



COVID-19 GUIDANCE FOR GOVERNMENT CONTRACTORS

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About PilieroMazza

PilieroMazza – a business law firm – serves as a strategic partner to government contractors and commercial businesses from across the United States.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translates into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

- Audits & Investigations
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Peter Ford heads the firm's Boulder, Colorado office. Since joining PilieroMazza in 2011, Mr. Ford has become one of the firm's most experienced attorneys for SDVOSB-related matters for both the VA and SBA. In this regard, he regularly assists clients with submitting applications to the VA's VetBiz VIP program, filing reconsideration requests of VA VetBiz VIP program denials, and filing and defending SDVOSB status protests.

Mr. Ford advises clients on small business procurement matters, particularly issues related to eligibility for, and continued participation in, small business federal procurement programs, such as the SBA's 8(a) BD, SDVOSB, WOSB and HUBZone programs and the VA's VetBiz VIP program. He represents clients in actions before OHA, GAO and ODRA. He also counsels clients on maintaining compliance with the FAR and the small business regulations, which includes auditing clients for potential size and affiliation issues.

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Lauren Brier represents commercial businesses in a variety of government contracting and litigation matters.

A highly skilled practitioner, Ms. Brier offers guidance on bid protests, terminations, constructive change claims, multiple award schedule (MAS) contracts, and solicitation reviews. She is also adept at counseling clients on suspension and debarment proceedings, mandatory disclosures, alternative dispute resolution, base debarments, False Claims Act (FCA) actions, and other issues under the Federal Acquisition Regulation (FAR) and Contract Disputes Act (CDA).

Overview

- Federal Guidance on Contract Issues Associated with COVID-19
- COVID-19 Related Stop Work, Suspension Orders, and Terminations
- Bases for REAs and Claims Arising from COVID-19
- Planning for Future Contracting Amidst the Pandemic

Federal Guidance on Contract Issues Associated with COVID-19

OMB Guidance for Government Contract Performance

- Issued guidance on March 20, 2020 to the heads of executive departments and agencies regarding contract performance issues stemming from COVID-19
 - Teleworking – encourages agencies not to discourage contractor use of telework when consistent with contractual requirements
 - Mitigating the Impact of COVID-19 on Contractors – encourages the extension or alteration of contract schedules if contractor personnel must be quarantined due to exposure to the virus
 - Addressing COVID-19 REAs – should be considered on a case-by-case basis and whether costs would be allowable to protect the health and safety of contract employees
 - Closure of Federal Buildings – whether work is continued or stopped should be addressed on case-by-case basis taking into consideration health and safety of government and contractor employees

OMB Guidance for Government Contract Performance

- Conducting Acquisition-Related Activities Normally Performed Face-to-Face – encourages agencies to act in line with CDC recommendations asking agencies to consider virtual activities, i.e. video proposals and online industry conferences/debriefings
- Communications with Industry Partners – informs agencies that clear and timely communication between agencies and industry partners is critical to government’s response to COVID-19
- Special Emergency Procurement Flexibilities of FAR 18.202
 - Flexibilities identified in FAR 18.202, “Defense or recovery from certain events,” are available for use in supporting response efforts to COVID-19
 - i.e. micro-purchase threshold is raised from \$10,000 to \$20,000 for domestic purchases and \$30,000 for purchases outside the U.S.
 - i.e. simplified acquisition threshold is raised from \$250,000 to \$750,000 for domestic and 1.5 million for outside the U.S.

Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act

- The CARES Act allows contracting officers to pay contractors at the “minimum applicable billing rates” for any employees who cannot perform work at a government site or government-approved contractor site due to a shutdown of said site because of COVID-19
- The contracting officer has the right to determine the amount reimbursed under Section 3610 and at what level (e.g., contract, division, segment, company, or corporate) the costs will be reimbursed
- Contractors must segregate COVID-19 paid leave costs in their books and records
- Contractors may not request Section 3610 reimbursement for any hours related to employees a contractor has furloughed or laid off

DoD Memorandum – Managing Defense Contracts

Impacts of the Novel Coronavirus

- Recognizes that DoD contracts contain clauses that excuse performance delays, including FAR 52.249-14, Excusable Delays; various termination clauses; and FAR 52.212-4 commercial contracts
- REAs must be considered on a case-by-case basis
- In consideration of REAs, contracting officers must review impacts realized from COVID-19, applicable law, and regulations, and any relief that may be authorized by laws enacted in response to COVID-19
- Contracting officers must take into account whether costs would be allowable, allocable, and reasonable to protect health and safety of employees

GSA COVID-19 Related Guidance for Contractors

- For existing contracts, contracting officers required to:
 - Assess whether contracts have “no potential” for impact, “have potential” for impact, “must be performed on site” and are mission critical, or “must be performed on site” and are not mission critical
 - Discuss with contractors any challenges they may be facing or may expect to face due to COVID-19
 - Identify potential alternate sources of supply or substitute products to mitigate disruptions
 - Communicate with key customers to keep them informed of any issues identified and any measures that need to be taken to mitigate
- Contracting officers may delay acceptance of deliverables through appropriate excusable delay clauses of the contract i.e. FAR 52.249-14 or 52.212-4(f)

COVID-19 Related Stop Work, Suspension Orders, and Terminations

Stop Work Orders (FAR 52.242-15)

- Permits the Contracting Officer to temporarily stop performance in the best interests of the government
- Must be provided to the contractor in writing (can come via email)
- Contractor must take immediate and reasonable steps to mitigate any additional costs incurred on the project
 - Mitigation examples – moving workers to different projects, using equipment at other project locations
- Important for contractor to keep records of any extra performance costs incurred as a result of stop work if it intends to submit costs to the government through an REA or claim
- When stop work is resumed, pertinent to submit request for costs within 30 days after end of the period of work stoppage

