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FEATURE COMMENT: Just What The Doctor Ordered—Remedies For Federal Contractors During The COVID-19 Pandemic And Beyond

> Somewhere in the world, the wrong pig met up with the wrong bat.
> Kate Winslet, as Dr. Erin Mears—*Contagion*

A World in Disarray—It is hard to overstate the impact of the COVID-19 pandemic. As we write this article, there are nearly three million documented cases of the virus worldwide, and more than 207,000 people have tragically lost their lives to this disease. In the U.S. alone, there are nearly a million confirmed cases, and in excess of 55,000 people have succumbed to the illness. In the months after the first outbreak of the novel coronavirus surfaced in Wuhan, China in December 2019 and began spreading around the world almost immediately, the devastating impact of the illness became quickly apparent. On March 11, 2020, the World Health Organization (WHO) declared COVID-19 a pandemic—the first such pandemic caused by a coronavirus. On March 13, 2020, President Trump declared the COVID-19 outbreak to be a national emergency. In the weeks following those declarations, nearly all of us have experienced seismic disruptions to multiple facets of our lives.

Virtually every business on the planet has been forced to confront a myriad of rules and regulations that govern "the new normal." Government contractors—often the vessels of critical Government services and functions—are no exception. In particular, as if in a series of clinical trials, the Federal Government has methodically taken numerous steps vis-à-vis the passage of new legislation and the rapid issuance of voluminous guidance as a preventative attempt to alleviate some of the hardships contractors are and will be facing, while also outlining a treatment plan to address continued business operations during this period of uncertainty. This article is intended as a holistic prescription to ensure that federal contractors sustain and regain their strength as they navigate the Government's legislative and regulatory responses to COVID-19 while avoiding pitfalls that could plague business operations.

Stat: The Government's Emergency Responses—In the days following the president's national emergency declaration, a maze of new rules and guidance began to rain down upon federal contractors. Some of the Government's key responses include:

- The Department of Homeland Security Guidance on Critical Infrastructure Workforce—issued on March 19, 2020;
- Office of Management and Budget Memorandum No. M-20-18, "Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)"—issued on March 20, 2020;
- The Coronavirus Aid, Relief, and Economic Security (CARES) Act—signed into law on March 27, 2020;
- An Office of the Under Secretary of Defense for Acquisition and Sustainment (OUSD A&S) Memorandum focused on management of the "Impacts of the Novel Coronavirus"—issued on March 30, 2020;
- A commercial item determination (CID) promulgated by the Defense Contract Management Agency Commercial Item Group (DCMA CIG) identifying as commercial items specific products and services needed by Department of Defense to address the COVID-19 pandemic—issued to DOD procurement authorities on March 31, 2020;
- A class determination and findings (CD&F) from the General Services Administration

directing that certain supplies to combat the COVID-19 may be acquired without regard to the domestic preference restrictions imposed by the Trade Agreements Act (TAA) and the Buy American Act (BAA) clauses included in the GSA Schedule and GSA individual procurements—issued on April 3, 2020.

The Government has moved with atypical alacrity to promulgate these legislative and regulatory initiatives, which have the potential to be of great use to contractors that know how to navigate the nuances. But, much like medicine, the devil is very much in the details and complications can quickly arise for the unsuspecting or unaware. Below, we provide a distillation of each of these responses while highlighting the critical compliance requirements contractors should follow to minimize risk—and to maximize revenue—in the new environment in which we now find ourselves. Beneath each regulatory/statutory summary, we have embedded key, practical steps that contractors should consider taking in response to each of these Government actions.

DHS Guidance on Critical Infrastructure Workforce—On March 19, 2020, DHS Cybersecurity and Infrastructure Security Agency (CISA) issued guidance pertaining to "critical infrastructure sectors … whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction" would have a devastating effect on security, national economic security, and/or national public health or safety. These 16 sectors are Chemical; Dams; Financial Services; Information Technology; Commercial Facilities; Defense Industrial Base; Food and Agriculture; Nuclear Reactors, Materials and Waste; Communications; Emergency Services; Government Facilities; Transportation Systems; Critical Manufacturing; Energy; Healthcare and Public Health; and Water and Wastewater Systems.

The CISA guidance is intended to help state and local jurisdictions identify and manage the nation's "essential workforce" in the face of COVID-19. This guidance has been updated twice (with the most recent version issued on April 17, 2020) and contains an "advisory list," which details specific members of the critical infrastructure workforce by discrete category. Although the guidance is neither a federal directive nor standard, states in all regions of the country—including California, Maine, Maryland, Michigan, etc.—have adopted and/or modified it as part of statewide executive orders closing "non-essential" businesses.

