

ALERT

The Impact of the Coronavirus on Government Contractors

March 2, 2020

WHAT: If the previous week made anything clear, it is that COVID-19 (the Coronavirus) is likely to continue causing significant disruptions worldwide across all industries, including the government contracts industry. Although the spread of the virus throughout the United States has thus far been limited relative to other nations, many contractors have already felt the impact of travel restrictions, supply chain disruptions, and supply shortages. While much about the virus remains unknown at this point, including the extent of the disruption, industry can expect to continue to feel ripple effects from the virus for the foreseeable future.

WHEN: 2020.

WHAT DOES IT MEAN FOR INDUSTRY: Government contractors are likely to feel the virus's impact more acutely than many industries, given the government's increased focus on containing the virus and preparing for the possible wider spread both within the United States, and in areas overseas that implicate national interests. So contractors would be wise to brush up on relevant Federal Acquisition Regulation (FAR) and contractual provisions, and other government powers, that either could or are likely to come into play in the months ahead. Below are a few areas most likely to be impacted by the virus, and protective measures for contractors to mitigate any disruption to the extent possible. In addition, contractors should review their subcontracts to identify who bears the risk in the event of a COVID-19 related disruption.

Excusable delays. Already, for some industries, supplies and services are becoming more scarce or expensive as travel restrictions and quarantines are put into effect. This can undoubtedly impact a

Authors

Jon W. Burd
Partner
202.719.7172
jburd@wiley.law
Paul F. Khoury
Partner
202.719.7346
pkhoury@wiley.law
Kara M. Sacilotto
Partner
202.719.7107
ksacilotto@wiley.law
Brian Walsh
Partner
202.719.7469
bwalsh@wiley.law

Practice Areas

Government Contracts

contractor's ability to maintain an existing schedule or stay within budget. But virtually all government contracts contain an excusable delay provision to protect contractors from default terminations for failing to meet schedules or incurring excess costs due to events beyond the contractor's control, specifically identifying quarantines and epidemics as qualifying events. The protections in these clauses, however, are not self-executing. Contractors still must advise the contracting officer of the specific facts causing the delay and work out a revised schedule. While contracting officers would need little explanation if their local offices were quarantined, they may be less sensitive to the impacts of OCONUS quarantines or other foreign state actions that may impact your supply chain or direct costs. Contractors who rely heavily on international supply chains to meet their requirements need to be proactive both in monitoring disruptions and communicating their effects with their government counterparts.

Telework. Contractors should also assess their telework capabilities prior to the virus spreading to their place of performance. If telework is a viable option, contractors should communicate their procedures and capabilities both internally and to the government. Making contracting officers aware ahead of time of your ability to fulfill the requirement on- or off-site will help them assess their options quickly should an emergency arise.

Stop work orders and base closures. Contractors operating in current, or likely, high-risk areas should also be prepared for stop work orders or, in the most extreme circumstance, terminations for convenience where a place of performance is deemed too risky or expensive to operate in. While the government's decision to discontinue performance temporarily or permanently is largely out of the hands of contractors, they should still "kick the tires" on their processes to identify and document costs incurred associated with work stoppage. Failure to properly document costs and prove the amount to a reasonable degree of certainty can leave contractors absorbing the full loss for government-directed stoppages, even if there is no dispute that you incurred costs as a direct result of the government's direction. And to the extent the known costs resulting from a termination are going to be high, e.g., you have a long-term, expensive lease with no right to cancel, contractors should consider flagging that for their contracting officer before an outbreak so that the government can perform an accurate cost-benefit analysis when determining whether to pause, end, or re-scope work due to an outbreak.

Constructive changes. As government personnel deal with unforeseen challenges caused by COVID-19, they may resort to leveraging contracting vehicles in unforeseen ways. For example, contractors providing base life support services to Armed Services personnel may suddenly find themselves handling effectively a new mission if the base becomes repurposed as a quarantine zone. Similarly, logistics providers may find themselves needing to (or being instructed to) redirect their supply chains around virus hotspots or in materially different volumes than anticipated when pricing a proposal and developing a technical approach. As with work stoppages, it is important to have a process to capture and document the increased costs associated with these changes. And just as importantly, it is important to communicate with the contracting officer to explain exactly why your new work is a change. Failing to do so could leave you with the bill for the changed scope of performance.

Defense Production Act (DPA). The DPA grants the government significant authority to require the production, prioritization, and allocation of supplies, services, and resources to advance national security with criminal penalties for willful failure to comply. Some preliminary news reports indicate that these powers are on the White House's radar for accelerated production of certain medical supplies, such as ventilators and masks, for which there is not an adequate existing stockpile for a nationwide outbreak, and which are traditionally manufactured in China. Depending on the severity of an outbreak, the Government could also invoke the DPA for the production of testing kits, vaccinations, and medical facilities. Producers of those supplies and services, particularly those with existing ID/IQ vehicles, should pay close attention to existing supply and demand, and assess the likely impact of a government direction to prioritize production of items in short supply.

Visit our COVID-19 Resource Center