

# **COVID-19 and Federal Contracting**

## **Contract Delays and Disruptions, Work Stoppages, and The Federal Government's Emergency Response**

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# Agenda

- Dentons COVID-19 Client Special Situations Team
- [Dentons COVID-19 Client Resources Hub](#)
- [Contract Delays and Disruptions](#)
- [The Government's Response to COVID-19 Impacting Federal Contracting](#)
- [Work Stoppages, Compensable Delay, Managing Claims](#)

# Dentons COVID-19 Client Special Situations Team and Client Resources Hub

- **Special Situations Team**

- Dentons has launched a cross-practice COVID-19/Pandemic Client Special Situations Team (PSST) to help navigate this fast-moving situation, drawing on the full scope of our global legal, policy and innovation capabilities.
- The purpose is to provide timely updates and practical guidance, Dentons will be hosting weekly webinars on policy and critical issues.

- **Client Resources Hub**

- Contains valuable information for companies, including a global tracker for employers regarding COVID-19 responsibilities, remote working readiness consultation, and 70+ articles and insights addressing the full range of issues that may arise in connection with the COVID-19 outbreak.

# Contract Delays and Disruptions

- Potential Causes of Contract Performance Delay and Disruptions
  - Causes may include unexpectedly high levels of claimed sick leave or absenteeism, government-imposed or voluntary quarantines, cancelled travel, and supply chain interruptions.
- Identifying Excusable Delays
  - The Default Clause, FAR 52.249-8, permits the Government to terminate a contract for default where there is a failure to perform within the time specified, to make progress or to perform any other provisions of the contract.
  - Federal contracting regulations have recognized “epidemics” and “quarantine restrictions” as *force majeure* bases for excused performance. See FAR 52.249-8(c), FAR 52.249-14(a); FAR 52.212-4(f).
  - Contractors must show causation and absence of fault

# Contract Delays and Disruptions

- Proving Causation and Lack of Fault
  - Contractor must tie delay to specific basis for relief (causation)
  - Contractor may be required to show that it took every reasonable precaution to avoid foreseeable causes for delay and to minimize their effect. *Asa L. Shipman's Sons, Ltd.*, GPOBCA No. 06-95, 1995 WL 818784 (Aug. 29, 1995).
  - In the context of the COVID-19 virus, contractors should examine and implement today precautionary measures to ensure the ability to perform in the future.
  - Also must quantify the extent of delay that is excusable
  - Keep an eye on potential constructive acceleration (CO insistence on performance in the face of excusable delay)
  - Make a record of actions -- it will support later recovery.

# Work Stoppages

- Voluntary v. Involuntary Work Stoppages
  - Force Majeure and excusable delay principles may operate to excuse non-performance and prevent a government default termination.
  - The Government also may direct a change or stop work, which entitle the contractor to an equitable adjustment for increased costs of delays and performance impacts.
    - Example: In the case of a federal facility closure, is there a possibility of remote work or on-site performance only?
  - Written Confirmation and Authority - Contractors should obtain (when possible) direction in writing from their contracting officer.

# Work Stoppages

- Cost Recovery
  - Contractors may be able to recover costs associated with these impacts pursuant to their contract terms.
    - FAR 52.212-4(c), (l) (Commercial Item Contract Changes and Termination);
    - 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;
    - FAR 52.249-2 Termination for Convenience of the Government (Fixed-Price);
    - FAR 52.249-6 Termination (Cost-Reimbursement);
    - FAR 52.243-6 Change Order Accounting.

# Work Stoppages

- Recovery under Cost reimbursable contracts
  - Contractors are entitled to recover allowable costs of impaired performance assuming costs are reasonable. See FAR 52.216-7, Allowable Cost and Payment; FAR 31.201-2 (explaining a cost is allowable when it is reasonable; allocable; complies with CAS or GAAP, as applicable, the terms of the contract, and the other parts of the FAR Cost Principles).
  - Stop Work and Changes clauses permit adjustment to estimated cost and fee.
    - If the disruption significantly increases costs or the level of effort required, contractors may seek an adjustment to the contract's estimated costs and/or fee.
  - The Limitation of Cost or Limitation of Funds clauses may limit recovery. See FAR 52.232-20; FAR 52.230-22.
    - Contractors are required to notify the Government of funds status and overrun and stop work if obligated funds are exhausted.
    - Until additional funding is provided/restored contractor is “at risk” of non-recovery of cost of performance.

