
WHEN YOUR CONTINGENCY PLAN IS NO LONGER A CONTINGENCY

Department of Defense solicitations require a Mission-Essential Contractor Services Plan when the DoD procures “Essential contractor Service and Mission-essential Functions.” DFARS 252.237-7023. The Plan must address the contractor’s ability to provide mission-essential functions during periods of crisis including, for example, how the contractor will supply the personnel and resources required to maintain continuity of essential functions “for up to 30 days or until normal operations can be resumed.” DFARS 252.237-7023(b)(1).

While most Plans contain considered procedures to address foreseeable but extraordinary circumstances, long-term interruptions to both supply chain and labor are not likely contemplated by even the best Plans. The sustained interruptions brought about by the COVID-19 virus leaves contractors to determine: 1) the scope of their obligations, and 2) how to address essential services that cannot be fully provided despite their best efforts.

CONTRACTOR’S OBLIGATIONS

Most importantly, the contractor must continue to provide those services the government deems mission-essential. Generally, government policy prevents designation that encompasses the entire contracted scope of work.

Once notified of a “crisis” situation, the contractor must implement the approved Plan. To recoup any increased costs of performance, the contractor must “segregate and separately identify all costs incurred in continuing performance of essential services in a crisis situation.” DFARS 252.237-7023(f). The contractor has “ninety (90) days after continued performance has been directed by the Contracting Officer,” or other timeframe if approved separately in writing by the Contracting Officer, to submit a proposal for equitable adjustment for the costs incurred in continued performance under the crisis situation. *Id.* Contractors should identify and segregate increased costs as early as possible, as such costs may be deemed allowable on a retroactive basis, even if not recoupable as a direct result of the crisis.

The contractor is required to use its best efforts to work with the Contracting Officer to provide as many of the essential services as it is able to provide and otherwise “cooperate with the government in the government’s efforts to maintain the continuity of operations.” DFARS 252.237-7023(d)(2).

The contractor must notify the Contracting Officer as soon as practicable if it is unable to perform designated mission-essential services. DFARS 252.237-7023(d)(2). Accordingly, prompt identification of potential performance issues is essential. Contractors should communicate their understanding of mission-essential functions with the Contracting Officer early and often to ensure a shared understanding of the contractor’s obligations.

A contractor can be liable for failing to provide services under the contract “unless nonperformance is caused by an occurrence beyond the reasonable control of the contractor and without its fault or negligence.” FAR 52.212-4. The FAR provides a list of various occurrences which the government will consider outside the control of the contractor, including “epidemics, quarantine restrictions . . . and delays of common carriers.” *Id.* The contractor must notify its Contracting Officer or other designee as soon as possible, in writing, “after the commencement of any excusable delay.” *Id.*

Ultimately, contractors performing “mission-essential functions” should:

1. Identify all “mission-essential” services under the contract;
2. Immediately activate the Plan’s policies and procedures;
3. Communicate with suppliers to identify potential delays and calculate any available alternatives;
4. Direct second-tier subcontractors to activate and work under their Mission-Essential Services Plan;
5. Identify and document any delayed or unavailable services and the reasons for such delays or failures;
6. Give the Contracting Officer written notice of any mission-essential functions that it will not be able to provide or that will be delayed;
7. Separately identify, track, and record all costs incurred in providing mission-essential functions and direct subcontractors to do likewise; and
8. Remain in close communication with their Contracting Officer and continually reassess their ability to provide mission-essential functions. Any revisions to their Plan should be submitted in writing to their Contracting Officer.

The quality of a contractor’s implementation of its Mission-Essential Contractor Services Plan will likely be a consideration in determining whether a delay in performance is excusable. Delays attributable to the contractor’s failure to follow the Plan or negligence in the Plan’s implementation will likely be unexcused. Continuous communication with your Contracting Officer regarding any expected delays and Plan revisions is crucial during this time.

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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