

March 18, 2020

The Honorable Ellen Lord
Office of the Under Secretary of Defense Acquisition and Sustainment Acquisition
Technology and Logistics, DoD
3000 Defense Pentagon
Washington, DC 20301

Ms. Lord,

We truly appreciate the information Kim Harrington sent out Monday regarding planning for potential COVID-19 impacts. Also, thanks to you and your team for the daily calls with industry to determine challenges affecting the Defense Industrial Base and how to mitigate them through communication and collaboration.

Kim's memo was timely, informative and helpful, and NDIA has pushed it to our membership. However, as I noted on Tuesday's call, our membership has many more questions and is requesting more information. They still seem to be left with many uncertainties, even after contacting their contracting officers. The myriad contracting officers are not all giving out the same guidance or messaging, and in some cases, contractors are receiving conflicting guidance. See attached FAQs a member received from a USAF contracting officer that appears to set up a number of situations in which federal contractors could be denied equitable adjustments.

It would be helpful if the department issued higher-level guidance companies can reference before engaging their respective contracting officers with specifics to their contract execution. Among these would be guidance on travel (domestic and international), telework, work stoppage, and forced contract delays and extensions.

Besides the at times inconsistent guidance mentioned, companies must deal with local and state authorities ordering facilities to close. This is true in California's Bay Area and threatens to spread to other jurisdictions. We would ask that the Department seek a federal exemption for businesses doing required national defense activities.

Additionally, our membership is especially concerned about the impact the COVID-19 response will have on small businesses and lower-tier suppliers. We would like the Defense Department to consider accelerated contracting and disbursement of the approximately \$160 billion of unobligated funds under the department's control. That acceleration, and its flow-down through the supply chain, will mean the difference between closing-up shop or surviving this crisis for a large number of firms and capabilities that will be difficult to replace.

Finally, we expect legislation soon from Congress. Including the small business considerations DoD is already authorized, what relief (SBA bridge loans, accelerated payments, tax breaks, etc.) is the Pentagon seeking?

As always, we highly value the partnership we have with your office and are available at any moment to help be a part of the solution to include acting as a conduit of any information/guidance you can provide.

Sincerely,

A handwritten signature in dark ink, appearing to read "HAWK" followed by a stylized name, likely "Carlisle".

Herbert J. Carlisle
General, USAF (Ret)
President & CEO

COVID-19 - General Contracting Frequently Asked Questions (FAQs)

***Caveat** – Every contract is unique. As such, every question should start with a review of the specific contract terms. Contracting Officers should consult with local legal counsel for specific guidance.

Q. What does the government do if it is told or suspects a contractor is infected by COVID-19?

A. The CO must coordinate with installation medical personnel for a determination if the contract employee should be removed from the workplace and the installation. The commander may issue the appropriate temporary bar letter, until such time as the contract employee is cleared by medical personnel to return to work. As for the contract, the CO should notify the contractor that the contract employee is temporarily barred from work and the installation. If warranted, the CO should discuss with the contractor plans for continued performance. The government is not responsible for the cost quarantine or medical care, that is between the contract employee and his/her contract employer. *Note, proactive Contracting Officers may contact companies and discuss procedures if an employee has been overseas, in contact with an ill person, or is feeling ill themselves before coming to an Air Force installation. Nothing prevents discussion that contractors should not present at the AF facility and should consider telework or other options in that situation.

Q: What if contractors cannot meet the performance, or is delayed in its work on the contract due to quarantine or COVID-19 virus quarantine?

A: Contractors cannot be terminated for default if they fail to meet contract deadlines/completion dates. The Default clauses for Supply and Services, R&D, and Construction contracts (FAR 52.249-8, 52.249-9, 52.249-10) call out epidemics and quarantines as excusable delays, which is a valid defense to failure to complete the work by the required dates. Still further, FAR 52.249-14, Excusable Delays, call out epidemics and quarantines as excusable delays. Similarly, 52.213-4 Terms and Conditions-Simplified Acquisitions (Other Than Commercial Items) compels the inclusion of the list of Excusable Delays, which includes epidemics and quarantine restrictions. Similarly, 52.212-4 Contract Terms and Conditions-Commercial Items calls out epidemics and quarantine restrictions and excusable delays, which is a defense to default. While the contractor does get additional time to complete the work, they are not entitled to additional payments due to epidemics or quarantine restrictions.

Sovereign Act Doctrine

Actions taken by the United States in its sovereign capacity shield the Government from liability for financial claims resulting from those acts, although a contractor is allowed additional time to perform. *Troy Eagle Group*, ASBCA No. 56447, 2013-1 B.C.A. P35,258 (2013); *M.E.S., Inc.*, ASBCA No. 56149, 12-1 BCA P 34,958 at 171,856 (no monetary compensation due for delays resulting from a sovereign act). Acts of a public and general nature, not targeted at a specific contractor, would constitute sovereign acts. *Conner Bros. Constr. Co. v. Geren*, 550 F.3d 1368, 1371 (Fed. Cir. 2008). *See also Henderson, Inc.*, DOTBCA No. 2423, 2500, 94-2 B.C.A. P26,728 (1994) (a sovereign act is whether the action taken is for the public good; if so, the Government is not liable for damages resulting from the act).

In *Conner Brothers*, *supra*, Conner was denied access to its work site on Fort Benning, Georgia, shortly after the attacks on 11 September 2001. The Federal Circuit upheld the Board's decision that the denial of access was a sovereign act. In *M.E.S., supra*, the Air Force "updated procedures for installation entry by contractors." It was undisputed that this change added one hour each day for compliance by M.E.S. and its subcontractors. This Board held that the "update" was a sovereign act for which the Air Force was not liable for money damages. *See also Garco Construction, Inc.*, ASBCA Nos. 57796, 57888, 2015-1 B.C.A. P36,135 (2015) (Air Force's decision to commence enforcing its existing base access policy was protected as a sovereign act – Air Force was not liable for monetary damages).

