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ADG Insights

Navigating performance disruptions relating to government contracts *(update)*

Special series focused on the impact of the COVID-19 pandemic on the Aerospace, Defense, and Government Services industry

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Through ADG Insights, we share with you the top legal and political issues affecting the aerospace, defense, and government services (ADG) industry. Our ADG industry team monitors the latest developments to help our clients stay in front of issues before they become problems and seize opportunities in a timely manner.

This issue in our special series on the impact of the novel coronavirus (COVID-19) pandemic updates our analysis of government contracts performance issues, including excusable and compensable delays, as well compensation for other performance disruptions to incorporate recent government guidance related to these topics. While performance issues are not new to government contractors, the recent pandemic has caused unexpected challenges with significant impacts on the industry. Numerous government agencies have recently recognized these challenges and have issued guidance about how these challenges may be addressed contractually.

Basic principles

The COVID-19 pandemic is causing significant disruptions and performance issues across all industries, including the ADG industry. The pandemic is posing challenges to both a company's own operations and that of its supply chain. This is especially so with respect to actions being taken by federal, state, and local governments that have the effect of shutting down facilities and workplaces or otherwise restricting performance. These actions are resulting in less efficient performance and, in some cases, cessation in performance with attendant ramp-down and ramp-up costs, as well as unabsorbed overhead and carrying costs. In some cases, customers are instructing contractors to take alternative means of performance that are inconsistent with the agreed-upon scope of work. Moreover, the inability of contractors to access secure government facilities to do classified work can lead to disruption. As discussed below, for those companies that contract with the federal government, there are several potentially applicable regulatory clauses and legal theories that will guide a contractor's ability to obtain schedule extensions and reimbursement for the increased cost of performance.

Initially, however, we set out the following high-level principals that we suggest should generally guide your actions:

- ***Communicate with your contracting officer (CO) early and often.*** As a contractor, it is prudent to communicate regularly with your CO about ways in which your performance is being impacted, or you anticipate it may be impacted. As soon as you are aware that COVID-19 may impact your performance, reach out to your CO to explore mutually acceptable ways to respond to any specific challenges. Document all such communications and agreements in writing.
- ***Give formal, timely notice of any delay or disruption in performance.*** Notify your CO clearly and promptly in writing if you believe you will not be able to perform your contractual obligations as originally described in your contract. Some federal contracting clauses require that such notice be provided "as soon as it is reasonably possible after the commencement of any excusable delay."[1] Given the importance of prompt and thorough notice, take steps now to ensure your team knows to alert you to any risk of a delay in performance or changes in performance. As detailed below, most contracts contain a number of clauses that may excuse a contractor's delayed performance.
- ***Contemporaneously document all impacts of COVID-19 on performance.*** Documenting how certain conditions have impacted performance, tracking the cost or performance impacts, and detailing the steps taken to address any adverse impacts are all important for contractors to address entitlement issues. Additionally, contractors should keep records of all government actions or inactions, including any and all communications with the government regarding COVID-19-related delays and work stoppages.
- ***Understand your contract terms.*** Closely review your contracts to identify clauses that may detail what relief from performance deadlines may be available and what actions you must take to secure such relief. In this regard, several standard Federal Acquisition Regulation (FAR) clauses may be relevant:
  - FAR 52.212-4, FAR 52.249-8, -9, -10, and -14, Excusable delays;[2]
  - FAR 52.242-14, Suspension of work;
  - FAR 52.242-15, Stop-work order;
  - FAR 52.242-17, Government delay of work;
  - FAR 52.243-1, Changes-fixed-price through 52.243-4, Changes
  - DFARS 252.237-7023, Continuation of essential contractor services
  - FAR 52.249-1, Termination for convenience of the government (fixed-price) (short form) through FAR 52.249-7, Termination (fixed-price architect-engineer)

The above clauses have unique requirements, require coordination and communication with the government, and offer different forms of relief.

