

COVID-19

WHAT GOVERNMENT CONTRACTORS NEED TO KNOW

AGENDA

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- SMALL BUSINESS CONTRACTING MATTERS
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INDUSTRY IMPACT

- The Defense Department has taken several actions in recent days to mitigate the impact of the COVID-19 pandemic on the defense industrial base.
- Defense Contracting Management Agency (DCMA) leadership is working with the contracting workforce and Defense Finance and Accounting Services (DFAS) – which provides payment services to the Pentagon – to ensure invoices continue to be paid in a timely manner.
- On March 20, Undersecretary of Defense for Acquisition and Sustainment Ellen Lord issued a memo to the defense industrial base saying the Department of Homeland Security had identified it as a critical infrastructure sector.
 - “Companies aligned with the essential critical infrastructure workforce definition are expected to maintain their normal work schedules. If your contract or subcontract supports the development, production, testing, fielding or sustainment of our weapon systems/software systems, or the infrastructure to support those activities, [your efforts] are considered critical infrastructure. If your efforts support manning, training, equipping, deploying, or supporting our military forces, your work is considered critical infrastructure.”

INDUSTRY IMPACT

- President Trump said he was invoking the 1950 Defense Production Act, which gives the president the authority to issue a directive to the private industry to boost the supply of critical materials and items during a war or national emergency
 - March 27, General Motors is ordered to build ventilators under DPA authority.
- Effective March 21: For procurements valued at \$100 million or less, contracting officers are not required to execute a justification and obtain approval for award of a sole source contract under the SBA's 8(a) program. Contracting officers shall use the threshold of \$100 million in lieu of the \$22 million threshold at Federal Acquisition Regulation (FAR) 6.302-5(b)(4), 6.303-1(b), 6.303-2(d), and 19.808-1(a). In lieu of the approval requirements at FAR 6.304(a), the approval authority for justifications of 8(a) sole source awards exceeding \$100 million is the head of the procuring activity. More details: <https://www.acq.osd.mil/dpap/policy/policyvault/USA000495-20-DPC.pdf>
 - Per FAR 19.805-1(b)(2) this only applies to ANC, NHO and Tribally owned Native American firms.

REGULATORY DEVELOPMENTS

FAR 18.202 DEFENSE OR RECOVERY FROM CERTAIN EVENTS

- The President has declared a national emergency concerning the novel coronavirus (COVID-19) under the Stafford Act. As a result of this emergency declaration, the flexibilities identified in FAR 18.202 are available for use in supporting response efforts to COVID-19.
- These flexibilities include increases to the micro-purchase threshold, the simplified acquisition threshold, and the threshold for using simplified procedures for certain commercial items.
 - The micro-purchase threshold is raised from \$10,000 to \$20,000 for domestic purchases and to \$30,000 for purchases outside the U.S.
 - The simplified acquisition threshold is raised from \$250,000 to \$750,000 for domestic purchases and \$1.5 million for purchases outside the U.S.
 - Agencies may use simplified acquisition procedures up to \$13 million for purchases of commercial item buys.
- The availability of the flexibility does not mean it must be used, but agencies should feel fully empowered to use the acquisition flexibilities, as needed.

CLASS DEVIATION – PROGRESS PAYMENT RATES

- DARS Tracking Number: 2020-O0010, dated March 20, 2020.
- Effective immediately, in response to the COVID-19 national emergency, the progress payment rates at Defense Federal Acquisition Regulation Supplement (DFARS) 232.501-1 are increased:
 - To 90 percent for large business concerns
 - To 95 percent for small business concerns
- Amounts are increased from current level of 80 percent of the Contractor's total costs incurred under this contract whether or not actually paid, plus financing payments to subcontractors.
- The Deviation constitutes a modification to the terms of affected contracts that already exist, therefore the Deviation is effective only upon the DoD CO issuing a contract modification. DCMA "will work on mass modifications to contracts where applicable (vs one by one).

