COVID-19 and Contracting: Breaking Down Recent Guidance

William Weisberg, Esq.
Partner, Law Offices of William Weisberg PLLC

1750 Tysons Blvd., Suite 1500
McLean, VA 22102
(703) 738-0552
william.weisberg@govprocurementlaw.com
www.govprocurementlaw.com
Disclaimer

This presentation is for informational purposes only and does not constitute legal advice. For legal advice on any issue, you should consult with an attorney.
Agenda

• Background: Where We Are/Might Be, Contractually
• Government Policy: OMB’s March 20 Memo
• Additional Government Tools in the Toolbox
• Contract Delays: What is Excusable, and When, and How?
• Increased Costs of Performance: What, When, and How?
• The Defense Production Act(s)
• Compliance Issues: More Important Than Ever
CMBOK® Competencies

2.0, “Management”
3.4, “Regulatory Compliance”
6.0, “Post Award”
Background: The Current (Contractual) Situation

• We are still operating in the *existing* contract (and grant, OTA, CRADA, etc.) framework.
• CICA, CDA, FAR, DFARS: they all still apply.
• Exceptions and exemptions must be affirmatively invoked by the Government, unless and until a blanket deviation/exemption/exception has been invoked.
• The False Claims Act and the False Statements Act are in full force, and DOJ and the IGs have been clear: “We are watching, and we will act.”
Practical Reminders

• Only the contracting officer can issue binding instructions to contractors.

• For subcontracts, understand the *Contractual Point of Contact* specified in the subcontract.

• Until contractors receive specific, written direction from a Contracting Officer or subcontract POC, it is “business as usual.”

• If direction comes from *anyone* else (COR, PM, “end-users,” etc.) contractors should confirm that actual authority has been delegated to that individual.

• That confirmation, and the direction itself, *should be documented*.

• Contracting Officers do not have the authority to break the law, and do not have the authority to direct contractors to break the law; this is different than the Contracting Officer granting a waiver or exemption, subject to authority.
Practical Reminders

• What contractors should not tell their counsel: “I don’t want to over lawyer it…” This is the time to get it right (i.e. write).

• Getting a record is more important than format: letter, email, etc.

• “If we don’t get a reply within one day, we will assume your concurrence” is NOT good enough most of the time, and certainly not now.

• Not everything has to be a formal contract modification, but we don’t want to rely on memory.

• Historically, after the crisis has passed, improperly documented an/or authorized work has become volunteer, or a false claim. This was true after 9/11, after Katrina, and after the darkest days in Iraq and Afghanistan. There is no reason to think it will be different this time.

• Communicate, communicate, communicate.
Some Things to Keep in Mind

• Expect more sole source and bridge contracts.
• For contractors, monitor SAM carefully for sole source awards; historically, there have been sole source awards that “overreach” in crisis situations. The FAR part 6.3 sole source factors still apply, and the Government can still buy competitively and fast.
• There will still be protests, and there will be CICA-stay overrides—probably more of them. (Re: recent ventilator repair contract).
• Most contract awards will still involve the same blocking and tackling.
• The compliance environment has not changed; DOJ has already announced enhanced anti-fraud surveillance.
Maximize telework: *(Practice tip: does your contract need a telework modification)*?

Impact on contract schedules: “...agencies should be flexible in providing extensions to performance dates...”

Stop work situations: “Agencies should take into consideration whether it is beneficial to keep skilled professionals or key personnel in a mobile ready state for activities the agency deems critical to national security or other high priorities.”

Special emergency powers: Changes to micro/simplified thresholds.

OMB, continued

- **Excusable delays**: Agencies should be “flexible,” may need to procure elsewhere (i.e. T/C), and these delays should not result in negative CPARS ratings.

- **Equitable adjustments**: On a “case-by-case” basis; costs must be allowable and reasonable within the context of FAR part 31.

- **Increase communications**

- **SAM extensions**—60 days if expiring before May 17, 2020.

- This is not law; this is policy guidance.
Additional Government Tools in the Toolbox

- **Additional paid sick leave**: Up to 80 hours of paid sick leave (in addition to paid sick leave already mandated by Service Contract Labor Standards and David Bacon Act).

- **CARES Act Section 3610**: Billing and contractual relief when employees cannot work on site due to COVID-19 and cannot telework. The Government is authorized but not required to modify contracts, without consideration, to allow contractors to keep their employees in a “ready state” to resume work.
  - CARES Section 3610 is based on 40 hours per week, at minimum applicable billing rate, reduced by credits under other applicable CARES sections.
DOD Progress Payments: OSD has issued memorandum requiring contracting officers to immediately use deviations for DFARS 252.232-7004 (DoD Progress Payment Rates) and FAR 52.232-16 (Progress Payments) permitting 90% progress payments for large businesses and 95% progress payments for small businesses.
FAR Part 18 Emergency Flexibility

(1) The micro-purchase threshold is raised from $10,000¹ to $20,000 for domestic purchases and to $30,000 for purchases outside the U.S.;

(2) The simplified acquisition threshold is raised from $250,000² to $750,000 for domestic purchases and $1.5 million for purchases outside the U.S.; and

(3) Agencies may use simplified acquisition procedures up to $13 million for purchases of commercial item buys.
Excusable Delay Issues

• First step: READ THE CONTRACT (or Subcontract)!

