

COVID-19 Federal Contractor's Survival Guide

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Like you, we've been thinking a lot about COVID-19 (aka the coronavirus) lately, and the mountain of misinformation that has followed in its wake. While we concede we have stopped shaking people's hands (which likely turned off more than a few folks at the Psychology-Law Society conference Jonathan spoke at last week), we're struggling to figure out what is fact and what is fiction. We regret we can't help you on that front. But we probably can lend a hand in understanding the impact of the current health emergency on your federal contracts.

Accordingly, we offer the following "**Federal Contractor's Survival Guide**" to help you prepare for any potential COVID-19 impact on your federal business (and to give you all something to read while you wait in line for your hand sanitizer, surgical masks, and latex gloves).

Communicate early. If you hold contracts that could be impacted by coronavirus (in terms of performance, schedule, or cost), reach out to your CO sooner rather than later. Among other things, explore mutually acceptable ways to handle issues relating to the virus (e.g., employees at Government facilities unable to report to work, shortages of staff delaying performance, inability to access Government facilities, etc.). If possible, try to come to an agreement with the CO regarding appropriate steps to take, and memorialize that agreement in writing. Doing this will help protect against

a future Government claim, and even could help you pursue a claim of your own should the need arise.

Provide timely notice. Be sure to notify your CO promptly (and memorialize it in writing) if you believe your performance will be impacted by the virus. And make sure your personnel know to bring such situations to your attention as soon as they know. Your contract almost certainly includes an excusable delay clause, which may cover performance delays caused by "epidemics" or "quarantine restrictions." To take advantage of such clauses, however, you will need to provide timely notice to your CO.

Review your contract's delay clauses. The FAR includes a number of different delay clauses, tailored to different contract types (see, for example, FAR 52.249-14). The clauses provide specific procedures for handling delays beyond the control of the contractor. You should review your contracts to see what delay clause(s) you have. If you do encounter delays due to the virus, ensure you're following the applicable procedures.

Document everything. You should document any increased costs or delays attributable to the virus, and more generally, document how the virus impacts your performance. There are cases where a contractor was unable to recover for a delay due to a "flu epidemic" because it did not adequately

document the impact of the delay. See *Appeal of Ace Electronics*, 67-2 BCA P 6456 (ASBCA), for example. It's old (if you consider something created in the 60s old, which, to be clear, Jonathan doesn't), but it's instructive.

Consider trying to recover or offset your increased costs. If you experience increased costs on your ongoing contracts, consider requesting a contract modification to cover those costs. If you are a commercial items contractor selling at fixed prices or rates, consider requesting an Economic Price Adjustment under your contract's EPA clause. The standard EPA clause gives a contracting officer discretion to approve unscheduled increases due to surprising national/international events. (See, e.g., I-FSS-969: "Notwithstanding the two economic price adjustments discussed above, the Government recognizes the potential impact of unforeseeable major changes in market conditions. For those cases where such changes do occur, the contracting officer will review requests to make adjustments, subject to the Government's examination of industry-wide market conditions")

Coordinate with your supply chain now. Consider the implications of production or shipping delays on your ability to comply with delivery requirements. If the virus could delay the availability of parts or components (e.g., from China), consider identifying alternative sources of supply as soon as possible if you have not done so already.

Be prepared for DPAS-rated orders. If you have any rated-orders, ensure you are well positioned in case the Government "pulls rank" and demands to jump to the head of the line for things like masks, gloves, or other items relating to a coronavirus response. You can find more information on DOD's DPAS system [here](#).

Review your sick-leave policy. Many contractors, like many companies, give their employees only limited sick leave. At the same time, having employees attend work because they are out of sick-leave creates significant risk – whether those workers work at a Government site or a company site. Contractors should consider how they plan to handle sick employees who are unwilling to stay home (or employees who need to stay home to care for a loved one). While standing outside the factory door with a thermometer may not be the answer, neither is ignoring the reality of the problem. Contractors will be well served by putting together a working group that involves HR and Legal – and probably

your employment law counsel and privacy counsel – to implement a practical plan of action.

