



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
ACQUISITION LOGISTICS AND TECHNOLOGY
103 ARMY PENTAGON
WASHINGTON DC 20310-0103

SAAL-ZP

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Deputy Assistant Secretary of the Army (Procurement) (DASA(P))
Response to the Coronavirus Disease (COVID-19)

Reference: Memorandum, Acting Principal Director, Defense Pricing and Contracting,
10 March 2020, subject: Planning for Potential Novel Coronavirus Contract Impacts

1. ODASA(P) recognizes the concerns related to the COVID-19 disease and its potential impact throughout the Army Contracting Enterprise. The global spread concerning the COVID-19 virus is rapidly evolving and may put many federal contractors at risk of missing contractual deadlines. The increased number of COVID-19 cases may impact a contractor's ability to perform in a timely manner and consequently endanger the U.S. Army mission.
2. As stated in the reference, communication between the Government and contractors is essential for workforce safety and mission continuity. Contracting Officers must assess each situation on a case-by-case basis. It is not the contracting officer's responsibility to determine whether the excuse of COVID-19 should apply or not.
3. Contractors should recognize that their contracts may contain clauses that would excuse performance delays including: Federal Acquisition Regulation (FAR) 52.249-14 (i.e., cost reimbursement and time and material contracts), FAR 52.249-8 (i.e., fixed price supply and service contracts), and FAR 52.212-4 (i.e., commercial contracts). Each of the aforementioned clauses share a special thread – a contractor should not be in default because of a failure to perform the contract if the failure arises beyond the control and without the fault or negligence of the contractor.
4. "Epidemics" and "quarantine restrictions" are also examples of causes beyond a contractor's control (FAR 52.249-14(a); FAR 52.249-8(c) and (d); FAR 52.249-9(c) and (d); and FAR 52.212-4(f)). These exceptions appear to consider circumstances such as the spread of the COVID-19 virus, which has been declared a public health emergency by U.S. authorities and subsequently resulted in global quarantine restrictions. If the failure to perform is caused by the default of a subcontractor and the cause of the default is beyond the control of both the contractor and subcontractor, contractors may be excused from liability for excess costs under FAR 52.249-14, FAR 52.249-8 and FAR 52.249-9. However, it may not apply under non-commercial contracts if the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule (FAR 52.249-14(b); FAR 52.249-8(d); FAR 52.249-9(d)).

SAAL-ZP

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Contractors also may not be entitled to relief if the contracting officer ordered the contractor to purchase the supplies from another source, and the contractor unreasonably failed to comply with that order (FAR 52.249-14). The commercial item clause does not address excess costs specifically but it does add a notice obligation.

5. The provisions mentioned above do not entitle the contractor to compensation. Non-compensable delays are delays for which the contractor is entitled to a time extension, but there is no entitlement to any additional monetary compensation. The federal government and contractor has no control over the non-compensable delay. Therefore, both parties assume their individual additional costs. The contractor absorbs its delay costs for being out on the project longer, and the federal government absorbs its costs by granting a time extension to the contractor and extending the contract.

6. To approve excusable delay provisions, contracting officers should carefully consider the circumstances of each case and ensure the contractor took reasonable steps to perform and provided notice as required.

7. In addition to the excusable delay provisions, the standard FAR changes clauses (e.g., FAR 52.243-1 or FAR 52.243-2) provide options for obtaining an equitable adjustment for increased work.

8. Heads of Contracting Activities and Senior Contracting Officials must keep the DASA(P) advised of significant COVID-19 related impacts to Army contracts and contract operations.

Encl

Stuart A. Hazlett
Deputy Assistant Secretary
of the Army (Procurement)

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