• Look for applicable clauses with excusable delay provisions: FAR part 52.249-14 (for cost reimbursement contracts); FAR part 52.249-8 (for fixed price contracts, both supply and service; and FAR part 52.212-4 (for commercial contracts).

• If the contract is silent on excusable delay, the Christian Doctrine may read the appropriate clause into your contract by operation of law.

• Practice tip: Many contracts will contain more than one of these clauses, along with other boilerplate. The contractor and the Government should confer as to which one applies to the contract. It may not be clear if both parties consider the contract to be “commercial.”

• Key element: delays are excusable if caused by events outside the control of the contractor and not due to contractor’s fault or negligence.
Delay Issues, continued

• It is not yet (as of April 6, 2020) clear how the Federal Government’s designation of defense and health-related contractors as “essential” will intersect with various State Government “shut down” orders.

• It is likely that government contractors are expected to keep working but will still be able to avail themselves of excusable delay provisions if they are unable to work.

• Beware of the distinction between not being able to work (due to shortages of supplier or employees) and not “wanting” to work.

• This is all evolving in real time.
Causes of Delays and Increased Costs: Some Examples

• State or local government lockdowns, shutdowns, or quarantines;
• Employee “constructive” lockdowns or quarantines (i.e. employees stay home);
• Government personnel unable or unavailable to provide directions, approval, guidance, etc.;
• Contractors and/or government unable to access a site;
• Formal or informal limitations on travel;
• Approvals or required information not being received in a timely manner from either the Government or from another contractor;
• Supply chain interruptions, ranging from cancellation, to delays, to increase in costs.
• Contractors should document delays in as close to real time as possible, **before** the events start impacting deliverables.
• These delays tend to be cascading; impact how “everything impacts everything else.”
• Narratives are useful but should be backed up as much as possible with documentation.
• Contractors should start documenting well before deciding (with counsel) whether or not to “make it official” with the government.
• Incomplete contemporaneous documentation often carries more weight than fancy document sets created weeks or months after the fact.
• Flow this direction down the supply chain, and (potentially) let upstream contractors know what may be coming from their way.
Delay Issues, continued

- Explicit excusable delay examples listed in the clauses include “epidemics” and “quarantine restrictions.” FAR part 52.249-14(a); FAR part 52.249-8(c) and (d); FAR part 52.249-9(c) and (d); FAR part 52.212-4(f).
- It goes without saying: contractors should **not** try and wrap “routine” performance problems or delays with these parts of the clauses.
- Delays may have more than one cause.
- These provisions apply to subcontractors (and vendors, suppliers, etc.) all the way down the supply chain. Documentation requirements will be the same at every tier.
- Contractors will have to show that the delay resulted from the virus (or virus-related impact) and was not caused by the contractor.
Final Thoughts on Delays

• Important note: these are excusable delay provision, NOT compensation provisions.

• Specific clauses contain specific notice requirements to the government.

• A good rule of thumb: you can never notify too early...

• Practice tip: Contractors should be clear they are talking about a delay, NOT suggesting they are abandoning the contract or otherwise not planning to perform.

• Even if there is no immediate prospect of performing, notice and eventual submissions should be positioned as indefinite or other long delay: “We will be able to perform when ______happens”, not “we will never be able to perform.”

• Government direction to meet a schedule in the face of an excusable (but not otherwise compensable) delay may create a compensable equitable adjustment.
Increased Costs of Performance

Scenario 1: Stop Work Orders

• Recovery of additional costs will be circumstance-specific.
• Stop Work clause at FAR part 52.242-15. (Note that the *Christian Doctrine* will read this clause into contracts where it is missing).
• Requires the contracting officer to issue a Stop Work Order and allows *both* schedule relief and cost recovery.
• It is possible that Government conduct results in a “constructive Stop Work Order.” The contractor *must* notify the Government promptly if it believes there has been a constructive Stop Work Order.
• Claims for cost and schedule impact generally must be submitted within 30 days of the end of the Stop Work Order.
Scenario 2: Contract Changes

• The Changes clause is the prime vehicle for contractor recovery of additional costs to perform.

• The prime contract should include a standard government Changes clause: FAR part 52.243-1 (fixed price), FAR part 52.243-2 (cost reimbursement), FAR part 52.243-3 (T&M), or FAR part 52.243-4 (construction).