Excusable days

The FAR does not include a clause specifically entitled force majeure, but it does include excusable delay provisions relating to quarantine restrictions and epidemics that may apply to COVID-19 delays. These provisions are included in both standard commercial item and non-commercial item contracts. For instance, FAR 52.212-4(f) and FAR 52.249-8, -9, and -14 excuse delays in performance where the delays arise solely from causes beyond the contractor's control and without the fault or negligence of the contractor.[3] These clauses do not entitle a contractor to compensation, but excuse contractors from default or liability for excess costs.[4] The clauses also identify examples of events that might qualify as a cause for an excusable delay, including "acts of the Government in either its sovereign or contractual capacity," "epidemics," and "quarantine restrictions."[5]

Contracts may also include clause FAR 52.242-17, Government delay of work. This clause allows a contractor to obtain an adjustment of time or cost when the CO's act or failure to act delays or interrupts the work. Relief is not available under the clause for a delay or interruption to the extent that performance would have been delayed or interrupted by any other cause or for which an adjustment is provided or excluded under any other term or condition of the contract. Thus, if there is a government-caused delay stemming from COVID-19 that causes delays unreasonable in length, a contractor may seek compensation under the FAR's government delay of work clause. (As addressed further below, however, claims for an increase in costs resulting from such a delay may be subject to a "sovereign act" defense.)

On 20 March 2020, the Executive Office of the President, Office of Management and Budget (OMB), issued guidance to the heads of all executive departments and agencies regarding managing federal contract performance issues associated with COVID-19. Among other things, the guidance presented the following "frequently asked question" and response:

> **If contractor personnel must be quarantined due to exposure to the virus, whether or not related to performance of the contract, and this action results in a slip in the contract schedule, may contracts be extended or otherwise altered?**

1. *See e.g.,* FAR 52.212-4(f).
2. *See also* DFARS 252.217-7009(b).
3. This excuse, however, may not apply under non-commercial item contracts if the subcontracted supplies or services were obtainable from other sources in sufficient time for the contractor to meet the required delivery schedule. *See* FAR 52.249-14(b); FAR 52.249-8(d); FAR 52.249-9(d). Under FAR 52.249-14, contractors also may not be entitled to relief if the CO ordered the contractor to purchase the supplies from another source and the contractor unreasonably failed to comply with that order. FAR 52.249-14(b); *see, e.g., Jennie-O Foods, Inc. v. United States,* 217 Ct. Cl. 314 (1978) (denying contractor's claim that performance was excused because its principal suppliers had suffered epidemics of cholera and avian influenza in their turkey flocks because the contractor had not shown that it had exhausted all other alternatives and that its performance was commercially impractical); *Crawford Dev. and Mfg. Co.,* ASBCA No. 17565, 74-2 BCA ¶ 10,660 (where contractor failed to demonstrate how a flu epidemic impacted its work force); *Nat'l Fruit Prod. Co., Inc. v. Dep't of Agriculture,* CBCA No. 2445, 12-1 BCA ¶ 34,979 (where contractor could have taken additional steps to perform during an alleged insect epidemic).
4. An excusable delay should result in an amendment to a contract schedule to take into account the delay. If it does not, a contractor may be able to recover its increased costs of performing to the original schedule by submitting a constructive acceleration claim.
5. *See, e.g., Ace Elec. Assocs., Inc.,* ASBCA No. 11781, 67-2 BCA ¶ 6456 (determining that a flu epidemic is in general an excusable cause for delay if performance was in fact delayed by reason of such epidemic.); *Asa L. Shipman's Sons, Ltd.,* GPOBCA No. 06-95, 1995 WL 818784 (contractor challenged default termination and had proven the existence of a flu epidemic but failed to prove how the flu caused the specific delay or what steps the contractor took to overcome the impact of the flu and continue performance).

Yes. Government contracts provide for excusable delays, which may extend to quarantine restrictions due to exposure to COVID-19. For example, see FAR clauses 52.249-14, 52.212-4, and 52.211-13.[6] In determining the best course of action, the contracting officer should discuss the situation with the contractor to determine if other options are available (e.g., ability of employee to telework or to find a substitute employee). If other options with the existing contractor aren't feasible, it may be appropriate to re-procure elsewhere if possible. Such actions should be taken for the convenience of the government (e.g., through use of the relevant convenience termination clause or a no-cost settlement) and without negatively impacting the contractor's performance rating. Excusable delays that result in adjustments to the contractor's delivery schedule should not negatively impact a contractor's performance ratings. Agencies are encouraged to be as flexible as possible in finding solutions.[7]

Thus, the Administration is encouraging federal agencies to be flexible with contractors whose performance is impacted by COVID-19. This includes adjusting a contractor's delivery schedule or terminating the contract for convenience as opposed to "for cause." Additionally, agencies are instructed that any excusable delay resulting from COVID-19 should not negatively impact the contractor's performance ratings.

