
COVID-19 UPDATE FOR GOVERNMENT CONTRACTORS: NAVIGATING SHUTDOWN ORDERS

The Coronavirus (“COVID-19”) pandemic is straining the defense industrial base and other federal contractors. Curfews and shelter-in-place orders have slowed or halted production on several programs, including Italian and Japanese facilities for final assembly of the F-35 joint strike fighter. California, Connecticut, Louisiana, Illinois, New Jersey, New York, Ohio, Pennsylvania, Puerto Rico, and numerous counties and cities, have issued orders restricting business activity at varying levels (“Local Orders”).

The DoD has initiated daily communications with industry in an effort to address the new normal. Secretary of Defense for Acquisition and Sustainment Ellen Lord conducts daily teleconferences with industry associations to provide updates to industry and also to receive feedback regarding Coronavirus impacts.

HOW SHOULD CONTRACTORS RESPOND TO STATE AND LOCAL SHUTDOWN ORDERS?

Absent countervailing federal law, government contractors and their employees are subject to generally applicable state and local laws and regulations. Indeed, many federal contracts expressly require compliance with state and local law. (FAR 52.212-4 (Commercial Item contracts)). But, in some instances, there is a tension between state and local directives and those issued by the DoD.

The DoD has directed its contractors to continue performance during the Coronavirus epidemic, despite Local Orders. The Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency’s March 19, 2020 “Critical Infrastructure” guidance (the “CISA Guidance”) designated the Defense Industrial Base as Critical Infrastructure. The DoD adopted the CISA Guidance by memorandum issued on March 20, 2020 (the “DoD Memorandum”). It covers, without exclusion, “aerospace; mechanical and software engineers; manufacturing/production workers; IT support; security staff; security personnel; intelligence support; aircraft and weapon systems mechanics and maintainers; suppliers of medical supplies and pharmaceuticals; and critical transportation. These include personnel working for companies, and their subcontractors, who perform under contract to the Department of Defense providing materials and services to the Department of Defense and government-owned/contractor-operated and government-owned/government-operated facilities.” The DoD Memorandum excludes services such as “providing office supplies, recreational support, or lawn care.”

The DoD Memorandum recognizes a “special responsibility” of those working in Critical Infrastructure to “[m]aintain [] normal work schedule[s].” But, unfortunately, neither the CISA Guidance nor the DoD Memorandum has the force of law. CISA acknowledges that its guidance “is advisory in nature” and “is not, nor should it be considered to be, a federal directive or standard in and of itself.” While some state and local jurisdictions, including California, have adopted the CISA Guidance, the scope of other Local Orders constrains the activities of some contractors. Consequently, contractors do not uniformly enjoy automatic immunity from Local Orders.

To the greatest extent possible, contractors should implement policies and procedures that permit continued performance. For example, subject to contracting officer approval, contractors may implement remote-work policies.

Agencies “shall generally not discourage a contractor from allowing its employees to telecommute in the performance of Government contracts.” (FAR 7.108.) Certain agencies, including the GSA, have recommended that contracting officers permit remote and virtual work environments in response to Coronavirus. Additionally, the government may make changes to the contract, including the place of performance, if feasible, through the applicable Changes clause. (FAR 52.243-1 through 52.243-4 or FAR 52.212-4(c).)

Contractors should notify their contracting officers as soon as possible of any circumstances that may affect contract performance, including applicable Local Orders. Contractors should request all contracting officer guidance in writing. When contracting officers require contractors to continue performance, despite a Local Order to the contrary, contractors should request federal assistance in obtaining approval from local authorities. Employees will also need some documentation to allow travel to and from work in locations with substantial travel restrictions. You should immediately consult with your legal counsel if the direction you receive from your contracting officer contradicts directives from state and local authorities.

WHAT ARE CONTRACTORS’ RIGHTS RELATING TO COVID-19-CAUSED PERFORMANCE ISSUES?

Prompt notice is critical to securing your rights. Immediately notify the contracting officer of any performance concerns. You must also document how the pandemic is affecting contract performance and mitigate those effects to the greatest extent possible.

Excusable Delay

Contractors are protected from performance issues beyond their control and not arising from their own fault or negligence. The FAR excuses performance problems caused by “epidemics” and “quarantine restrictions.” (FAR 52.212-4; 52.249-6; 52.249-8 through 52.249-10; and 52-249-14.) These clauses allow extensions and prevent terminations for default.

Prompt notice to the contracting officer is necessary to take advantage of these protections. Your notice must specify anticipated performance impacts. You must also be able to demonstrate that the impacts were caused by the epidemic. To do that, you must prove that you (i) would have timely performed absent the epidemic and (ii) took reasonable actions to mitigate the adverse effects. *Asa L. Shipman’s Sons, Ltd.*, GPOBCA, 1995 WL 818781 (Aug. 19, 1995).

Compensation for Increased Costs

To establish entitlement to an equitable adjustment in price, contractors must show liability, causation, and resultant injury. *Wilner Construction Co. v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994). The type of contract also bears heavily on your potential for relief. Cost-type contracts are susceptible to equitable adjustments (where appropriate), but fixed-price contracts impose a higher hurdle. Contractors performing fixed-price contracts bear maximum risk, and cannot recover increased performance costs without proof that government fault or direction caused them. See *Agility Defense & Government Services, Inc. v. United States*, 115 Fed. Cl. 247 (2014). That rule can lead to draconian results.

The Changes clause is frequently at the heart of claims for equitable adjustment. A compensable change in the contracted work requires “(1) that [the contractor have] performed work beyond the contract requirements, and (2) that the additional work was ordered, expressly or impliedly, by the government.” *Bell/Heery v. United States*, 739 F.3d 1324, 1334 (Fed. Cir. 2014). For example, a federal quarantine order that increased the cost of performance might constitute a compensable change to the contract, but a state quarantine order likely would not.

Additionally, if the Coronavirus results in a contracting-officer-directed work stoppage (or an act of the government causes a work stoppage or interruption), contractors may be entitled to recover increased costs under the Suspension of Work clause (FAR 52.242-14) or the Stop-Work Order clause (FAR 52.242-15). In the case of a Stop-Work Order, contractors must assert their right to an equitable adjustment within 30 days of the end of the stoppage. Under the Suspension of Work clause, contractors must notify the contracting officer in writing of how the government’s act (or failure to act) interrupted or stopped work. Costs incurred more than 20 days before the date of the notice may not be recouped. Thus, contractors should submit notice as soon as possible to maximize their possible recovery. Following the

work stoppage or interruption, the contractor must submit a written claim “as soon as practicable” but “not later than the date of final payment under the contract.”

Reasonably prompt, written communication with the contracting officer is key. Several agencies have directed contracting officers to work with contractors regarding Coronavirus issues. It is our expectation that most contracting officers will use sound business judgment to ensure mission success while taking into account the requirements of the contracting community.

Please reach out to a member of [Maynard Cooper's Government Solutions Group](#) if you have any questions or need assistance.

[Maynard Cooper's COVID-19 Coronavirus Task Force](#) is closely monitoring all updates to pending legislation related to the COVID-19 pandemic. We are dedicated to providing client-focused services, and it is the goal of the Task Force to continue this level of service to each and every client as they face challenges about planning for and responding to the threats posed by the virus. If you have any questions, please reach out to your relationship partner or any of the attorneys serving on the [Task Force](#).

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