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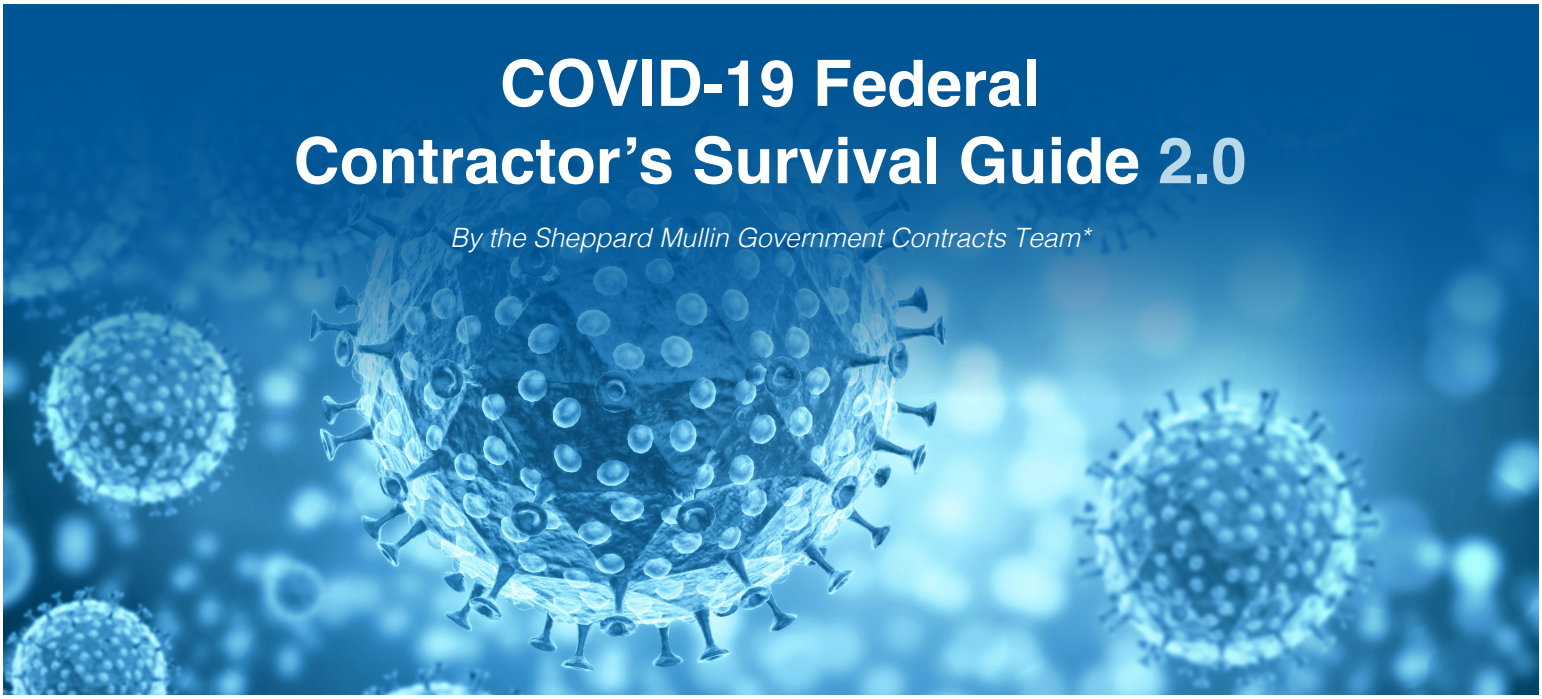
COVID-19 Federal Contractor's Survival Guide 2.0

*By the Sheppard Mullin Government Contracts Team**



Last week, we (Ryan and Jonathan) published the COVID-19 Federal Contractor's Survival Guide in the Coalition For Government Procurement's Friday Flash. The Guide was very well received — perhaps because it didn't once instruct anyone to wash his/her hands — and several readers asked us to expand it to cover additional topics and new developments. Because the COVID-19 contracting landscape is changing so fast, we agreed an update made sense. To make the update as comprehensive as possible, we have retained the information from the original *Survival Guide*, and supplemented it with a wealth of new information, including answers to the questions asked during last week's Coalition *Survival Guide* webinar, which is available for free download from the Coalition here.