The Department of Defense (DoD) has also recognized in a 30 March 2020 memorandum that COVID-19 may impact contractors' ability to perform and that DoD contract clauses (including FAR 52.249-14, FAR 52.212-4, and various termination clauses) provide that a contractor will not be in default because of a failure to perform if the failure arises due to circumstances beyond the control and without the fault or negligence of the contractor.[8]

Consistent with the DoD guidance, the branches of the military have issued guidance relating to their contracting activities. For example:

- On 12 March 2020, the Department of the Army (Army) issued its own memorandum covering contracting issues relating to COVID-19.[9] This memorandum notes that "epidemics" and "quarantine restrictions" are examples of causes beyond a contractor's control under the applicable clauses (FAR 52.249-14(a); FAR 52.249-8(c) and (d); FAR 52.249-9(c) and (d); and FAR 52.212-4(f)), and confirms that this language appears potentially applicable to the spread of the COVID-19 virus. Accordingly, the guidance concludes that if a failure to perform is caused by the default of a subcontractor and the cause of the default is beyond the control of both the contractor and subcontractor, contractors may be excused from liability for excess costs under FAR 52.249-14, FAR 52.249-8 and FAR 52.249-9. However, the Army recognizes that the relief may not apply under non-commercial item contracts if the subcontracted supplies or services were obtainable from other sources in sufficient time for the contractor to meet the required delivery schedule (FAR 52.249-14(b); FAR 52.249-8(d); FAR 52.249-9(d)) or if the CO ordered the contractor to purchase the supplies from another source, and the contractor unreasonably failed to comply with that order (FAR 52.249-14).
- A Department of the Air Force (Air Force) memorandum dated 21 March 2020, which is primarily focused on the continuation of mission essential contractor activities on installation support contracts, also notes that "Contracting Officers must address performance issues, which arise from COVID-19" and lists the key regulatory clauses discussed above that relate to excusable delays as relevant to these efforts.[10]
- On 26 March 2020, the Department of the Navy (Navy) issued a very brief memorandum identifying the various FAR clauses available to address performance issues that could arise from COVID-19.[11] Specifically, the memorandum lists the following FAR clauses, which "shall be the conduit through which any adjustments to a contract should be measured": FAR 52.249-14, Excusable delays, FAR 52.249-8, Default (fixed-price supply and service), FAR 52.249-9, Default (fixed-price research and development), FAR 52.213-4, Terms and conditions-simplified acquisition (other than commercial items), and FAR 52.212-4, Contract terms and conditions-commercial items. According to the memorandum, COs are not authorized to craft or include any special clauses or terms to address COVID-19 and should rely on the standard clauses.

In conclusion, contractors should expect that each claim for excusable delay will be evaluated individually. Contractors should carefully examine the clauses in their government contracts, subcontracts, supply agreements, and any guidance issued by the contracting agency to assess the contractual consequences of delays that might result from COVID-19. For instance, contractors should be aware of their burden to prove that a delay was in fact caused by an event covered by the clause and outside of their control.[12] Contractors should also ensure they understand the notice requirements of any such delays in performance and promptly prepare and provide all required notices regarding disruptions, especially those related to COVID-19. If a contract does not include the standard delay clauses, you should consult the CO to determine how such delays should be handled.

Compensable delays and disruptions

Delays and disruptions in performance caused by COVID-19 issues will likely result in government contractors incurring increased costs. These costs are wide-ranging, and may include costs due to loss of learning, idle facilities, ramp-down and subsequent remobilization, and the increased costs charged by alternative sources of supply. To the extent that the contract is cost reimbursable, such costs typically will be chargeable to the contract, provided that the costs are reasonable, allowable, and allocable to the contract.[13] The ability to recover increased costs under other contract types will depend largely on whether the "sovereign acts" doctrine applies, the terms of the contract, the contractor's efforts to mitigate costs, and the applicability of Section 3610 of the recently enacted Coronavirus Aid, Relief, and Economic Security Act or the CARES Act.[14]

Sovereign acts defense

Under the sovereign acts doctrine, the U.S. Government, when sued as a contractor, cannot be held liable for an obstruction to the performance of a particular contract resulting from the government's public and general acts as a sovereign.[15] Thus, the sovereign acts doctrine presents a defense based on the notion that the government at times takes actions in its "sovereign" capacity, rather than in its "contractual" capacity, to further ends that are general and public in nature. If government action is found to constitute a sovereign act, a contractor will not be entitled to a contract price adjustment for the effects of the act even though the act may have affected the contractor's costs of performance. For example, in one case the U.S. Forest Service closed a national forest after a fire, and the closure delayed a contractor that was constructing a visitor facility in the forest. Because the fire closure was an action of general effect taken for the public good as opposed to an action directed specifically at the contractor, the closure constituted a sovereign act and the contractor was unable to recover delay costs.

