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# Resource Guide for Government Contractors in COVID-19 Outbreak

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## What's the Issue?

As our fight against the COVID-19 pandemic continues to evolve, disruption to business operations is increasing. Over the past weeks, numerous state and municipal government bodies have issued shelter-in-place or stay-home orders, limiting access to workplaces, closing manufacturing facilities, restricting travel, and creating numerous other obstacles to business operations. These restrictions have a profound effect on all industries, including federal contractors.

Below are a few tips to help federal contractors protect their businesses.

## Things to Consider

### 1. Are Performance Delays Excused?

Federal contractors are advised to review the terms of their contract to determine whether it contains *force majeure* bases for delayed performance. For example, several contractual provisions may excuse performance if the federal contractor can demonstrate that: (i) an “epidemic” or “quarantine restriction” caused a failure to perform; and (ii) the failure to perform was beyond the control and without the fault or negligence of the federal contractor. These clauses include, without limitation:

- FAR 52.249-8(c) (fixed-price supply and service contracts);
- FAR 52.249-10(b)(1) (fixed-price construction);
- FAR 52.249-14(a) (cost reimbursement and time-and-material); and
- FAR 52.212-4(f) (commercial items).

It is important to note that these provisions generally contemplate a federal contractor receiving a time extension, not compensation.

### 2. Can I Recover Additional Costs?

Federal contractors may be able to seek an equitable price adjustment or time extension due to changing contractual performance requirements:

- If the Government changes the manner in which work is to be performed under the contract, either through a formal change order

or a constructive change, federal contractors may be entitled to an equitable price adjustment or time extension under the Changes clause of the contract (*i.e.*, FAR 52.241-1 (fixed price), FAR 52.243-2 (cost reimbursement), FAR 52.243-3 (time-and-material), or FAR 52.243-4 (construction)).

- Similarly, if the Government issues an order under either the Stop Work (FAR 52.242-15) or a Suspension-of-Work (FAR 52.242-14) clauses, federal contractors may recovery costs incurred to comply with such orders, as well as a potential time extension.

Whether a federal contractor is entitled to an equitable price adjustment or time extension must be determined on a case-by-case basis. To prepare for any such request, federal contractors should use great care to document the amount and reasons for any increased costs incurred under the contract due to the Government's direction. It is also important to note that many of these clauses contain contractual notice requirements that must be submitted to the Government before pursuing a relief. Therefore, federal contractors are advised to closely review the terms of their contracts and engage in proactive communications with the contracting officer.

### 3. Does your Contract Require Continuity of Operations?

In some circumstances, the Government may determine that particular goods or services procured through a contract are vital. Specifically, DFARS 252.237-7023(2) (Continuation of Essential Contractor Services) states that “[n]otwithstanding any other clause of this contract, the Contractor shall be responsible to perform those services identified as essential contractor services during crisis situations (as directed by the Contracting Officer).” Generally, the designation of services as essential contractor services will not apply to an entire contract but will apply only to those service function(s) that have been specifically identified as essential contractor services.

### 4. How Does the Defense Production Act Impact my Contract?

The Defense Production Act (“DPA”), 50 U.S.C. §§ 4501 *et seq.* confers authority upon the President to “ensure national defense preparedness” by requiring private companies to prioritize “supplies for national defense needs.” On a related note, many federal contractors are likely aware of the Defense Priorities and Allocation System (“DPAS”) regulations, 15 C.F.R. §§ 700 *et seq.* To mobilize efforts to combat COVID-19, federal contractors may receive “rated orders” under DPAS, which the federal contractor **must** accept unless a basis for rejection exists under 15 C.F.R. § 700.13(b) (mandatory rejection) or § 700.13(c) (optional rejection). To the extent a federal contractor has already “accepted a rated order and subsequently finds that shipment or performance will be delayed, the person must notify the customer immediately, give the reasons for the delay, and advise of a new shipment or performance date.”

### 5. Where Can I Find Government Guidance?

In the last several weeks, various agencies within the Government have

issued guidance to assist federal contractors as they respond to the COVID-19 epidemic. We will try our best to update this list as often as possible:

- OMB: Administrative Relief for Recipients and Applicants of Federal Financial Assistance directly Impacted by the Novel Coronavirus (COVID-19) (March 9, 2020)
- OSHA: Guidance on Preparing Workplaces for COVID-19 (March 10, 2020)
- Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19 (March 18, 2020)
- DHS CISA: Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (March 19, 2020)
- OMB: Managing Federal Contract Performance Issues Associate with Novel Coronavirus (COVID-19) (March 20, 2020)
- DoD: Defense Industrial Base Essential Critical Infrastructure Workforce (March 20, 2020)
- DoD: Class Deviation - Progress Payment Rates (March 20, 2020)

*We encourage you to visit Holland & Hart's Coronavirus Resource Site, a consolidated informational resource offering practical guidelines and proactive solutions to help companies protect their business interests and their workforce. The dynamic Resource Site is regularly refreshed with new topics and updates as the COVID-19 outbreak and the legal and regulatory responses continue to evolve. Sign up to receive updates and for upcoming webinars.*

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