Thus, without further ado, we offer you the ***COVID-19 Federal Contractor's Survival Guide 2.0***.

Review your contract's delay clauses.

The FAR includes a number of different delay clauses, tailored to different contract types, including:

- FAR 52.249-14 – Excusable Delay
- FAR 52.212-4(f) – Excusable Delay (commercial items)
- FAR 52.249-8(c), -9(c), -10(b) – Default

Each clause is slightly different, but they all more or less serve the same purpose — excusing the contractor from a delay in performance caused by events beyond its control. FAR 52.249-14, for example, provides (in relevant part) as follows:

> (a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, ***(5) epidemics***, ***(6) quarantine restrictions***, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. Default includes failure to make progress in the work so as to endanger performance.

Case law tells us the contractor must be able to demonstrate that the pandemic was the cause of the delay.

48 C.F.R. § 52.249-14 (emphasis added). To take advantage of the "excuse" these clauses provide, the contractor must be able to *link the excuse to the delay*. In other words, in the current Public Health Emergency ("PHE") situation, it won't be enough to prove the existence of a COVID-19 pandemic. Case law tells us the contractor must be able to demonstrate that the pandemic was the *cause* of the delay. And the contractor must be able to document that fact. In similar situations, contractors have been unable to recover for a delay due to a "flu epidemic" because they did not adequately document the impact of the delay. *See, e.g., Appeal of Ace Electronics Associates, Inc.*, ASBCA No. 11496, 67-2 BCA 6456 (July 18, 1967). The case is old (if you consider something created in the 60s old, which, to be clear, Jonathan doesn't), but it's very instructive.

In *Ace Electronics*, the Government terminated a contract for default after the contractor failed to timely produce certain test reports. The contractor asked the Government (unsuccessfully) to reconsider its default termination, asserting that its delay was due to a "flu epidemic that had 'passed through' its plant causing 30% to 40% rate of absenteeism over a period of several weeks." Although the Board recognized that illness caused by a flu pandemic generally is an "excusable delay," it denied relief, finding the contractor failed to adequately support its contention.

The issue arose again more recently in the context of another flu outbreak. The case is called *Appeal of Asa L Shipman's Sons Ltd.*, GPOBCA No. 06-95, 1995 WL 818784 (Aug. 29, 1995), and the Board's decision relied heavily on Ace Electronics. In *Asa*, the contractor argued its delayed performance was excusable because its "key employees" were incapacitated due to yet another flu epidemic. While the Board acknowledged the existence of the epidemic, it found the contractor failed to establish (i) the epidemic *was the cause* of the delay and (ii) what efforts were made to keep the work going. The Board outlined a four-part test based on *Ace Electronics*, and stated the essence of the test is "the requirement that the defaulted contractor prove that an epidemic was the sole cause, not merely a contributing cause, of the performance delay." Specifically, to meet the *Ace Electronics* test, the contractor must show:

1. The precise duration of the epidemic;
2. What personnel were affected by the epidemic and the period during which they were absent because of the disease;
3. Whether such absences in fact caused the delay in performance, and if so, the extent of such delay; and
4. What efforts were made during such absences by the use of overtime or other measures to keep the work going.

The language of *Ace* and *Asa* is highly instructive for contractors dealing with potential and actual delays caused by COVID-19.

Specific to COVID-19, the Office of Management and Budget ("OMB") included guidance about delays in its recently issued Q&A to federal employees:

> **Question.** If contractor personnel must be quarantined due to exposure to the virus, whether or not related to performance of the contract, and this action results in a slip in the contract schedule, may contracts be extended or otherwise altered?
>
> **Answer.** Yes. Government contracts provide for excusable delays, which may extend to quarantine restrictions due to exposure to COVID-19. For example, see FAR clauses 52.249-14, 52.212-4(f), and 52.211-13. In determining the best course of action, the contracting officer should discuss the situation with the contractor to determine if other options are available (e.g., ability of employee to telework or to find a substitute employee). If other options with the existing contractor aren't feasible, it may be appropriate to re-procure elsewhere if possible. Such actions should be taken for the convenience of the government (e.g., through use of the relevant convenience termination clause or a no-cost settlement) and without negatively impacting the contractor's performance rating. Excusable delays that result in adjustments to the contractor's delivery schedule should not negatively impact a contractor's performance ratings.