The sovereign acts doctrine has been interpreted at times to excuse government performance where the sovereign act has made government performance impossible or impractical.[16] However, it has also been interpreted to not excuse the government where

6. FAR 52.211-13, Time extensions, is used with certain construction contracts and applies to time extension for contract changes.
7. OMB Memorandum M-20-18, Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19), available at https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-18.pdf.
8. DoD Memorandum Managing Defense Contracts Impacts of the Novel Coronavirus (30 March 2020), https://www.acq.osd.mil/dpap/policy/policyvault/Managing_Contracts_under_COVID-19_Memo_DPC.pdf.
9. Deputy Assistant Secretary of the Army (Procurement) (DASA(P)) Response to the Coronoavirus Disease (COVID-19) (12 March 2020), https://www.acq.osd.mil/dpap/pacc/cc/docs/covid-19/DASA(P)_Memo_COVID-19_Army_Contracting.pdf.
10. Air Force Memorandum Mission Essential Activities during COVID-19 (21 March 2020), https://www.acq.osd.mil/dpap/pacc/cc/docs/covid-19/USAF%20-%20Mission%20Essential%20Activities%20during%20COVID-19,%20dated%20March%2021,%202020.pdf.
11. Navy Memorandum Use of COVID-19 Language within DON Contracts (26 March 2020), https://www.acq.osd.mil/dpap/pacc/cc/docs/covid-19/USN%20-%20Use%20of%20COVID-19%20Language%20within%20DON%20Contracts,%20dated%20March%2026,%202020.pdf.
12. Contractors should compile evidence to track the timing and impact of COVID-19.
13. Additionally, the contractor may attempt to seek an equitable adjustment to fee depending on whether the disruption is deemed compensable.
14. Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (27 March 2020), https://on24static.akamaized.net/event/22/40/22/9/rt/1/documents/resourceList1585228210963/finalcaresact1585228207508.pdf.
15. *Horowitz v. United States*, 267 U.S. 458, 461 (1925).

the act is counter to a specific contractual warranty, resulting in increased contractor costs. Thus, where a specific method of performance is foreclosed by a sovereign act, but the government directs an alternative method of performance, the sovereign acts doctrine may not preclude the contractor from seeking reimbursement of the extra costs of such performance.[17] The extent to which the sovereign acts doctrine will preclude or limit reimbursement for increased costs incurred will depend on the specific facts of the situation.

Section 3610 of the CARES Act

Section 3610 of the CARES Act allows any agency to modify the terms and conditions of a contract to reimburse paid leave, including sick leave, that a contractor provides to keep its employees or subcontractors in a ready state. This will be particularly useful for contractors and their employees that cannot telework, are prohibited from accessing facilities, or require working in shifts, such as personnel working on classified contracts. FN "*See, e.g.,* ODNI: Guiding Principles for the IC Acquisition & Procurement Community on Implementation of the Coronavirus, Air, Relief, and Economic Security (3 April 2020)." The maximum reimbursement authorized by the CARES Act, however, must be reduced by the amount of credit a contractor is allowed pursuant to the Families First Coronavirus Response Act (P.L. 116-127) and the CARES Act. This authority only applies to a contractor whose employees or subcontractors (i) cannot perform on a site approved by the federal government due to facility closures or other restrictions, and (ii) who cannot telework because their job duties cannot be performed remotely. Reimbursement is limited to an average of 40 hours per week for a period of time not to extend beyond 30 September 2020.

A DoD memorandum dated 30 March 2020 discusses Section 3610 of the CARES Act, noting that this section provides discretion for agencies to modify the terms and conditions of a contract to reimburse a contractor for paid leave provided to contractor employees who could not access work sites or telework, "but actions were needed to keep such employees in a ready state."[18] The memorandum notes that Defense Pricing and Contracting (DPC) will provide implementing guidance for this section as soon as practicable and comments can now be submitted to the Defense Acquisition Regulation System.

A recent National Aeronautics and Space Administration (NASA) memorandum appears to evoke the type of discretion Section 3610 explicitly authorizes.[19] The 20 March 2020 memorandum notes that as a result of restricted access to NASA locations due to actions taken to respond to the COVID-19 outbreak, NASA is invoking NASA FAR Supplement (NFS) clause 1852.242-72, entitled Denied access to NASA facilities in the contracts for on-site contractors. That clause requires on-site NASA contractors to maintain readiness and assume full performance of all contract requirements when the emergency has passed, and the local municipalities and NASA determine that conditions allow a return to normal operations. The memorandum also instructs that off-site contractors that must stop work as a result of any federal, state, or local government directive, decision, or recommendation related to the COVID-19 situation should also "maintain [their] readiness to assume full performance of all contract requirements when the emergency has passed, [and] the federal, state, and local municipalities determine[] that conditions allow a return to normal operations."

