (Default (Fixed-Price Supply and Service))

- “the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor” which includes “(1) acts of God or of the public enemy . . .

- (5) epidemics, (6) quarantine restrictions . . .” as long as the contractor can demonstrate that the failure to perform was “beyond the control and without the fault or negligence of the Contractor.”



Government Action - Proceed with Contract Work as Required

- Contractor remedies
 - Direct or “Constructive” Changes with continued work (next slides)
 - Process for securing excusable delays and no excess costs
 - Past epidemics and quarantine restrictions have been viewed by courts and boards as reasons to issue excusable delays and to negate excess costs
 - Prove that the coronavirus is the primary cause of any delayed performance or extra costs
 - Failure to show that the epidemic caused impacts results in no relief



Government Action - Change the Contract Work to Account for Coronavirus Impacts

- FAR 52.243-1(a)
 - The contracting officer “may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract . . .”
- Changes occur all the time on federal contracts and routinely result in disputes
- Changes related to coronavirus will be no exception
- Direct vs. “Constructive” changes



Government Action - Change the Contract Work to Account for Coronavirus Impacts

- Contractor remedies
 - Equitable adjustment
 - FAR 52.243-1(b)

“If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.”



Government Action - Change the Contract Work to Account for Coronavirus Impacts

- Contractor remedies
 - Foreseeable that contracting officers will implement changes to contract scopes of work, schedules and contract milestones
 - Enable contractors to seek time extensions and extra costs incurred as a result of these changes
 - Must assert right to extra time or costs within 30 days from the date of receipt of the change / knowledge of change
 - Must provide prompt notice to the contracting officer of any potentially compensable change



Contractor Best Practices

1. Provide Timely Notice of all Coronavirus Impacts



Contractor Best Practices

1. Provide Timely Notice of all Coronavirus Impacts
2. Keep Comprehensive Project Records



Contractor Best Practices

1. Provide Timely Notice of all Coronavirus Impacts
2. Keep Comprehensive Project Records
3. Keep Performing During Impacts



Contractor Best Practices

1. Provide Timely Notice of all Coronavirus Impacts
2. Keep Comprehensive Project Records
3. Keep Performing During Impacts
4. Exercise Good Faith



Thank You



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Please visit our **Coronavirus Resource Center** at www.foxrothschild.com/coronavirus-resources to stay up to date on the ever-changing COVID-19 legal and regulatory developments.

