

Government Contractor's "Coronavirus Checklist"

Wiley continues to closely monitor the COVID-19 crisis and will update this list as new information is available. This alert was originally published on March 19, 2020 and updated on April 24, 2020.

Over the past several weeks, federal, state and local governments have taken unprecedented actions to try to address both the public health and economic impacts of the Coronavirus (COVID-19). These unprecedented actions include the \$2 trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act, which includes financial relief aimed at easing some of the financial hardships inflicted on various industries, including government contractors. In addition, government contractors have played a key role in responding to the COVID-19 crisis, with contractors being called upon to deliver personal protective equipment (PPE), ventilators, and other badly needed medical supplies.

As we continue to navigate through these uncertain times, the following is an updated "checklist" of key issues that government contractors should consider, in order to protect themselves contractually from the potential disruptions and delays that are likely to arise as this situation continues to unfold.

□ **Identify Available Forms Of Financial Relief**

- As summarized in our previous [alert](#), the CARES Act includes a number of different provisions that may provide a mechanism for government contractors to obtain financial relief from the impacts of COVID-19, including:
 - [Section 3610](#), which expressly authorizes federal agencies to reimburse contractors for the cost of paid leave incurred to keep contractor or subcontractor personnel in a "ready state";
 - The [Paycheck Protection Program \(PPP\)](#), which allocates a total of \$659 billion (including the additional funds in the Paycheck Protection Program and Health Care Enhancement Act, signed into law on April 24, 2020) to enable lenders to make fully-guaranteed (and potentially completely forgivable) loans to small businesses to cover payroll and overhead costs;
 - Various forms of [tax relief](#), including tax credits and deferral of certain tax payments.
- Recent guidance issued by Office of Management and Budget (OMB) regarding Section 3610 specifically warns against "double dipping" (e.g., requesting reimbursement for payroll costs under both Section 3610 and PPP). Therefore, contractors should be careful to ensure that any request for paid leave costs under Section 3610 is justified and adequately supported, and appropriately identifies and offsets any other forms of financial relief received by the contractor (e.g., PPP or tax credits).

□ **Assess The Need For Additional Contractual Protections For COVID-19 Responses**

- As detailed in an earlier [alert](#), contractors that provide goods or services in the fight against COVID-19 may be able to obtain additional protections against liability, including:
 - [Indemnification](#) under Public Law 85-804 for contracts to support certain agencies (e.g., Veterans Affairs (VA), Department of Energy (DOE) in their responses to COVID-19;
 - [PREP Act immunity](#), which protects against certain claims against manufacturers, health care providers and suppliers, and other "covered persons" engaged in "the manufacture, testing, development, distribution, administration, and use of" certain "covered countermeasures" under government contracts and agreements;
 - [Protection from claims](#) under the Defense Production Act of 1950 (DPA), which protects contractors that receive "rated orders" from third-party claims resulting from the contractor's compliance with the DPA.

□ **Check Your Existing Contract Terms**

- Contractors would be well advised to review their contracts to identify those clauses that may impose obligations or provide protections that may be implicated by the current crisis, such as:
 - “Force Majeure” or “Excusable Delay” clauses, such as Federal Acquisition Regulation (FAR) 52.249-14, which protect the contractor against termination for delays in performance that are caused by events outside of the contractor’s negligence, fault or control.
 - “Stop Work” or “Suspension of Work” clauses, such as FAR 52.242-14 and -15, which require the contractor to stop or suspend performance for a certain period of time if directed by the Contracting Officer.
 - “Continuation Of Essential Contractor Services” clauses, including Defense Federal Acquisition Regulation Supplement (DFARS) 252.237-7023 and -7024, which require contractors performing work that has been designated as “mission essential functions” to develop plans for the continued performance of the designated services during periods of crisis, such as pandemics.
 - “Rated Orders” issued pursuant to the clause at FAR 52.211-15 and the Defense Priority and Allocation System (DPAS) rules in 15 CFR Part 700, as well as the Health Resources Priority and Allocation System (HRPAS) rules in 45 CFR Part 101. The use of rated orders, which require contractors to give rated orders priority over their commercial business and non-rated government contracts and orders, has proved to be an important tool in securing much-needed supplies in the Government’s battle against COVID-19.

□ **Communicate With Your Customers**

- Certain clauses—such as the Force Majeure and Excusable Delay clauses mentioned above—may require contractors to provide notice of a covered event within a certain time, and with certain information, in order to invoke the clauses’ protections. Contractors should therefore review their contracts and ensure that they are providing timely and complete notice to preserve their rights.
- In addition to any formal notification requirements, early communication with customers and suppliers may help to mitigate impacts and identify workarounds (e.g., authorization of remote work/telework).
- Early on in the crisis, anecdotal evidence suggested that contracting officials might be reluctant to provide formal direction or stop work orders in order to avoid government liability under certain contract clauses (e.g., Stop Work, Changes) and/or to preserve the government’s defenses against potential claims (e.g., the “sovereign acts” defense).
- However, guidance issued in OMB Memorandum M-20-18, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)*, specifically encourages “continued communication by agencies with their contractors, both small and large, and effective leveraging of flexibilities and authorities to help minimize work disruption.”
- Therefore, contractors should continue to communicate with their customers, seek direction where possible, and document their communications in order to preserve their rights in the event of later disputes.