Importantly, the NASA memorandum establishes a method for contractors to recover costs of paid leave for employees who are not able to work remotely. NASA is also establishing advance agreements to identify the treatment of special or unusual costs covering contractor employees who are unable to work remotely:

> In recognition that some employees may not be able to perform NASA work remotely, you should contact your Contracting Officer immediately regarding the details of the Advanced Agreement under the conditions that will be provided, allow for the placement of such employees under a form of weather and safety leave (consistent with your company procedures), in order for such leave to be an allowable cost under the contract and subject to provisional payment. This leave would be allowed solely for covering employees unable to work remotely because of this COVID-19 situation and keeping employees in a mobile ready state to maintain the Space Industrial Base and other skilled professionals and key personnel, per OMB memorandum 20-18. Any costs provisionally paid for weather and safety leave purposes will be subject to reconciliation and settlement as part of an equitable adjustment to the contract after a return to normal operations. Circumstances and conditions may vary according to contract type (terms and conditions and fixed-price vs cost reimbursement).

Stop work and suspension of work clauses

Should the government issue a stop-work order or suspend work on a contract, contractors may have a claim for additional compensation under certain FAR provisions. Government-ordered and "constructive" suspensions of work may give rise to compensable delay. Government-ordered suspensions are generally covered by standard FAR clauses, such as FAR 52.242-14 (Suspension of work) and FAR 52.242-15 (Stop work order).

The 21 March 2000 Air Force memorandum discussed above also recognizes that challenges related to COVID-19 may implicate these provisions. Specifically, it states that "Contracting Officers must address performance issues that arise from COVID-19" and lists the key regulatory clauses that should guide their efforts as including FAR 52.242-14, (Suspension of work), FAR 52.242-15 (Stop-work order), FAR 52.242-17, (Government delay of work), all of which may entitle a contractor to additional compensation under certain circumstances.[20] The NASA memorandum discussed above also instructs contractors who are required to stop work in the future due to Centers for Disease Control and Prevention (CDC) precautions and/or guidelines, to contact their CO and notes that any stoppage or interruption of work and resulting adjustments to the contract shall be treated consistently with FAR 52.242-15.[21]

Where the government suspends contract performance pursuant to FAR 52.242-14, a contractor is entitled to an adjustment for the increased cost associated with the suspension only where the suspension is for an unreasonable period of time and is caused by an act or omission of the government. A contractor is not entitled to any costs incurred more than 20 days before the date that the contractor notified the government of the act or omission that caused the increased cost to the contractor, except in limited circumstances.

Where the government issues a stop work order in accordance with FAR 52.242-15, a contractor is entitled to an equitable adjustment for all increased costs caused by the stop work order or for additional time to complete the contract if the stop work order increases the amount of time required. For instance, if there are closures or travel restrictions that result in a stop work order, contractors may be able to seek an equitable remedy under the FAR's stop work order provision. A claim for an equitable adjustment under this clause must be asserted within 30 days of the cancellation of the stop work order.[22] Contractors should therefore carefully track any additional costs incurred due to orders to stop-work or suspend work

16. *Klamath Irr. Dist. V. United States,* 635 F.3d 505 (Fed. Cir. 2001).
17. *See* Gerhardt F. Meyne Co. v. United States, 76 F. Supp. 811 (Ct. Cl. 1948).
18. DoD Memorandum Managing Defense Contracts Impacts of the Novel Coronavirus (30 March 2020), https://www.acq.osd.mil/dpap/policy/policyvault/Managing_Contracts_under_COVID-19_Memo_DPC.pdf.
19. NASA Memorandum for NASA Contractor Community (24 March 2020), https://www.research.psu.edu/sites/default/files/NASA%20Global%20Contractor%20Community%20Memo%203-24-2020.pdf.
20. Air Force Memorandum Mission Essential Activities during COVID-19 (21 March 2020), https://www.acq.osd.mil/dpap/pacc/cc/docs/covid-19/USAF%20-%20Mission%20Essential%20Activities%20during%20COVID-19,%20dated%20March%2021,%202020.pdf.
21. NASA Memorandum for NASA Contractor Community (24 March 2020), available at https://www.research.psu.edu/sites/default/files/NASA%20Global%20Contractor%20Community%20Memo%203-24-2020.pdf.
22. *See* FAR 52.242-15(b)(2).

on any federal contract and should flow down such suspension or stop work notices to subcontractors. Moreover, contractors should maintain a record of cost or schedule impacts (including separately accounting for the cost impacts) and take reasonable efforts to mitigate the costs of the delays in performance.