U.S. OFFICE OF MANAGEMENT AND BUDGET (OMB)
MEMO M-20-18

OMB MEMORANDUM NO. M-20-18

On March 20, 2020, the Office of Management and Budget (OMB) issued Memorandum No. M-20-18, titled “Managing Federal Contract Performance Issues Associated With The Novel Coronavirus (COVID-19).” The Memorandum:

- Directed to the heads of all Executive Departments and constituent federal agencies, provides key guidance on maintaining continued contract performance while respecting the need to protect the safety of the contracting community.
- Identifies steps to help ensure this safety while maintaining continued contract performance in support of agency missions, wherever possible and consistent with the precautions issued by the Centers for Disease Control and Prevention (CDC).
- Includes a set of "frequently asked questions" intended to provide additional guidance and further assist the acquisition workforce as it addresses impacts due to COVID-19.

OMB MEMORANDUM NO. M-20-18

If contractor personnel must be quarantined due to exposure to the virus, whether or not related to performance of the contract, and this action results in a slip in the contract schedule, may contracts be extended or otherwise altered?

- Yes. Government contracts provide for excusable delays, which may extend to quarantine restrictions due to exposure to COVID-19.
- OMB cites the Excusable Delays clauses at FAR 52.249-14, 52.212-4(f), and 52.211-13.
- Agencies are encouraged to be as flexible as possible in finding solutions.
- If performance is not feasible – even with extensions – contracting officers “should discuss the situation with the contractor to determine if other options are available.
- If other options with the existing contractor aren't feasible, it may be appropriate to obtain elsewhere if possible.
- Excusable delays that result in adjustments to the contractor's delivery schedule should not negatively impact a contractor's performance ratings.

OMB MEMORANDUM NO. M-20-18

How should agencies address requests for equitable adjustment associated with costs related to safety measures taken by contractors to protect their employees from COVID-19, including costs associated with performance disruptions caused by the government (e.g., closure of an office building) when performance doesn't allow for telework (e.g., work requires access to secure location, or involves building maintenance)?

- 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.
- Agencies should 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.”
- The standard for what is "reasonable," according to FAR § 31.201-3, is what a prudent person would do under the circumstances prevailing at the time the decision was made to incur the cost (e.g., did the contractor take actions consistent with CDC guidance, etc).

CONTRACT CHANGES AND DELAYS

CONTRACT CHANGES AND DELAYS

- FAR permits adjustments to delivery schedules if performance is disrupted due to causes beyond the contractor's control - force majeure type clauses.
- Relief offered by these clauses is afforded due to disruptions at both the prime and the subcontract levels.
- The public health emergency declared by federal, state and local authorities caused by COVID-19 should provide contractors with protections under these clauses to the extent that contract performance is delayed.
- While the force majeure type clauses excuse performance, they do not entitle a contractor to additional compensation or damages.
- Compensation or damages only comes with the issuance of a stop-work order
- Absent such an order, contractors facing delays, disruptions and additional costs related to COVID-19 may wish to pursue an equitable adjustment.
- 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).

CONTRACT CHANGES AND DELAYS

FAR 52.249-14, “Excusable Delays,” includes:

- (a) 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. Default includes failure to make progress in the work so as to endanger performance.
- Note that while the clause specifically lists “epidemics” as an excusable cause of delay, it simply means that a contractor will be given a time extension. It does not provide compensation for the cost of maintaining a workforce, the cost of materials and equipment, overhead expenses, etc. The contractor is not at risk for default, but is at risk for the cost of the resulting delay.

CONTRACT CHANGES AND DELAYS

- Contractors should be aware that the government may direct unilateral changes to an existing contract under the contract's changes clause (FAR 52.243-1, FAR 52.243-2 or FAR 52.243-3) to address the coronavirus pandemic.
- Such changes are typically permissible, provided they are within the general scope of the contract.
- Due to the rapidly changing circumstances of the COVID-19 pandemic, the government may need to informally direct change orders without expressly invoking the contract's changes clause.
 - However, contract changes do require a "written order" from the contracting officer.
 - If this situation arises, contractors should make their best effort to obtain written, express change orders from the CO as soon as reasonably possible.
 - Contractors should be sure to document all communications with the government to capturing any changes directed to support a subsequent request for equitable adjustment.
- Subs should review contract clauses, as those are not a mandatory flowdowns.