□ **Document Impacts**

- In order to preserve potential claims and defenses, contractors impacted by the COVID-19 crisis should take steps to document those impacts on contract performance, including for example:
 - Inability to access required facilities;
 - Delays by suppliers, other contractors;
 - Shortages of critical materials;
 - Government-directed changes;
 - Unavailability of government personnel; and
 - Other government delays.
- Contractors seeking reimbursement of paid leave costs under Section 3610 of the CARES Act should be particularly mindful of guidance issued by OMB and U.S. Department of Defense (DOD), which emphasize the need for contractors to provide supporting documentation. In fact, OMB guidance suggests requests for reimbursement under Section 3610 may require documentation “beyond that normally submitted to support costs”

- Although the OMB guidance does not identify the specific forms of documentation required, FAQs issued by DOD suggest that Contracting Officers should require the following documentation in assessing requests for reimbursement under Section 3610:
 - Identity of the employees who were provided paid leave;
 - The contract(s) the employees are performing under;
 - The amount and dates of the paid leave provided to the employees for which the contractor is seeking reimbursement;
 - An explanation that each employee –
 - Worked on a site approved by the government, but for COVID-19;
 - Could not perform work on the approved site due to closures or other restrictions resulting from COVID-19;
 - Was unable to telework or otherwise work remotely;
 - Received paid leave beginning no earlier than January 31, 2020, and ending no later than September 30, 2020;
 - Received paid leave at rates calculated based on the rates the contractor would have paid the employee but for the COVID-19 pandemic; and
 - A statement by the contractor that: (1) the costs it is claiming are only for paid leave meeting all of the conditions outlined above; and (2) its claimed costs constitute the only reimbursement or payment it is receiving for this purpose, and that it is not being paid or reimbursed for the same costs via any other source or funding.

□ **Capture Costs**

- While certain relevant contract clauses may provide a basis for a contractor to seek an equitable adjustment to compensate for any increased cost of performance (e.g., clauses relating to "mission critical support"), other clauses may only provide for time extensions (e.g., Excusable Delays).
- In addition, Section 3610 of the CARES Act specifically authorizes reimbursement of paid leave costs for certain employees who have been denied access to approved facilities as a result of COVID-19.
 - Although Section 3610 authorizes reimbursement "at the minimum applicable contract billing rates" up to 40 hours per week, guidance by both DOD and OMB instructs agencies to reimburse only for actual labor costs, plus overhead, but excluding profit/fee.
 - The DOD guidance recommends that contractors establish separate line items in fixed-price and time-and-materials contracts and cost accounts for cost-reimbursement contracts to segregate costs that may be reimbursable under Section 3610.
 - Also, as noted above, Section 3610 also requires contractors to offset any other financial relief received by the contractor, including PPP or tax credits, to prevent "double dipping."
- Therefore, contractors should take steps to segregate the cost impacts resulting from the current crisis—including paid leave costs for employees unable to telework—as well as any other offsetting forms of financial relief received by the contractors (e.g., PPP or tax credits).

□ **Check Your Telework Policies**

- For now, the Office of Personnel Management (OPM) has directed government agencies to continue maximum teleworking for eligible employees in response to the COVID-19 crisis, and industry groups are encouraging agencies to include contractors in those policies. OPM has directed agencies to provide guidance to "employees and contractors" as agencies gradually transition back to normal operations consistent with the national guidelines for *Opening Up American Again*.
- In the meantime, Federal procurement statutes and the FAR encourage contractor teleworking, and contractors should communicate with their Contracting Officers to confirm that teleworking is permitted unless it is expressly prohibited by the contract. See 41 U.S.C. § 3306(f) (the FAR "shall permit telecommuting by employees of federal government contractors," except in limited circumstances); FAR 7.108 ("an agency shall generally not discourage a contractor from allowing it employees to telecommute in the performance of Government contracts" unless the CO determines that contract requirements cannot be met through telework and includes a contract provision prohibiting it).

- Nevertheless, contractors should confirm that their teleworking policies and systems comply with the terms of their contracts, including any cybersecurity requirements in their contracts, such as FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems, DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, and any agency- or contract-specific clauses incorporated into the contract.
- **Review Employment Requirements and Policies**
 - As we previously [outlined](#), contractors should ensure that their COVID-19 responses comply with published vacation and sick leave policies, federal and state wage and hour laws, and furlough provisions in employee contracts.
 - The Families First Coronavirus Response Act (FFCRA or Act), which the President signed into law on March 18, 2020 and we summarized [here](#), includes additional employer obligations for coverage under the Family and Medical Leave Act (FMLA) and paid sick leave. Contractors should understand these new requirements and watch for additional statutory obligations that may be imposed as Congress moves quickly to respond to the crisis. Wiley will continue to provide updates on those topics.

Wiley's Government Contracts team is closely monitoring developments and assisting clients in navigating through this fast-moving crisis, and will provide further Alerts and Webinars as events unfold.

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