Constructive suspensions or de facto stop-work orders occur when contract performance is stopped, absent an express order by the CO, and where the government is found to be responsible for the work stoppage. A constructive suspension of a contractor's work may occur if the contractor is unable to continue to work and, after the fact, it is determined that the government caused the circumstances making it impossible for the contractor to continue to perform. When a contractor's performance is effectively suspended, courts will characterize the suspension to be a "constructive suspension."[23] Accordingly, contractors that find their performance constructively suspended should be prepared to assert constructive suspension claims and demonstrate elements similar to those required for a government-direct suspension.[24]

The changes clauses

Other standard FAR clauses provide options for obtaining an equitable adjustment when the government changes directly or indirectly the contract specifications, statement of work, time or place of delivery, or time or place performance. For instance, a contractor may be entitled to an adjustment in contract price, delivery schedule, or both through the standard FAR Changes clauses (e.g., FAR 52.243-1 through FAR 52.243-4 and FAR 52.212-4(f))[25] for changed contract requirements due to COVID-19. Government contractors should examine their contracts to determine which changes clause applies and take care to comply with the notice requirements to secure equitable adjustments under these clauses.

Contractors should also track and document any impact due to a change, including segregating and accounting for increased costs.

As noted above, on 30 March 2020, DoD issued a memorandum addressing the challenges that COVID-19 poses for DoD and the defense industrial base (DIB).[26] In addition to recognizing that COVID-19 will affect the cost, schedule, and performance of many DoD contracts and identifying the regulatory tools that can be used to address these challenges, the DoD memorandum recognizes that "where the contracting officer directs changes in the terms of contract performance, which may include recognition of COVID-19 impacts on performance under that contract, the contractor may also be entitled to an equitable adjustment to contract price using the standard FAR changes clauses (e.g., FAR 52.243-1 or FAR 52.243-2)."

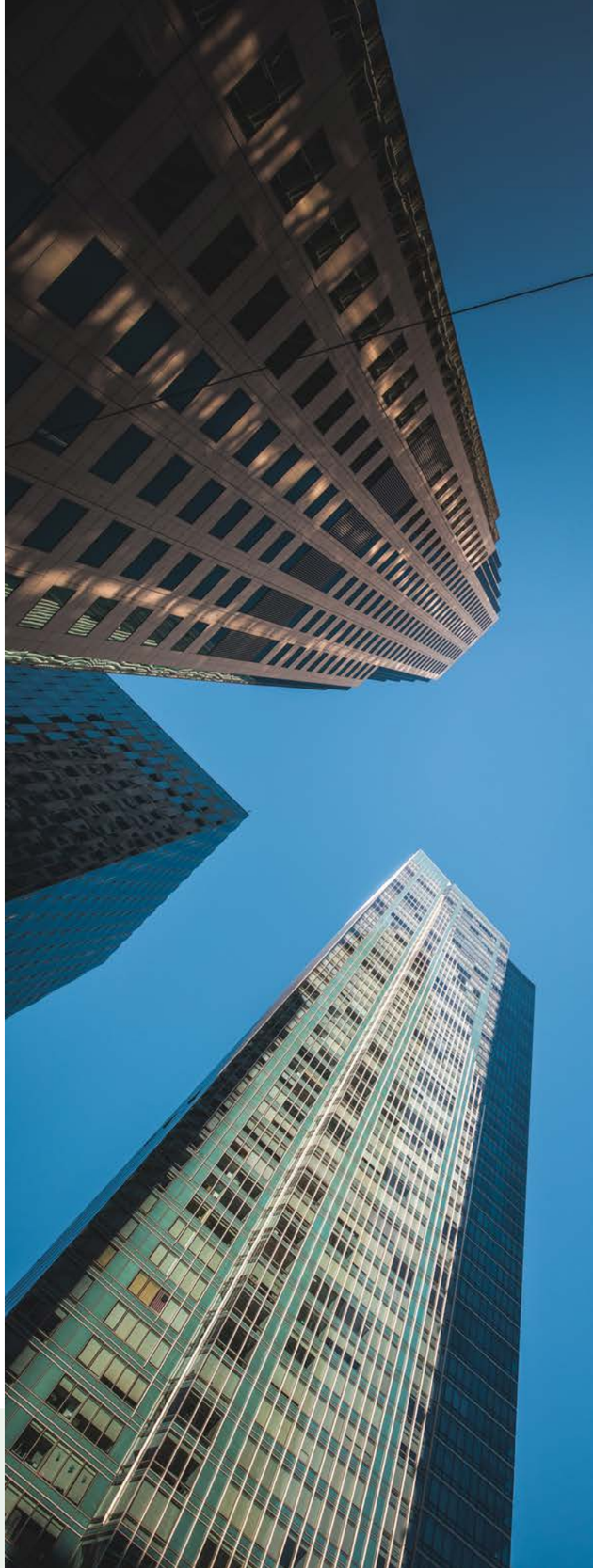
The DoD memorandum notes that requests for equitable adjustment (REAs) must be considered on a case-by-case basis, in consideration of the particular circumstances of each contract and the impact of COVID-19 on performance. The memorandum direct COs to take into account whether the requested costs would be allowable, allocable, and reasonable to protect the health and safety of contract employees as part of the performance of the contract. The memorandum also directs that equitable adjustments to the contract or reliance on an excusable delay should not negatively affect contractor performance ratings.