Equip your employees to work remotely. Contractors should consider providing technology that allows employees to work from home (e.g., a laptop with VPN access to your systems) if remote work is permitted under the applicable contract. If the contract does not contemplate remote work – and some federal contracts do not – then consider reaching out to the CO to discuss modifying the contract. In either case, communicate with your employees now. Give them an action plan. A simple reminder to bring their laptop home with them every day (if allowed) could go a long way.



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Consider your cybersecurity obligations if you have personnel working from home. Remember, your federal contracts bring with them a number of cybersecurity rules. For example, your federal contracts may incorporate data security provisions requiring that sensitive information be maintained on secure systems with specific protections. (Our colleagues just published a useful blog on this topic, which you can access [here](#).) Employees should be reminded of these provisions and that transmitting information to or from their home systems may run afoul of these rules.

Consider the potential implications of Section 889 on telework. As most everyone has heard by now, Section 889 of the 2019 NDAA imposes stringent prohibitions on the sale of products to the Government that incorporate certain technology (e.g., Huawei technology), as well as a contractor's use of equipment that incorporate such technology to perform services for the Government. If your employees are direct billers on federal contracts, working at home could bring their home technology (e.g., computers, laptops, routers, etc.) within the scope of Section 889. (We'll

spare you all for now the complications contractors will face in August when Section 889 expands to cover any “use” of banned technology whether or not related to a federal contract.) For more information regarding Section 889, you can check out Jonathan’s recent 889 webinar with GSA here and his blog here.

Be prepared for novel customer requests. Like contractors, federal agencies are struggling to adapt to the realities of a Corona-fueled purchasing and performance landscape. As federal agencies contemplate sending their own employees to work at home, they are going to face a host of questions not contemplated by their current contracts. Do they have enough laptops? How can they buy more quickly without a contract in place? Do their end user licenses (EULAs) for their software permit work from home? Will an agency need to purchase additional software “seats” for every teleworker? What does an agency do if it doesn’t have the necessary funding in hand? While the answer to these questions will be driven by the terms of the particular contracts and EULAs in play, regardless of those terms contractors should keep a fundamental rule in mind: *Get It In Writing!* While most contractors will want to show themselves to be nimble, accommodating, and mission-oriented, an oral agreement is not worth the paper it is written on. It’s admirable to want to help a customer, but that help need not put the company at risk.

Understand GSA’s Cooperative Purchasing Program. If you are a GSA Schedule contractor, keep in mind that state, local, territorial, and tribal government are authorized to purchase through the MAS program when the Government declares a Public Health Emergency. The Government declared a PHE at the end of January. Accordingly, state, local, territorial, and tribal governments that previously were not permitted to make Schedule purchases now may be permitted to make such purchases through GSA’s Cooperative Purchasing Program. More info on GSA’s PHE program can be found here.

Look around. Other companies are being proactive. United Airlines just sent an email to its customers outlining the steps the Company is taking to keep them safe (and keep them flying). Among other things, United now is wiping armrests and tray-tables with sanitizing wipes between flights. (As frequent flyers, we had hoped they were doing

that previously, but alas . . .) As these things become the norm, equivalent steps (tailored to the given industry) will be expected of other companies as well. No one wants to be implicated in an outbreak caused by a failure to adhere to industry “best practices.” And, of course, if you say you are going to do something, make sure you do it so you don’t end up with a misrepresentation on your hands.

In addition to the foregoing, federal contractors, like all companies, will be well served by developing a detailed plan of action. Think through the various ways coronavirus could impact performance, schedule, and/or cost, and develop a concrete mitigation plan. The earlier you get started on that, the better off you’ll be down the road.

Obviously, we’re dealing here with a “live event,” and the facts continue to change. The steps outlined above, however, should keep you ahead of the curve at least contractually. But you’ll still have to wait in a long line to buy your hand sanitizer like everyone else.

About The Authors



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