R Contractor Prescription: Contractors should be actively and continuously assessing operations to determine whether they qualify as "essential" businesses that may continue to operate during this time under state, federal and local laws. We suggest taking the following actions:

Assess the breadth of any operating restrictions in each of the state and local jurisdictions in which your company has a presence. While the CISA guidance provides a helpful starting point, jurisdictions have interpreted and implemented the guidelines in different ways.

Remember that the Government is focused on maintaining services that enable continued economic and social vitality. If you believe that your business should stay open in the face of closures, you should be able to explain how your operations service the critical infrastructure.

If your business is an essential business, consider providing letters to each active employee in which (a) the employee is designated as a critical infrastructure worker and (b) the basis for the designation is explained. These letters may be useful if your employees are questioned by any authority enforcing "stay-at-home" orders.

If you are not a critical infrastructure business, carefully review the rules in place in the jurisdiction(s) in which you operate. Most jurisdictions allow even non-critical businesses to continue essential operations to keep the business functioning during this time.

OMB Memorandum No. M-20-18—On March 20, 2020, OMB issued Memo No. M-20-18, titled "Managing Federal Contract Performance Issues Associated With The Novel Coronavirus (COVID-19)." The memo, directed to the executive departments and associated federal agencies, provides key guidance on maintaining continued contract performance while respecting the need to protect the safety of the contracting community. The critical aspects of the memo are as follows:

- Consistent with Federal Acquisition Regulation 7.108, agencies are "strongly encouraged" to work with contractors to evaluate and maximize telework for contractor employees whenever possible. To the extent existing contracts do not provide for telework, the memo explicitly instructs agencies to contemplate

modifying the contract to provide for such circumstances. In the event that a contract requires the physical presence of a contractor (e.g., because the work is performed at a Government facility), agencies are directed to "consider being flexible on delivery schedule contract completion dates."

- Agencies should be flexible in providing extensions to performance obligations if a contractor is unable to perform due to interruptions related to COVID-19. In the FAQs attached to the memo, OMB specifically cited excusable delays clauses codified at FAR 52.249-14, 52.212-4(f), and 52.211-13 as examples of regulations that allow such performance extensions. The FAQs note that if performance is not feasible—even with extensions—contracting officers "should discuss the situation with the contractor to determine if other options are available" and should consider a termination for convenience and re-procurement with no negative past performance repercussions to the contractor unable to perform.
- Agencies are encouraged to use special emergency procurement authorities now available as a result of the president's emergency declaration under § 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 USCA §§ 5121–5207. Consistent with the president's declaration, agencies are now vested with the authority identified in FAR 18.202, "Defense or recovery from certain events." Examples of this authority include substantial increases to (i) the micro-purchase threshold (increased from $10,000 to $20,000 for domestic purchases and to $30,000 for purchases outside the U.S.), (ii) the simplified acquisition threshold (increased from $250,000 to $750,000 for domestic purchases and to $1.5 million for purchases outside the U.S.), and (iii) the threshold for using simplified procedures for certain commercial items (increased to a ceiling of $13 million).
- The memo contemplates that contractors may file requests for equitable adjustments (REAs) to receive compensation for increased costs associated with measures taken to protect employees and fight the spread of COVID-19. It directs agencies to consider each REA on a case-by-case basis, "taking into account, among other factors, whether the requested costs would be allowable and reasonable to protect the health and safety of contract employees as part of the performance of the contract." Consistent with FAR 31.201-3, the FAQs state that the reasonableness of such costs will be measured by whether the contractor acted as a "prudent" business, took actions consistent with the Centers for Disease Control (CDC) guidelines, and discussed the actions with the CO or CO technical representative.
- The memo also instructs agencies to consider whether current contracts that address capabilities relating to impending requirements (such as security or logistics) can be "retooled for pandemic response consistent with the scope of the contract." In particular, the memo points out that agencies "may make changes" to the contract as permitted by, for example, FAR 52.243-1 through -3 or 52.212-4(c). To the extent necessary, agencies are also reminded of their power to suspend work pursuant to FAR 52.242-14 or to stop work altogether in accordance with FAR 52.242-15.
- The memo provides that agencies should "practice appropriate social distancing" with contractors and should consider engaging in "virtual activities" regarding acquisitions, including "online industry conferences" and "video proposals."
- If a contractor's active registration in the System for Award Management is set to expire before May 17, 2020, the contractor will be afforded a 60-day extension to re-register.