• A variation should be flowed down to all lower-tier contractors.

• The *Christian Doctrine* will read into the contract a missing Changes clause.

• Government action may result in a “constructive change” to the contract, where the Government’s actions or inactions require work or other effort outside the scope of the contract, but no formal change order is issued.
Increased Costs, continued

• A wide variety of scenarios may increase the cost of performance and lead to a Request for Equitable Adjustment ("REA") and, potentially, a claim.

• Contractors should document, document, document....and notify the contracting officer as early as possible that Government action is increasing costs.

• **Potential pitfall:** Changes are compensable to the contractor when the Government is acting in a “contractual” capacity but may not be when the Government is acting in its “sovereign” capacity (although a schedule delay may still be applicable).

• Contractual vs. sovereign acts is a fact (and case law) specific determination.
The Defense Production Acts

The “Traditional” Defense Production Act—Still in Place

• Most important DPA authority: the “Priority” system, which allows the government to direct contractors to prioritize “rated” orders over lower-rated orders or over unrated orders.

• The DPA also gives the government “allocation” authority over facilities, services, materials, and technical data to support rated and other contracts.

• The DPA does not give the government authority to order companies to accept a government contract.

• New DPA authority has been given to HHS; DOD already has DPA authority.
The government has a variety of tools to “encourage” contractor behavior:

- **Purchases and Purchase Commitments**
- **Loan Guarantees and Direct Loans**
- **Defense Production Act Fund** - The Defense Production Act Fund is used to carry out the above two authorities and is capped at $750 million in any given year. This authority is expected to increase substantially.
- **Experts** - The government has the authority to offer expert assistance to industry.
- **Industry Agreements** - This may include allowing industry to collaborate in ways not normally permitted.
- **Liability Protection** - The DPA also provides for protection from liability for acting or failing to act in compliance with imposed obligations, even if the obligations are later determined to be invalid.
Practical Guidance on the DPA

• Orders are rated: DX orders are the highest rated; they take precedence over DO orders, which take precedence over unrated orders.

• These apply to contracts, not to firms without a contractual relationship with the Government.

• Pricing, terms, and conditions remain the same as with unrated orders.

• Apply ratings to an unrated contract may be a compensable change under the contract.

• Ratings flow down the supply chain.

• There are very limited situations where a contractor can decline a rated order, and those circumstances are expected to narrow.

• Rated contracts assume that the contractor has factored the costs of complying with the rating system into their prices (i.e. penalties paid to other customers are not allowable costs to be recovered).

• If the Government is asserting that a company MUST accept a NEW government contract, that assertion MUST BE EXPLICIT.
Compliance Issues

• The Government has learned lessons from ARRA—”follow the money.”
• DOD created a procurement-fraud Task Force before the March 20 OMB guidance.
• The IG community has been telling contractors, and contractor counsel, that this will not be the “wild west.”
• FAR part 3.10—requiring a formal government contract compliance program—remains in effect.
• Even when other procurement aspects are waived (for example, a sole source contract, or a FAR part 18 emergency flexibility) the False Claims Act and False Statements Act remain in full force.
Compliance Issues: What is Still in Place?

- The Buy American Act and the Trade Agreements Act remain in place;
- DFARS and FAR counterfeit and defective parts requirements remain in place;
- Rules related to set-aside contracting, particularly affiliation and limitations on subcontracting, remain in place;
- Rights in technical data and computer software remain in place;
- Certified cost and pricing data must still be current, accurate, and complete; and
- Rules on contracting with suspended or debarred firms remain in place.
Every Contractor Should:

• Ensure that they have a FAR part 3.10 Code of Business Ethics and Conduct (regardless of the size or duration of their contracts);

• Have internal controls in place;

• Have every employee be current (within last 12 months) on having completed compliance and ethics training, on on-board all new employees.

• Flow these requirements down their supply chains.

• Consult frequently with counsel; if it doesn’t feel right in “normal times,” it may not be right in these strange times.
Contact Information

William Weisberg, Esq.
Law Offices of William Weisberg PLLC
1750 Tysons Blvd., Suite 1500
McLean, Virginia 22102
(t) 703-738-0552
william.weisberg@govprocurementlaw.com
www.govprocurementlaw.com
Questions?

Please submit your questions in the Q&A pod on your screen.
COVID-19 Resources

As a service to the contract management community, NCMA is curating sources of contracting guidance related to the COVID-19 pandemic.

https://www.ncmahq.org/insights/covid-19-resources
Contract Management Body of Knowledge® (CMBOK®)
Sixth Edition

Aligns with the competencies found in the Contract Management Standard™ Second Edition—now ANSI accredited.

Provides a common understanding of the terminology, practices, policies, and processes used in contract management.

www.ncmahq.org/store
Register for World Congress at ncmaworldcongress.org
Thank You for Participating in Today’s Program