Q. What if govt closes a facility or installation due to COVID-19. Should the Govt issue work stoppage to contractors?

A. No. We do not direct the contractor to stop work. If contractor personnel cannot access their location of work, we direct them to their supervisor. It is up to the contractor to direct the actions of their employees. Depending on the type of contract work, some contracts have alternate locations provided by the contractor for the purpose of continuing to perform contract tasks. Do not direct the contractors to stop working. Do not issue a stop work order because it may negate the government's sovereign act making the government responsible for costs. (Consider flexible telework if in contract, see FAR 7.108)

Q. For contractors that are ordered to self-quarantine by the government (whether Federal or State), should the government continue to pay the company during the quarantine period?

A. The law does not automatically require payment under those circumstances. As a general matter, depending on the type of contractor, contractors usually don't (and shouldn't) get paid for not working. A government-directed quarantine would likely be considered a sovereign act, and if so, a defense to any contractor claim. Assuming the contractor cannot perform any work under the contract due to a government-ordered quarantine (i.e., cannot telework from the quarantined location), absent a contractual provision, it wouldn't be wise to pay them without contractual authority to do so. We don't recommend asserting an official position that effectively says "don't worry if you get quarantined, you'll get paid anyways." Comments like this may defeat the sovereign act defense. There are two exceptions to the sovereign act defense which prevent the government from avoiding liability. First, the Contracting Officer issues instructions or orders to implement the sovereign act which exceed contract requirements, e.g., which constitute a constructive change. Second, the government expressly or impliedly agrees to pay the contractor's losses due to the sovereign acts. Under the first of these two limitations, an act ceases to be a sovereign act when it takes the form of a direction for implementation under the contract and when it requires a constructive change to the contract. *Anham Fzco, LLC*, ASBCA No. 58999, 2018 ASBCA Lexis 501. Bottom line, look at the contract to determine if the contractor can continue to perform via alternative means, such as telework, if not, refer them to the contractor supervision.

Q. Contractors that are put into isolation by a medical professional or quarantined, would the company's sick leave policy be responsible for covering the employee?

A. Generally, the company's leave policy should control in this situation. The government would not be responsible for this costs associated. Moreover, the government would not pay for services not rendered and depending on the contract, should ask the contractor to continue to perform under the contract.

Q. How does the government handle contractors' teleworking?

A. Refer to FAR 7.108, which provides that agencies should not discourage use of teleworking. If FAR 7.108 is not incorporated into the contract, a D&F may be required.

Q. If the installation is locked down, would we handle mission essential contractors as we normally do with the exception we may have to find alternate means of work with the company (i.e. if they are able to telework, but not written into the contract we can adjust as necessary)?

A. Yes, in-scope changes are permitted. See Defense Pricing and Contracting (DPC) memo dated 10 March 2020 dealing with mission essential contractors.

Q. Should an individual contractor test positive for COVID-19, resulting in an extended medical absence, would the company will be required to replace the individual?

A: Depending on the type of contract, whether the company replaces the individual or not is generally the company's decision to make. We don't own the employee or direct personal actions, even with A&AS contractors. Certainly the government and company might have discussions that realize the company's performance is at risk, which may achieve the intended result. Bottom line the government generally should not direct a contractor to replace an employee who is out on extended medical leave. It is likely that companies in the past have had employees out on extended medical leave for illnesses other than COVID-19. The company is responsible for how to handle an employee who will not be able to work for an extended period of time, regardless of the reason.

Q. Command is in the process of identifying "mission essential" personnel that will still work if non-mission essential personnel have to shelter in place at residences or evacuate. The CO wants to ensure contractor support even if the installation goes to mission essential only?

A. Check to see if contractors are mission essential. If not, a modification may be appropriate, however, mods may have scope and cost implications that need to be evaluated on a case by case basis by PMs and PCOs per 5 Mar 2020 Memo from OSD Pricing and Contracting Director, Kim Herrington: https://www.acq.osd.mil/dpap/policy/policyvault/Continuation_of_Essential_Contractor_Services_DPC.pdf. The relevant clauses include DFARS 252.237-7024 and DFARS 252.237-7023, as prescribed at DFARS 237.7603

Q. In the event of mandatory quarantines, can bases use contractors to perform security of the quarantine?

A. 10 U.S.C. 2465 prohibits use of contractors for security guard functions. Nothing in FAR Part 18 allows us to ignore this in the face of a contingency. Presidential authority to suspend the title 10 provision may be given under 50 U.S.C. 1431, and has been authorized for DoD so long as the SECDEF deems that such action will facilitate the national defense (Ex. Ord. 10789). Any contract awarded under that provision could not exceed \$50K without Assistant Secretary approval, and could not exceed \$25M without notifying the Committees of Armed Services in Congress. 50 U.S.C. 1432 states restrictions to the use of this authority and does not mention security. Two different ways to look at this would be that the function sought is not "security guard" duty and therefore prohibition doesn't apply at all; or, pandemic/quarantine is not sufficiently related to national defense, and therefore there is no authority to bypass the prohibition.

Q. Can contractors be treated at the local medical treatment facility if they show signs of infection?

A. No. Unless the DoD puts out direction that contractors can get tested at its base MTFs, contractors need to follow local health guidelines and ensure their people are tested off-base. In some cases like the Hospital Aseptic Maintenance Contract which provides housekeeping services for AF Medical Treatment Facilities, including treatment areas, the contract provides that the MTF can assess the individual and provide initial treatment due to the concern for insuring that maintenance workers are safe and for insuring that such workers do not spread the disease to AF patients.