R Contractor Prescription: In light of the guidance outlined above, here are some critical next steps that contractors can and should take:

- Ensure that the actions taken in response to the pandemic follow the guidelines and guidance provided by the CDC, OMB, your cognizant federal agency and the states/communities where your employees work.
- Remind all employees of the importance of social distancing and utilize technology to facilitate telecommuting where possible. Immediately document any Government reticence to these efforts.
- To the extent that telecommuting is not presently permitted under your operative contract(s), coordinate with your CO—*in writ-*

ing—regarding any requests to telecommute. Document all related correspondence. With the Government's focus on crisis purchases, know that there will be ample "receipt checking" after the dust settles. Do not let a dispersed workforce and an eager customer displace necessary compliance and supply chain obligations.

- Be prepared to have your contract terminated for convenience—not because it will definitely happen—but because it puts contractors in the right mindset to collect, segregate and track all appropriate costs and impacts including (a) allowable costs incurred in the performance of the work, (b) a reasonable profit for work performed, (c) reasonable settlement expenses, and (d) certain post-termination costs. See, e.g., FAR 52.249-2, FAR 52.212-4(l).

The CARES Act and Related DOD Response—On March 27, 2020, the president signed the CARES Act into law (P.L. 116-136). The CARES Act is designed to provide economic assistance to individuals, families, and small businesses and otherwise preserve jobs endangered by the pandemic's impact on the economy. In addition to economic impact relief payments to individuals and loans to small businesses, the CARES Act contains several measures designed to lessen the burden of the various shutdowns and slowdowns caused by the public health emergency on businesses of all sizes, including employee retention credits, payroll tax deferrals and payroll support.

Of particular interest to Government contractors is § 3610 of the CARES Act, which gives agencies the authority to modify contracts or other agreements "without consideration, to reimburse at the minimum applicable contract billing rates not to exceed an average of 40 hours per week any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel." While at first blush this provision seems a promising way for contractors to recover some of the additional costs associated with managing contracts during the pandemic, it is important to remember the limitations built into the law—i.e., (1) this is not a permanent change, and the authority to grant relief expires Sept. 30, 2020; (2) the provisions only apply to contractors whose employees (or subcontractors) "cannot perform work on a site that has been approved by the Federal Government, 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; (3) reimbursement is not mandatory; and (4) the funds are subject to the availability of appropriations.

Shortly after the enactment of the CARES Act, DOD issued a class deviation authorizing COs to use a new cost principle—Defense FAR Supplement 231.205-79, CARES Act Section 3610 Implementation—to permit the reimbursement of certain leave-related costs incurred by contractors in accordance with § 3610 of the CARES Act. Issued on April 8, 2020, and applicable to FAR-based contracts as well as other procurement vehicles (including other transaction authority agreements), the class deviation is premised on DOD's position that while § 3610 "is permissive, not mandatory," it is important to ensure that DOD and its contractors "remain a healthy, resilient, and responsive total force." With that duty in mind, COs are vested with wide latitude and broad discretion to ensure the ongoing balance between the expenditure of federal dollars and maintenance of contractor resiliency. Accordingly, the cost principle does not apply to *every* contractor, but only to those whom the cognizant CO establishes—in writing—are:

- "Affected" contractors;
- With employees or subcontractors who cannot perform work on a Government-owned, Government-leased, contractor-owned, or contractor-leased facility or at any other place of performance specifically identified in the contract for performance, due to closures or other restrictions (including federal, state and local orders having the effect of law); *and*
- With employees who are "unable to telework because their job duties cannot be performed remotely during the public health emergency declared on Jan. 31, 2020, for Coronavirus (COVID–19)."

The proper segregation and identification of the specific cost impacts created by COVID-19 are essential to aid the Government's determination regarding "compliance with all terms" of § 3610 in a manner that provides DOD with "a sufficient audit trail." To this end, DOD has acknowledged that costs can properly be charged as either indirect *or* direct costs and has specifically stated that the issue should be "discussed and resolved" on a contract-by-contract

basis. Perhaps in an effort to frame these forthcoming discussions, DOD has recognized the propriety of charging the leave costs to a newly created "Other Direct Costs (ODC) COVID-19" cost pool, while also stating that it "may be more appropriate to charge these costs through indirect pools" in other situations. In sum, the diagnosis here is uncertain. What is clear, however, is that a contractor's ability to recover § 3610 costs will be highly contract-specific and will require careful recordkeeping and clear communication with the cognizant CO.