A 12 March 2020 memorandum issued by the Army also notes not only that excusable delay provisions may potentially excuse performance failures related to COVID-19, but that the equitable adjustments for increased work may be available through standard FAR changes clauses (e.g., FAR 52.243-1 or FAR 52.243-2).[27]

It is important to note that relief under the changes clauses is not limited to formal change orders. These rules contemplate that some changes requested by the government may not be documented in written orders, but may entitle a contractor to an equitable adjustment as a constructive change.[28] If the government does not adjust the schedule in response to contractor requests and in a sense speeds up performance, this refusal might constitute constructive acceleration, which may entitle contractors facing this scenario to recover added costs.[29] Additionally, the government might instruct a contractor to change the method of performance in light of COVID-19. To the extent that the instruction increases cost to the contractor, the contractor may be entitled to an equitable adjustment in contract price. Under these circumstances, contractors should also notify the government within the timeframe specified for notice provided in the applicable changes clause for any constructive change and should make sure that cost and schedule impacts resulting from the constructive change are tracked and documented.

Contractors can also receive some protection from changes that are outside the general scope of their contract under the "cardinal change" doctrine.[30] A cardinal change is where a contractor is required to perform duties materially different from those originally bargained for, and results in a material breach of the contract by the government. Determinations of whether a change is "within the scope" of a contract require a fact-specific and case-by-case inquiry.

In order to preserve a right to an equitable adjustment, contractors should carefully document communications with their COs, notify their COs if any action or inaction on the government's behalf constitutes a change to the contract, identify the potential impact of any change on contract performance, and seek direction on how to proceed. Any disputes that may arise should be addressed under the contract's disputes clause.



23. *Merritt-Chapman & Scott Corp. v. United States*, 429 F.2d 431, 443 (Ct. Cl. 1970).
24. The requirements for a constructive suspension are often stated as a four-part test: "(1) contract performance was delayed; (2) the government directly caused the delay; (3) the delay was for an unreasonable period of time; and (4) the delay injured the contractor in the form of additional expense or loss." *W.M. Schlosser, Inc. v. United States*, 50 Fed. Cl. 147, 152 (2002) (citation omitted).
25. The standard FAR clauses allow the government to unilaterally direct changes, while the commercial items clause requires mutual agreement on changes, as changes may only be made by written agreement of the parties.
26. DoD Memorandum Managing Defense Contracts Impacts of the Novel Coronavirus (30 March 2020), https://www.acq.osd.mil/dpap/policy/policyvault/Managing_Contracts_under_COVID-19_Memo_DPC.pdf.
27. Deputy Assistant Secretary of the Army (Procurement) (DASA(P)) Response to the Coronavirus Disease (COVID-19) (12 March 2020), https://www.acq.osd.mil/dpap/pacc/cc/docs/covid-19/DASA(P)_Memo_COVID-19_Army_Contracting.pdf.
28. *See e.g., Advanced Eng'g & Planning Corp.*, ASBCA No. 53366, 03-1 BCA ¶ 32,157; Pan Artic Corp., 77-1 BCA ¶ 12,514.
29. *See e.g., Alley-Cassety Coal Co.*, ASBCA 33315, 89-3 BCA ¶ 21964; Continental Heller Corp., GSBCA 6812 et al., 84-2 BCA ¶ 17275.
30. *See Air-A-Plane Corp. v. United States*, 408 F.2d 1030 (Ct. Cl. 1969).

