

COVID-19: A Federal Contractor's Guide: Some Quick Points for Surviving and Thriving in an Unprecedented Environment

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The spread of the COVID-19 virus and the unprecedented steps taken by federal, state and local authorities to contain it by shutting down or significantly altering normal business operations pose great challenges to government contractors in meeting the needs of their universal customer, the U.S. government.

Work spaces are closed. Supply chains are disrupted. Key employees may no longer be available to oversee critical operations—both on and off U.S. government installations.

Here are some proactive measures that contractors can take now to avoid loss and to maximize the potential of obtaining new business opportunities created by the expected exponential increase in government spending:

1. Prime contractors must understand that standard clauses under the Federal Acquisition Regulation (FAR) will permit adjustments to delivery schedules if performance is disrupted due to causes beyond the contractor's control. These "force majeure"-type clauses can be found in FAR 52.249-14 for both cost reimbursement and time and materials contracts, FAR 52.249-8 for fixed-price contracts and FAR 52.212-4 for commercial item contracts.

The relief offered by these clauses is afforded due to disruptions at both the prime and the subcontract levels. These clauses provide examples for cases warranting relief, including "epidemics" and "quarantine restrictions."

The public health emergency declared by federal, state and local authorities caused by the COVID-19 virus falls within these definitions and should provide contractors with critical protections to the extent that contract performance is delayed.

2. Subcontractors should carefully review subcontracts to confirm that they contain identical or similar clauses (whether in the body of the terms and conditions or incorporated by reference).
3. While force majeure-type clauses excuse performance, they do not—per force—entitle a contractor to additional compensation or damages. Such relief may only come with the issuance of a stop-work order, which, under FAR 52.242-15, opens up the door for additional compensation. Absent such an order, contractors facing delays and disruptions related to the COVID-19 virus, and incurring additional costs as a result, should consult with counsel on whether an equitable adjustment to the price or cost ceiling is warranted because of a "constructive change" to the contract.

The extent to which relief is obtainable will depend on proper documentation and tying the delays to some kind of government action (e.g., imposing restrictions on work or free access to supplies or materials).

4. With the president's invocation of the Defense Production Act and, under it, the constituent powers of the Federal Priorities and Allocations System (FPAS), agencies such as the Department of Defense (DOD), the Department of Health and Human Services and the Department of Homeland Security have the ability to issue "rated orders," which compel businesses to accept such orders and place them ahead of all commercial orders.

Contractors need to be fully informed as to the conditions under which federal agencies may exercise these powers and under which circumstances such orders may be resisted.

5. Know that contracting officers, in consultation with program managers and other technical personnel, have the authority and flexibility to make adjustments to contract performance requirements and key personnel requirements. This is by a directive of DOD's Kim Herrington, acting principal director, defense pricing and contracting. DOD has told contracting officers to encourage contractors to engage with employees about COVID-19 virus concerns and identify "impacts to the welfare and safety of their workforce or contract performance."

Contractors should, therefore, follow suit, consult with subcontractors and be transparent with contracting officers assigned to respective contracts regarding the need for flexibility in contract performance.

6. Telework is now a reality for most employees of federal contractors. FAR 7.108 provides that agencies shall neither discourage a contractor from allowing employees to telecommute nor unfavorably evaluate an offer because it includes telecommuting. The Office of Management and Budget has now issued guidance asking federal agencies to offer "maximum telework flexibilities" for employees.

Although the guidance does not address the contracting community, department heads within military agencies, such as the Chief of the Contracting Office Contracting Officer Naval Undersea Warfare Center, are advising contractors by email today as follows:

"Given the national emergency surrounding the ever-evolving COVID-19 response, in the interest of speed and eliminating the need for thousands of contract modifications: any specifications limiting the ability to telework contained in all NAVSEA and Navy Seaport contracts are suspended until notified otherwise. Contract workers are instructed to abide by their official company policies for telework and utilizing alternate locations to perform the Government work called for under the contract."

Should an employer meet any resistance by a contracting officer, point to both the policy embodied in the FAR and these instructions coming out of the Navy.

7. Keep track of additional costs associated with combating the COVID-19 virus and responding to federal, state and local mandates such as IT expenditures for telework, protective equipment, hazard pay, additional time off and repatriation. Work with counsel on defending the allowability of such expenditures whether as direct, or more likely indirect, costs. For pending solicitations, pose questions to the contracting agency with regard to the allowability of such costs and the agency's understanding that prices proposed by offerors will be higher.

8. If a local or state mandate shuts down your business, and your business is providing what could be characterized as "essential services" or products, components or materials necessary for "essential functions" to support the U.S. government, consult with counsel in adopting a strategy for getting appropriate support to maintain business operations.

9. If your only source of supply is now on foreign soil because of COVID-19 virus-related closures or delays in the domestic supply chain, explore with counsel the option of getting waivers from domestic preference statutes and clauses such as the Trade Agreements Act, the Berry Amendment and the DFARS "Specialty Metals" clause.

10. Take advantage of and encourage agencies to use streamlined acquisition processes such as Commercial Solutions Openings (CSOs) permitted under both the Other Transaction Authority statutes and regulations and under the GSA Pilot Program authorized by the 2017 National Defense Authorization Act. Pursuant to the CSO process, contracts can be awarded in less than 30 to 60 days.

11. Use any downtime wisely to (a) get ahead of solicitations by conducting a thorough analysis of the likelihood