# Work Stoppages

- Best Practices
  - Document cost impacts and delays
  - Contract Type and Timing of Impact and Delay
    - When contractual direction exists, costs reasonably incurred as a result of the government order may be recovered under the appropriate clauses, so long as the impacts and delays arise during a period where the contract is funded.
  - Schedule impacts should be addressed through extensions of period of performance
  - Take steps to mitigate impact
  - Take appropriate action with respect to subcontractors
  - Communicate with contracting officer

# The Government's Response to COVID-19 Impacting Federal Contracting

- **Presidential Declaration of National Emergency**
  - Makes available billions of dollars in federal disaster relief funds.
  - Administered by state and local governments through subgrants and procurement contracts.
- **Public Readiness and Emergency Preparedness (“PREP”) Act Declaration Issued by the Secretary of Health and Human Services (Feb. 4, 2020)**
  - Provides liability immunity for certain activities related to medical countermeasures against COVID-19.
  - The liability immunity covers the manufacture, testing, development, distribution, administration, or use of one or more Covered Countermeasures.

# The Government's Response to COVID-19 Impacting Federal Contracting

- **DoD Memorandum Re: Planning for Potential Coronavirus Contract Impacts**
- On March 10, 2020, DoD issued a [memorandum](#) delegating decision-making authority to individual contracting officers to address contract administration issues related to coronavirus.
- “Contracting officers, in consultation with Government program managers and requirements owners, are the authority in the event contract performance is affected due to COVID-19 situation (e.g., the need for alternate work locations, travel restrictions, or schedule changes).”
- The lack of agency-wide guidance has the potential to create conflict, e.g., where a contractor may be receiving different guidance from different contracting officers.
- Industry trade groups have been participating in calls with DOD to address the confusion experienced by some contractors

# The Government's Response to COVID-19

## Impacting Federal Contracting

- **Exercise of Authority under the Defense Production Act and Defense Priorities and Allocations System**
  - Provides Government with authority to prioritize government contracts over competing customers, allocate or control the general distribution of materials, and enhance the production and supply of critical materials and technologies when necessary to respond to a national emergency.
  - On March 18, 2020, President Trump issued [Executive Order](#) invoking DPA authority for HHS to prioritize acquisition of protective equipment and ventilators (and other medical equipment and resources as determined by HHS).
    - Other possibilities: therapeutics, vaccine production/supply, new construction, renovation of health facilities, masks, biohazard supplies, and potentially other items.
  - Rated orders must be accepted within a short timeframe and may only be rejected in very limited circumstances.
  - Obligations to flowdown requirements to subcontractors.
  - Failure to comply may lead to civil and criminal penalties for willful violations. See 50 U.S.C. § 4513; see *also* 15 CFR § 700.74 (explaining that the government may seek an injunction to enforce compliance).

# The Government's Response to COVID-19 Impacting Federal Contracting

- Potential Actions Affecting Intellectual Property
  - The Government may authorize a company to produce, for example, critical pharmaceutical products, testing equipment or other essential items that are patented by another company to combat COVID-19. See Bayh-Dole Act, 35 U.S.C. ch. 18; 28 U.S.C. § 1498.
  - Authorizes the US government to license or require licensing without regard to whether the patented technology was developed with government funding or exclusively at private expense.
  - Compensation may be available, but compensation may be limited or even unavailable where the Government exercises its “march in” rights for subject inventions that were developed using federal funds and contain the appropriate contractual language. See FAR Part 27.3; DFARS 252.227-7038.

# Thank you

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