Additional clarification on the application of the new cost principle has been ongoing since April 9, 2020. Through the publication of a "living" FAQ document, contractors are being provided answers to critical questions. While information provided in the FAQ does not clarify the Government's position on every conceivable issue associated with the implementation of § 3610, it does provide a hearty treatment plan that contractors seeking reimbursement should follow as part of their pandemic response prescription.

℞ Contractor Prescription:

- A company seeking to establish "affected contractor" status should describe (1) the actions taken to continue performance, (2) the circumstances necessitating employee leave, (3) an explanation as to why telework or remote work was not feasible for the affected employees, and (4) how the leave served to keep employees in a ready state. In addition, contractors that are considered part of the essential critical infrastructure workforce (as discussed in OMB memo no. M-20-18) and/or those that have been directed to implement the Continuation of Essential Services Plan in affected contracts must also "demonstrate that all reasonable efforts were made to continue contract performance." Companies should also implement procedures to create and retain "appropriate documentation" in support of all claimed costs. The guidance makes clear that this documentation should detail the identification of the employees that were provided paid leave for which the contractor is seeking reimbursement, the contract(s) under which the employees are performing, and the amount and dates of the paid leave provided.
- Be prepared to state, with respect to each affected contract, that work on a site approved by the Federal Government could not be performed due to closures or other restrictions resulting from the COVID-19 pandemic. In addition, the documentation should reflect that each affected employee who was unable to telework received paid leave for a period beginning no earlier than Jan. 31, 2020, and ending no later than Sept. 30, 2020. Importantly, the paid leave must also be calculated at rates that the contractor would have paid the employees to whom it is providing paid leave but for the COVID-19 pandemic.
- Ensure that employees are fully informed as to the availability of reimbursable paid leave. Note that § 3610 does not require that employees deplete their own leave balances before contractors may seek reimbursement for the costs of paid leave provided to keep employees in a ready state.
- Verify that the claimed costs have not been reimbursed previously via any other source and identify any other applicable credits that may reduce entitlement to reimbursement. For example, to the extent that Paycheck Protection Program (PPP) credits are allocable to costs allowed under a contract, the Government should receive a credit or a reduction in billing for any PPP loans or loan payments that are forgiven. Any reimbursements, tax credits, etc. from whatever source that contractors receive for any COVID-19 paid leave costs should be treated in a similar manner and disclosed to the Government.
- Proactively engage with your CO to determine the appropriate contractual mechanism for receiving reimbursement. With respect to cost-type contracts, the confirmation of "affected contractor" status will take place when the CO transmits their written determination required pursuant to DFARS 231.205-79(a)(1)(i), as outlined in the class deviation. In the context of a fixed-price contract or where recovery will take place under a fixed-price line item, a formal contract modification will be required and the execution of such a modification will necessarily entail the "affected contractor" determination. Remember that no billings for § 3610 costs can be made before such a modification is executed.
- Consider creating a new cost category for these paid leave costs (e.g., Other Direct Costs

(ODC) COVID-19). Work closely with your CO to determine whether these costs should be allocated to specific contracts, or whether it is more appropriate to charge these costs through indirect cost pools (overhead, G&A, etc.).

- Confirm your understanding and application of the cost principle with that of your acquiring agency. Some agencies within DOD may restrict the dates within which COVID-19-related costs can be attributed. In light of the flexibility granted to COs and agencies in responding to this crisis, do not assume that each procuring entity shares your interpretation.
- Carefully track other "COVID-19 related costs" incurred during the pandemic. Although items such as personal protective equipment purchased for employee use are not specifically reimbursable under section 3610, these costs may be allowable in accordance with existing cost principles and your cost accounting system.