Work Suspensions (FAR 52.242-14)

- Permits the Contracting Officer to temporarily suspend performance in the best interests of the government
- Only allows for equitable adjustments when CO causes the delay by failing to act in a reasonable manner and in accordance with the contract
- More difficult to recover costs – need to make connection between COVID-19 related suspensions and contracting officer conduct
- Suspension of Work clause can be used to recover costs stemming from site restrictions/access to project

Termination Clause and Considerations

- If termination is made in whole or in part as a result of COVID-19, contractor will be entitled to recover costs under the termination for convenience clause of the contract
- FAR 52.249-2 (fixed price); FAR 52.249-6 (cost reimbursement); FAR 52.212-4(l) (commercial items)
- Termination convenience settlement proposals must be submitted in accordance with FAR Part 49
- FAR Part 49 sets forth specific rules regarding the categories of costs that are reimbursable (i.e. labor, materials, equipment)
- Settlement proposals must be on the forms prescribed in FAR 49.602
- Legal fees to prepare proposal are recoverable

Bases for REAs and Claims Arising from COVID-19

Excusable Delay Claims

- FAR 52.249-14 provides that the government will not hold the contractor in default because of any failure to perform, for causes outside the contractor's control
- FAR 52.249-10 (Default Fixed-Price Construction) allows for excusable delays related to epidemics and quarantine restrictions as long as contractor notifies the CO in writing of the delay within ten days
- Entitles the contractor to a time extension, not costs associated with the delay
- Important if a contract extension is needed to complete performance to avoid liquidated damages and/or termination for default

Compensable Delay vs. Non-Compensable Delay

- **Non-Compensable Delay** – delay often unrelated to government conduct, i.e. strikes, weather, acts of God, fires, floods, etc.
 - Entitles contractor to a time extension
- **Compensable Delay** – delays that are unforeseeable and beyond the contractor's control. Normally caused directly by the government.
 - Indirect cost increases that occurred during the extended performance period
 - Material cost increases that occur during the delay
 - Other damages directly related to or attributable to the delay

Changes Clause (FAR 52.243-1)

- FAR 52.243-1 (fixed price); FAR 52.243-2 (cost reimbursement); FAR 52.243-4 (construction)
- Allows for an adjustment in contract price when changes are made to scope of work, either through formal, written order or conduct (constructive change)
- Standard changes clause often requires contractors to provide notice within 30 days from government-direct change
- Costs and time are potential areas of relief if COVID-19 is making performance more difficult or if the government is seeking additional requirements outside the original scope

Important to Know the Limits of Government Authority

- Who has authority to bind the government?
 - The contacting officer
 - Formally-designated representative (i.e., COR, COTR, GTS, GTE)
 - Representative assigned without formal designation
- Methods of appointing authority
 - Look for designation in the contract
 - If not designated in the contract, must be a separate writing (i.e., letter) specifying authorization

When Is the Government Bound?

- The government official acted within the scope of his / her actual authority
 - The government is not bound by apparent authority
- The government official acted with implied actual authority
 - May arise when the government intended to grant authority but failed to do so, and such authority is considered to be an integral part of the duties assigned to the government official
 - Do not bet the farm on implied actual authority
- Unauthorized action is later ratified by an authorized representative

The Government's Duty to Cooperate

- The government has an implied obligation to carry out its duties under a contract in good faith
- The duty not to hinder and the duty to cooperate are aspects of the implied duty of good faith and fair dealing
- The duty of good faith and fair dealing is limited by the original contract
 - Prevents a party's acts or omissions that are inconsistent with the contract's purpose and deprive the other party of the contemplated value
- Bad faith is not an essential element of a breach of the implied duty of good faith and fair dealing claim

Waivers and Reservations of Rights

- Watch out for waiver language before you sign any modification related to COVID-19
 - The government often includes waiver language in contract mods releasing the government from any liability for any action or inaction prior to the modification
 - Waivers and releases of rights may be absolute bar to recovery
 - If the release language is unambiguous, contractor more than likely is stuck with the plain and ordinary meaning of the release
- An executed bilateral modification that contains no reservations constitutes accord and satisfaction
 - If you believe you may have a claim, add your own language to the release to make clear you take exception and are reserving your right to file a claim in the future and describe the reserved issue(s)

Use Experts and Consultants

- Claimed amount must be calculated based on reliable principles and methods
- Certification for claims over \$100,000 heightens emphasis to ensure the figures are accurate
- For these reasons, experts and consultants are prudent in most cases
 - In case of litigation, a third-party expert or consultant, or an expert within the company, should be used for calculating delay damages
 - Your attorney should not prepare delay damage calculation – risk of your attorney becoming a material witness in litigation

Planning for Future Contracting Amidst the Pandemic

How to Best Protect Yourself under Existing Contracts

- Understand the clauses in your contract – look at Master Contract
- Provide a safe workplace and ensure that you have a telework policy in place
- Determine how to keep performance on track
- Keep detailed documentation of how COVID-19 is impacting performance i.e. how company is being impacted, personnel, supply chain
- Assure timely notice is given to contracting officer as soon as costs/delays are known
- Maintain open communication with contracting officer and upstream/downstream contractors

Reasons to Continue Doing Business with the Federal Government

- Government contractors more recession/natural disaster proof than some commercial businesses
- Depending on type of service/products being provided, government contracts may sustain it or even increase revenues during time of crisis
- Government agencies often buy products and services in large quantities, which can help small businesses grow and develop
- Government is ramping up to provide disaster relief through its contractors
- Contractors are issued 12 months a year, and can provide a steady stream of revenue

Questions?



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