Additional recent government guidance related to requests for equitable adjustments

Consistent with the above discussion, OMB's recent guidance to federal agencies recognizes that contractors may be entitled to equitable adjustments in contract price, depending on the circumstances. For example, OMB's guidance provides the following "frequently asked question" and answer:

> **How should agencies address requests for equitable adjustment associated with costs related to safety measures taken by contractors to protect their employees from COVID-19, including costs associated with performance disruptions caused by the government (e.g., closure of an office building) when performance doesn't allow for telework (e.g., work requires access to secure location, or involves building maintenance)?**
>
> Requests for equitable adjustment should be considered on a case-by-case basis in accordance with existing agency practices, taking into account, among other factors, whether the requested costs would be allowable and reasonable to protect the health and safety of contract employees as part of the performance of the contract. The standard for what is "reasonable," according to FAR § 31.201-3, is what a prudent person would do under the circumstances prevailing at the time the decision was made to incur the cost (e.g., did the contractor take actions consistent with CDC guidance; did the contractor reach out to the contracting officer or the contracting officer representative to discuss appropriate actions).
>
> Agencies may take into consideration whether it is beneficial to keep skilled professionals or key personnel in a mobile ready state for activities the agency deems critical to national security or other high priorities (e.g., national security professionals, skilled scientists). Agencies should also consider whether contracts that possess capabilities for addressing impending requirements such as security, logistics, or other function may be retooled for pandemic response consistent with the scope of the contract. A number of contract clauses may be helpful in managing COVID-19 issues as they arise. The government may make changes to the contract using the appropriate changes clause that applies to the contract (see FAR clauses 52.243-1 through 52.243-3 or clause 52.212-4(c)). If necessary, generally after considering other alternatives, they may suspend or stop performance through clause 52.242-14, Suspension of work, and clause 52.242-15, Stop work order.

Accordingly, the OMB guidance to federal agencies may prove helpful in discussing performance options with COs and, ultimately, tying changed or suspended performance to an equitable adjustment in contract price.

At the military branch level, at least one branch is pushing branch components to resolve REAs on an expedited basis in order to increase cash flow to defense contractors. Specifically, on 20 March 2020, the Navy's acquisition executive, James Geurts, Assistant Secretary of the Navy for Research, Development, and Acquisition (ASN RDA), issued a memorandum to the commanders of Navy system commands and Navy Program Executive Officers aimed at ensuring that Navy contractors and their underlying suppliers remain solvent and available to support the Navy.[31] Among other things, the memorandum instructs the Navy to:

> Pay all our settled REAs immediately, submit requests for obligation of expired funds where required in support of this immediately and resolve all remaining REAs as quickly as possible, including preparing provisional payments where appropriate with reservation of right of recoup any overpayment upon final settlement. I encourage you to set up dedicated teams to do this as [maximum] pace.

Contractors that have pending REAs with the Navy should consider requesting quick resolution of the REAs and/or provisional payments in response to the REAs.

Contract termination for convenience

As reflected in OMB's recent guidance to federal agencies, an option for the government where COVID-19 related issues negatively impacts a contractor's ability to perform is to terminate the contract for convenience so that the government may find alternative means to fill its requirements.[32] To the extent that a contract is terminated in whole or in part as a result of the pandemic, contractors can recover certain costs under the standard FAR termination for convenience clauses (e.g., FAR 52.249-1, -3, or FAR 52.212-4(l)). In the event of such termination, the contractor must immediately stop all work and cause all of its suppliers and subcontractors to cease work. The FAR includes rules regarding the categories of costs that are recoverable in the event of a termination for convenience. Generally, the government is only required to pay the contract price for completed supplies/services accepted by the government, reasonable costs incurred in the performance of the terminated work, a reasonable profit on the performed work (but no profit on the terminated work), and reasonable costs of settlement of the terminated work.

If a CO issues a termination pursuant to applicable FAR clauses as a result of COVID-19, contractors should stop performance, mitigate costs, and promptly request adjustment of cost and/or schedule terms.

31. Memorandum from Assistant Secretary of the Navy, Research, Development, and Acquisition to Navy System Commanders and Program Executive Officers, 20 March 2020 (on file with authors).

32. OMB Memorandum M-20-18, Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19), available at https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-18.pdf.

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