The March 30, 2020 DOD Memorandum—On March 30, 2020, the OUSD A&S released a fairly unique and welcomed memo focusing on management of the "Impacts of the Novel Coronavirus." The memo bluntly acknowledges that (1) "[t]he effects of COVID-19 will affect the cost, schedule, and performance of many DoD contracts," (2) DOD and its contractors are experiencing impacts "borne across the total force," (3) "[m]any contractors that ordinarily work side-by-side with the DoD workforce may be unable to access their work site," and (4) "most contractors are coping with employees who are unavailable for work due to quarantine and state and local requests to restrict movement of their personnel." In response to these concerns, the memo directs DOD components to consider the following "regulatory tools" that can be utilized to "take action" in recognition of these impacts:

- Excusable Delays Clauses, e.g., FAR 52.249-14 and FAR 52.212-4(f), which provide that a contractor is not in default due to any failure to perform arising from causes beyond the control and without the fault or negligence of the contractor. These clauses function to shield the contractor from liability for performance delays caused by epidemics, quarantine restrictions and acts of the Government. As the memo makes clear: "[i]n the event of such a delay, the contractor is entitled to an equitable adjustment of the contract schedule."
- Termination Clauses, e.g., FAR 52.249-8, which insulate the contractor from liability for excess costs due to performance failures arising from circumstances that cause excusable delay (including epidemics, quarantine restrictions, and acts of the Government).
- Changes Clauses, e.g., FAR 52.243-1 and FAR 52.243-2, which recognize that a contractor "shall" be entitled to relief where the Government directs changes to contract terms. The memo notes that such changes "may include recognition of COVID-19 impacts on performance" and specifically recognizes that the contractor "may also be entitled to an equitable adjustment to the contract price" as a result of such changes.

All told, the ability of a contractor to recover costs and/or to receive schedule relief hinges on the extent to which the contractor can demonstrate entitlement to such relief.

R Contractor Prescription: We recommend that contractors confronting the impacts of COVID-19 take the following steps:

- Carefully review all existing impacted contracts to ascertain the operative clauses providing potential relief.
- Meticulously document and maintain written records of all bases for any performance delays.
- Track all excess costs incurred as a result of contract changes directed by the Government.
- Prepare and timely submit requests for equitable adjustments where appropriate.
- Engage with COs on any necessary contract modification(s) to secure reimbursement for paid leave provided to employees (see discussion of CARES Act).

Commerciality Opportunities—*DOD's Commercial Item Determination:* On March 31, 2020, the OUSD A&S issued a memorandum attaching a class CID promulgated by the DCMA CIG identifying as commercial items specific products and services needed by DOD to address the COVID-19 pandemic. This memo is specifically intended to "allow contracting officers maximum flexibility" in awarding critical contracts for supplies and services needed for DOD to combat the COVID-19 pandemic. The memo is expected to facilitate the award of "urgent

commercial item procurements," and the class CID is specifically "limited to the information pertaining to the 2020 COVID-19 pandemic."

The list of supplies and services in the CID includes those pertaining to the following:

- Research and development and/or procurement of Food and Drug Administration-approved COVID-19 vaccination(s) or anti-viral medications (e.g., vaccine treatments);
- Efforts associated with establishing and setting up temporary booths, testing stations, or hospitals for possible COVID-19 surges (other than real property);
- Emergency medical supplies (e.g., ventilators, masks, gloves, disinfectants, thermometers, beds, blankets) and services for COVID-19 relief efforts; and
- Services related to orderly shutdowns, and associated equipment and building maintenance (e.g., cleaning and disinfecting services).

The memo makes clear that the items included in the CID meet the requirements of the commercial item definition in FAR 2.101 and "are determined commercial items." Accordingly, acquisition of these goods and services may be subject to expedited simplified acquisition procedures permitted by FAR pt. 13 (permitting purchases up to $13 million in value for commercial items, per previous guidance in OMB memo M-20-18) and emergency acquisitions under FAR pt. 18. Moreover, as commercial items, the procurements are subject to more streamlined and favorable terms and conditions codified in FAR pt. 12.

Notably, the DCMA CIG did not relax the requirements for determining commerciality—meaning that, in theory, these crucial supplies and services could retain the "commercial item" designation once the pandemic wanes. While the determination explicitly does not apply to products or services being procured for non-COVID-19 activities, it does apply to "future procurement(s) of the same supplies and/or services that were previously procured using this CID."

GSA's Class Determination and Findings: In a CD&F published April 3, 2020, GSA directed that some COVID-19 battling supplies may be acquired without regard to the domestic preference restrictions imposed by the TAA and the BAA clauses included in the GSA Schedule and GSA individual procurements. Premised on concerns over scarcity, quantity and quality, the CD&F applies to purchases at any dollar value, is effective through July 1, 2020, and extends only to the following general products (identified by their Federal Supply Classes (FSCs)):

- N95 masks—FSC 4240
- Sodium hypochlorite (bleach)—FSC 6810
- Disinfectants including cleaners, sprays and wipes—FSC 6840
- Cleaners including sanitizing surface and floor cleaners—FSC 7930
- Hand sanitizers, soaps and dispensers—FSC 8520

Pursuant to this deviation, these particular types of products may be manufactured in any country, including China, except those listed in FAR subpt. 25.7 as prohibited sources (i.e., Cuba, Iran, Sudan, Burma and North Korea). Moreover, the CD&F can apply to rated orders related to these products.