CONTRACT CHANGES AND DELAYS

Performance on some contracts may not be feasible during a prolonged stoppage. In those cases, the projects may be suspended under the Suspension of Work clause at FAR 52.242-14. Under that clause:

- Contractors will be entitled to recover their costs (but not profit).
- If the government does not issue a written suspension order, but the contractor believes that the project has been effectively suspended, it is important to provide prompt notice.
 - The Suspension clause states that “A claim under this clause shall not be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act...and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.
- Absent an express suspension, it is likely that the government would take the position that epidemics, although they are excusable delays, are not compensable causes of delay.

SMALL BUSINESS CONTRACTING MATTERS

SBA ECONOMIC INJURY DISASTER LOANS

- Per SBA's guidelines: Up to \$2 million in assistance for a small business to help overcome the temporary loss of revenue due to COVID-19.
- Most all states and territories have declared an emergency due to COVID-19 and are therefore eligible for this assistance.
- These loans may be used to pay fixed debts, payroll, accounts payable and other bills that can't be paid because of COVID-19's impact. The interest rate is 3.75% for small businesses without credit available elsewhere; businesses with credit available elsewhere are not eligible. The interest rate for nonprofits is 2.75%.
- SBA offers loans with long-term repayments in order to keep payments affordable, up to a maximum of 30 years. Terms are determined on a case-by-case basis, based upon each borrower's ability to repay.
- Key downside: Loans must be **personally guaranteed** by every 20% or more equity holder.
- SBA disaster assistance customer service center: 1-800-659-2955 or disastercustomerservice@sba.gov.

CARES ACT: PAYCHECK PROTECTION PROGRAM

- March 27, 2020: Coronavirus Aid, Relief and Economic Security Act of 2020 (CARES Act) signed into law.
- Rather than millions of Americans filing for unemployment just 7 months from the election, the Administration chose to offer direct loans to small businesses, thus enabling them to float payroll and other key operational expenses for several months.
- Who qualifies?
 - Businesses, nonprofit, veterans organization, or tribal business; this includes sole proprietors, independent contractors, and self-employed individuals.
 - In operation by February 15, 2020.
 - Have employees for whom the business paid salaries and payroll taxes (this includes full-time and part-time employees, and those employed on any other basis, such as 1099 independent contractors).
 - Employ fewer than 500 employees (with certain exceptions like food service franchisees) or small by primary SBA NAICS standards.
- Why lobbying matters: PE and VC backed companies are exempt from receiving these loans because the Small Business Investor Alliance (SBIA, the trade association of Small Business Investment Companies) successfully carved themselves out of any “affiliation” limits in the PPP.

CARES ACT: PAYCHECK PROTECTION PROGRAM

- What can you use the loan for?
 - Borrowers will need to certify that funds will be used for an allowable purpose, which include:
 - Payroll costs
 - Payments of interest on any mortgage obligations*
 - Payments of interest on any other debt obligations*
 - Utilities*
 - Rent*

* Must be in force prior to February 15, 2020 to be allowed and eventually forgivable. Funds used for allowable purposes will be eligible for forgiveness once proper documentation of the expenses has been provided to the SBA lender. For allowed debt payments, only the interest portion of payments will be eligible for forgiveness.

- DOCUMENT EVERYTHING.

CARES ACT: PAYCHECK PROTECTION PROGRAM

- Allowable use of Payroll Funds
 - Salaries, wages, commissions, or similar compensation.
 - Payment of cash tips or equivalent.
 - Payment for vacation, parental, family, medical, or sick leave.
 - Allowance for dismissal or separation.
 - Payment required for the provisions of group health care benefits, including insurance premiums.
 - Payment of any retirement benefits.
 - Payment of State or local tax assessed on the compensation of employees.
 - The sum of payments of any compensation to a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than \$100,000 in 1 year, as prorated for the covered period.

