

COVID-19: “NOT MY FAULT!” — POTENTIAL SAFE HARBORS FOR FEDERAL CONTRACTORS WITH SUPPLY CHAINS DISRUPTED BY CORONAVIRUS

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The coronavirus ("COVID-19") has emerged as a widespread and potentially prolonged disruption to the global economy. As international and domestic government agencies strive to curb the spread of COVID-19 through all means necessary, global supply chain disruption and delay will continue to occur. Although federal contractors have already begun to feel the burn, the brunt of the disruptions may be yet to come.

Responses to COVID-19 continue to threaten manufacturing operations, distribution mechanisms, and procurement channels. Responses include travel restrictions, telework directions, and office closures. The possibility of federal contractors missing contractual deadlines due to COVID-19 has quickly materialized into a reality. Despite the plethora of unknowns in connection with COVID-19, one thing is certain: Many contractors and their suppliers will experience disruption and delay.

Federal contractors and their suppliers should be aware of options when faced with this unpleasant reality, which has occurred due to no fault of their own. We are prepared to assist with analyzing the particular facts of your situation and identify options for relief, such as excusable delay.

CONSIDERATIONS FOR PRIME CONTRACTORS

Excusable Delay

Most, but not all, prime contracts contain Federal Acquisition Regulation ("FAR") 52.249-14 (Excusable Delays), which provides that the contractor will not be in default due to failure to perform its contractor obligations if the failure occurred due to "causes beyond the control and without the fault or negligence of the [c]ontractor." Among the causes that qualify as "excusable" 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.[1]

In other words, a contractor will not be in default if the contractor's failure to make progress in its contractual obligations so as to endanger performance is due to any of the enumerated causes.[2] Many delays and disruptions associated with COVID-19 arguably fall within the categories "epidemics," "quarantine restrictions," and perhaps "acts of the Government." Of relevance, the World Health Organization declared COVID-19 a public health emergency on January 31, 2020.

All cost-reimbursement contracts for supplies, services, construction, and research and development must contain FAR 52.249-14.[3] In addition, all time-and-material contracts and labor-hour contracts must contain the "Excusable Delays" provision.[4] Similarly for fixed-price contracts, the FAR carves out excusable delays as a safe harbor from termination for default.[5]

If your contract includes FAR 52.249-14 or a similar excusable delays provision and you either have realized delay or reasonably anticipate such delay, the clause indicates that a contractor may request the contracting officer to "ascertain the facts and the extent of the failure." [6] The contracting officer will then evaluate the cause(s) and extent of the delay and develop a revised delivery schedule.[7] Any revised schedule should take into account the extent of excusable delay.[8] For commercial item contracts, the contractor must provide written notice to the contracting officer as soon as reasonably possible after the inception of excusable delay.[9]

Changes Clause

Due to COVID-19 and its impacts, it is possible that the Government may direct a contractor to perform differently than contemplated in the applicable contract. Depending on the nature of such a directive, it may qualify as a "change" to the contract. Accordingly, contractors should assess their rights under the applicable changes clause (e.g., FAR 52.243-1) and ensure that they preserve their rights for additional costs associated with changed performance, whether direct or constructive, by providing timely notice to the contracting officer.

Agency Supplemental Regulations

As noted earlier, all provisions of the applicable contract should be evaluated for potential application to delays and disruptions caused by COVID-19. Importantly, some contracts may contain agency supplemental regulations that bear relevance to excusable delays. For example, DFARS 252.217-7009(b) (included in U.S. Department of Defense master agreements for the repair and alteration of vessels) provides, in relevant part, that a defense contractor will "not be liable for any excess costs if failure to perform the job order arises from causes beyond the control and without the fault or negligence of the [c]ontractor." Examples of covered causes largely resemble those enumerated in FAR 52.249-14. Contractors should be on the lookout for similar agency supplemental regulations and clauses applicable to or incorporated into their contracts that provide for excusable delay and remove the possibility of termination for default.

Proving Excusable Delay

Excusable delays provisions are not a fail-safe for contractors. First, a contractor claiming excusable delay must demonstrate that the claimed circumstance (in this case, COVID-19) was in fact the cause of performance delay.[10] Moreover, contractors have a duty to mitigate delays by attempting to obtain the required supplies from another source.[11]

CONSIDERATIONS FOR SUBCONTRACTORS AND SUPPLIERS

Subcontractors and suppliers should also conduct a detailed review of their contracts to identify and evaluate their rights in connection with delays and disruptions caused by COVID-19.

In some instances, it may be that the prime contractor or higher-tier subcontractor included FAR 52.249-14 or any associated agency supplemental regulations as a flow-down provision in the subcontract or supplier agreement. Where these clauses have been flowed down, the subcontractor and/or supplier will enjoy the same rights the prime contractor enjoys to be excused from default for nonperformance or delayed performance, provided the subcontractor/supplier preserves its rights and can demonstrate the cause of its delay as discussed above.

Additionally, Government subcontracts often contain a force majeure clause in addition to FAR 52.249-14. A force majeure (i.e., "superior force" or "act of God") clause often functions similarly to an excusable delays provision, immunizing a party for certain liability associated with unforeseeable and unpreventable delays due to events outside of the contractor's or supplier's control. Although a force majeure provision generally applies to circumstances beyond the control of the parties that impacts performance, the covered causes may vary depending on the terms of the provision. Traditional analysis would find that most force majeure clauses could apply to the COVID-19 situation, particularly where "epidemic" is listed as a cause in the clause. However, the particulars of any at-issue force majeure clause should be carefully reviewed and assessed in detail.

OTHER POTENTIAL IMPACTS OF COVID-19

Excusable delay is just one of many issues that could affect federal procurements. For example, there also may be delays in agencies' acquisition timelines, such as a delay in the issuance of a solicitation or an award. Depending on the particular situation, agencies may rely on other acquisition regulations to ameliorate situations, such as FAR 52.242-15, Stop Work Order, which permits the contracting officer to issue a stop work order for up to 90 days and requires the contractor to stop incurring costs to the maximum extent possible. Agency closures or the absence of key agency personnel such as contracting officers could introduce even more delays, and questions may arise regarding which party bears the additional costs of such delays. We will continue to monitor the situation and issue updates as additional issues materialize.

Conclusion

Over the coming weeks, governmental efforts to combat and contain COVID-19 may become more pervasive. K&L Gates continues to monitor the emerging impacts of COVID-19 on contractor and subcontractor performance rights and obligations. Our government contracts, procurement policy, and national security teams stand by to help federal contractors and suppliers identify and evaluate their rights. Contact any of the authors listed on this alert for more information.

Notes:

[1] See FAR 52.249-14(a) (emphasis added); see also FAR 52.212-4(f) for commercial item contracts.

[2] Although the government may not terminate the contractor for default due to the excusable delay, the government does maintain the right to terminate for convenience.

[3] See FAR 49.505.

[4] *See id.*

[5] *See* FAR 52.249-8(c).

[6] FAR 52.249-14(c).

[7] *Id.*

[8] *Id.*

[9] *See* FAR 52.212-4(f).

[10] *See* FAR 52.249-14(c).

[11] *See* FAR 52.249-14(b)(1) ("The Contractor shall not be deemed to be in default unless . . . [t]he subcontracted supplies or services were obtainable from other sources.").

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