℞ Contractor Prescription: Contractors that have the capacity to provide these commercial items to the Government should be mindful of the following:

- Take necessary steps to ensure that—as much as possible—the products and services fit the definition of "commercial item" set forth in FAR in 2.101 for non-COVID-19 sales and future sales once the pandemic recedes.
- If offering the services and/or products listed in the CID in response to COVID-19, ensure that the basic terms and conditions offered to the Government mirror those provided to the general public.
- If products and/or services, whether in development or already available for offering, do not appear on the CID but are related to COVID-19 emergency requirements, proactively engage with the DCMA CIG so that the proper products and/or services can be added in the future.
- For GSA, remember that COs are encouraged to employ modifications to reflect the CD&F and its limited timeframe of applicability.
- If planning to provide non-TAA compliant products to GSA buyers, remember to carefully follow GSA's instructions for adding those products to schedule contracts and to submit any proposed modification request via the eMod system. Also, ensure that non-TAA compliant products are clearly identified and kept separate from the TAA-compliant supply chain, and be prepared to remove non-TAA compliant products from the contract immediately upon Government cancellation of the CD&F.

- Ensure that your federal sales team understands the CD&F and that all sales and related discussions with the Government are carefully documented.

The Consequences of Noncompliance: Protecting Contractors from the Secondary Effects of Pandemic Response—While there are many opportunities for contractors to survive (and thrive) during the pandemic, it is critical to remember that all of the regular compliance rules—and those imposed by these opportunities—still apply. Indeed, the Government Accountability Office has been given specific oversight authority under the CARES Act. As part of that function, GAO has the ability to perform comprehensive audits of charges made to Government contracts pursuant to the CARES Act, and has the right to access contractor records, interview contractor employees, and to inspect contractor facilities.

Accordingly, on April 10, 2020, GAO announced an initiative to uncover fraud associated with the billions of dollars in payments promised by the CARES Act. The congressional watchdog is encouraging individuals—private citizens, Government workers, contractors, etc.—to report any allegations of fraud, waste, abuse and mismanagement through FraudNet (GAO's fraud-reporting website), via e-mail, or by calling GAO's automated phone answering system. GAO, of course, is seeking as much detail as possible about any allegations so the reports can be handed off to its own investigative unit, to appropriate inspector general offices, or to the ultimate enforcer—the Department of Justice.

The threat of a False Claims Act accusation or lawsuit is, of course, the ever-present specter associated with the receipt of any federal dollar expended in connection with a Government contract. This means that a contractor receiving CARES Act funds is at risk if it submits a single invoice for payment to the Government that is false. In particular, the FCA applies when a company "knowingly" (defined to include reckless conduct) makes or uses false records or makes false statements material to those false or fraudulent claims for payment. Thus, FCA liability can be grounded on allegedly false certifications of eligibility related to CARES Act programs.

As we are reminded daily in the masks that we see, the hands that we wash, and the people we avoid, never has there been a clearer example where an ounce of prevention is worth a pound of cure. Take that to heart in your business. The importance of ensuring compliance when contracting with the Federal Government is as critical now as it has ever been—particularly in light of the trillions of dollars pouring out of federal coffers. Companies must continually keep abreast of all guidance and refuse to let speed replace accuracy in their filings and requests for Government funds. The promise of free and fast money in a time of uncertainty is not a panacea for business. All business opportunities should be approached cautiously, like a clinical trial or experimental treatment, and contractors should be cautious of the potential side effects. GAO guidance has deputized private citizens, competitors, and employees as whistleblowers. While sunlight may sometimes operate as a disinfectant, remember that it also provides the light with which Uncle Sam will be carefully checking receipts. If those receipts do not add up, there could be grave results.

Unfortunately, navigating the Federal Government's pandemic response is not as easy as taking two aspirin and calling the CO in the morning. It will require commitment to understanding the changing environment, a meticulous dedication to compliance, and arduous recordkeeping. Yes, this is a tall order. But we have no doubt that our nation—and the Government contractors who are so vital to its success—will prevail. Although the road to recovery seems far away, we will all travel it together in time (standing at least six feet apart from one another, of course).

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