CARES ACT: PAYCHECK PROTECTION PROGRAM

- The Calculus
 - Maximum Loan Amount: Lesser of \$10 million, or:
 - For Existing Small Businesses = small business borrower's total average monthly payroll for the previous year, excluding compensation above \$100K/employee, times 2.5, plus the unrealized share of any 7(a) loan already approved under FY20 budget.
(Payroll period/seasonal small businesses: either Feb. 15, 2019, or March 1, 2019 – June 30, 2019, at borrower's election).
Example - \$1m payroll/mo x 2.5 = \$2.5m PPP loan
 - Otherwise Eligible Businesses = small business not in business during the covered period: payroll between Jan.1 -Feb. 29, 2020, times 2.5, plus the unrealized share of any 7(a) loan already approved under federal FY20 budget.

CARES ACT: PAYCHECK PROTECTION PROGRAM

Loan Forgiveness

- Covered Loans - Eligible for loan forgiveness on the PPP loan total provided borrower demonstrates that loan proceeds were used for eligible purposes during the “Covered Period” Feb 15-June 30, 2020.
- Amount forgiven limited to principal amount borrowed.
- If borrower reduces salaries, number of employees, or both during the covered period, then the loan amount available for forgiveness is reduced by the amount of any reduction in number of employees or salary/wages.
 - Loan amount available/forgiveness is reduced by the amount of any reduction in total salary or wages of any employee during the covered period that is in excess of 25 percent of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the covered period.
 - But, if a small business borrower rehires or ends the salary reduction before June 30, 2020, then the small business has eliminated the layoff or salary cuts and its loan amount eligible for forgiveness is not affected.
 - Cancelled indebtedness is not taxable to the borrower as gross income.

BEST PRACTICES & HELPFUL RESOURCES

COST TRACKING

- Keep track of any additional costs associated with COVID-19, including:
 - Responding to federal, state and local mandates such as IT expenditures for telework, protective equipment, hazard pay, additional time off and repatriation.
 - Increased indirect labor costs caused by idle employees.
 - Cost of excess or idle facilities.
 - Cost for consultants or counsel on defending the allowability of such expenditures.
 - For pending solicitations, disclose these additional costs to the contracting agency so the agency understands proposed prices may be higher due to COVID-19.
- Open project numbers as required to capture additional costs.

CONTRACTING RATES

- Many contractors will have impacts to their pricing and billing rates as a result of COVID-19.
- Decreases or increases to labor and material cost bases due to changes in volumes.
- Decreases or increases to indirect poolcost:
 - Increased indirect labor due to idle employees.
 - Personnel shifting between overhead pools: customer site / contractor site / remote work.
 - Idle facilities or capacity.
 - Supply chain delays.
- Contractors should update forward pricing rates and provisional billing rates as appropriate.
- Disclosures should be updated as appropriate to mitigate any exposure to Truthful Cost or Pricing Data (TINA) risk.

DELAYS & DISRUPTIONS

- Evaluate how performance delays and disruptions will impact different segments of your company's workforce: hourly vs. salary, personnel working at government worksites, etc.
- Take reasonable steps to mitigate costs during delays and disruption: shifting available capacity toward contracts with increasing demand, assess facility requirements.
- Make productive use of downtime: shift resources to key indirect projects, spend time of professional development/training activities.
- Evaluate impacts to your suppliers and subcontractors and how it may impact your cost or performance.
- Accelerate cash collections as much as possible to fund ongoing operations.
 - Interest on borrowings is unallowable.

COMMUNICATION WITH CUSTOMERS

- Communicate early and often with your government (and Prime contractor) customers
- Document all decisions, communications, and actions that affect contract performance and costs. Get government direction in writing, including documenting your understanding in emails to your government customers

HELPFUL RESOURCES

- Warren Averett Resource Hub: Coronavirus (COVID-19) Resources
<https://warrenaverett.com/coronavirus>
- U.S. Office of Management and Budget (OMB) Memo M-20-18: “Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)”, Frequently Asked Questions
<https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-18.pdf>
- SBA Disaster Loan Assistance Portal
<https://disasterloan.sba.gov/ela/Information/Index>
- The Office of Personnel Management (OPM) has released several memos that provide operational guidance to agencies during the Covid-19 outbreak
<https://www.opm.gov/policy-data-oversight/covid-19/>
- SBIA COVID-19 Resource Page
<https://www.sbia.org/resources-for-small-businesses-impacted-by-covid-19/>