

Potential Contractor Claims Related to COVID-19

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Since the start of the COVID-19 pandemic, government contractors in nearly every sector have seen increased costs as a result of COVID-19. With the increased costs come questions about how to recover those costs. Contractors have a number of options for potential cost recovery, but in all cases, they should make sure to document the impact of COVID-19 events on their costs and performance and communicate the impact to their customers.

A. AUTHORITIES

Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. 116-136, authorizes agencies to reimburse contractors for the cost of any paid leave incurred to keep contractor or subcontractor personnel in a “ready state” through September 30, 2020. The government may reimburse these costs only to the extent the contractor or subcontractor personnel were (i) unable to access a government-approved facility or site, and (ii) unable to telework because their job duties could not be performed remotely during the COVID-19 pandemic. Any reimbursement of standby costs pursuant to this provision is subject to reduction for any tax credits taken by the contractor or subcontractor under the Families First Coronavirus Response Act, Pub. L. 116-127, such as Paycheck Protection Program (PPP) loans.

In addition to Section 3610’s new authority, many contracts already provide for recovery of increased costs or schedule adjustments through standard Federal Acquisition Regulation (FAR) clauses. These clauses can be used to seek additional performance time or costs that may not be contemplated by Section 3610, such as delay-related costs:

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- “Force Majeure” or “Excusable Delay” clauses, such as 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 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.
- “Changes” clauses, such as FAR 25.243-1, which allow for equitable adjustments in both price and schedule if the Contracting Officer orders a change.

B. SEEKING RELIEF

Prior to submitting a claim or request for equitable adjustment (REA), contractors should communicate with the Contracting Officer about what costs have increased and why. Communicating with the Contracting Officer can also help ensure that contractors and government personnel are on the same page about issues such as whether a facility “has been approved by the Federal Government,” as required for recovery under Section 3610. Early communication also ensures that notice requirements of certain clauses – such as the *Force Majeure* and Excusable Delay clauses mentioned above – are met, while also potentially mitigating impacts through workarounds (e.g., authorization of remote work/telework). Contractors should pay close attention to communications from the Contracting Officer and should evaluate whether the Contracting Officer has directed a change, which would allow for reimbursement under the Changes clause.

Contractors should also be sure to capture costs appropriately prior to submitting an REA. Although Section 3610 authorizes reimbursement “at the minimum applicable contract billing rates” up to 40 hours per week, guidance from both the U.S. Department of Defense (DoD) and the Office of Management and Budget (OMB) instructs agencies to reimburse only actual labor costs, excluding profit/fee. 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. Further, Section 3610 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 (e.g., PPP or tax credits). The same is true when seeking increased costs under traditional FAR clauses, and contractors should consider setting up additional time codes to account for delay costs associated with COVID-19.

Further, in order to preserve potential claims and defenses, contractors impacted by the COVID-19 pandemic 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.

This documentation will serve as important support for claims or REAs seeking schedule extensions or potential price adjustments.

Contractors seeking reimbursement of paid leave costs under Section 3610 of the CARES Act should be particularly mindful of guidance issued by OMB and 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.”

Once a contractor has communicated with the Contracting Officer about delays and increased costs, captured those costs appropriately, and documented the cost and schedule impact on contract performance, it should consider submitting a claim or REA. Importantly, the contractor does not need to have incurred all costs associated with COVID-19 prior to submitting a claim or REA; it can later update the amount sought. There may be some benefit to submitting a claim or REA as soon as practicable, as there may be limited funding to adjust contract prices.

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