The OMB concluded with this direction: "Agencies are encouraged to be as flexible as possible in finding solutions." As reflected in the OMB's guidance, to receive protection under an excusable delay clause, a contractor needs to notify its CO promptly (and memorialize the notification in writing) if performance will be impacted by the virus. Early communication with the CO, thorough record keeping, and good documentation are critical. It's also important to remember, these clauses only provide an excuse for a performance delay. They do not provide for additional compensation to the contractor. Indeed, an excusable delay clause provides no tool to recover increased costs whatsoever. (See below for a discussion on how to deal with increased costs.

On the off chance a Government contract does not have an excusable delay clause (unlikely in the federal context), a contractor still might be able to obtain relief from an excusable delay through the common law doctrines of impracticability and impossibility. For example, even if Coronavirus does not constitute an excusable delay under the contract's excusable delay clause, a government contractor might have the opportunity to seek relief in the event of a dispute by showing that COVID-19 made it impossible for it to perform its contractual obligations. New York courts, for example, look to whether impossibility of performance is the result of destruction of the subject matter of the contract or the means of performance. *See Sher v. Allstate Ins. Co.*, 947 F. Supp. 2d 370 (S.D.N.Y. 2013). If the subject matter of the contract or the means of performance are not destroyed, the defense of impossibility is inapplicable. *See Warner v. Kaplan*, 71 A.D. 3d 1, 5 (1st Dept. 2009).

Employees who used to work at a Government facility now may have to work at home, bringing with them a number of increased costs to their employer.

Consider trying to recover or offset your increased costs.

As noted above, your contract's excusable delay clause does not provide an avenue to recover or offset increased costs. It only excuses performance delays. However, the FAR provides other ways to seek the recovery of increased costs. The particular method depends upon the type of contract and the nature of and reason for the increase.

Unquestionably, the current PHE will lead to all manner of changes in ongoing contract performance efforts. Employees who used to work at a Government facility now may have to work at home, bringing with them a number of increased costs to their employer. Contractors may be denied access to military bases making performance more difficult and, thus, more expensive. Travel restrictions may

frustrate performance in a number of ways. These and many other changes unexpectedly can increase costs and, in some cases, materially frustrate performance. Fortunately, contractors (and COs) do have tools at their disposal to deal with these changes.

.....contractors must keep an eye on the contract's spending caps.....

For cost-based contracts, increases to costs may need no special contract clause at all since the contract already contemplates payment *based on cost*. But even in these contexts, contractors must keep an eye on the contract's spending caps, such as the limitations of funds and ceiling limits in their contracts and any other cost sharing provisions to which the parties agreed prior to the issues at hand.

For other contracts, one of the best tools available is the contract's Changes clause. The FAR includes a number of Changes clauses, such as FAR 52.243-1, -2, and -3, as well as 52.212-4(c). Under FAR 52.243-1, for example, the CO is permitted to make changes to the delivery location, the specifications for products being acquired, the shipment or packing method, the "description of services to be performed," and the time and place of performance of the services. Key to recovery of costs and obtaining schedule relief under these provisions, however, is notice to the Government of the cost and schedule impacts of the changes.

According to recent OMB COVID-related guidance, COs should consider requests for equitable adjustment "on a case-by-case basis in accordance with existing agency practices, taking into account, among other factors, whether the requested costs would be allowable and reasonable to protect the health and safety of contract employees as part of the performance of the contract." OMB went on to remind COs that "The standard for what is 'reasonable,' according to FAR § 31.201-3, is what a prudent person would do under the circumstances prevailing at the time the decision was made to incur the cost (e.g., did the contractor take actions consistent with CDC guidance; did the contractor reach out to the contracting officer or the contracting officer representative to discuss appropriate actions)."

In addition to the Changes clause, addressed above, if the CO has no better alternative, he or she may exercise the Government's rights under the contract's Suspension of Work clause (52.242-14) or the Stop Work Order clause (52.242-15). If these clauses are invoked, the contractor may be entitled to an equitable adjustment to the schedule or price, or both, once work resumes. Notably, under the Stop-Work Order clause, such equitable adjustment may possibly include profit. Under the Suspension of Work clause, however, it would exclude profit. The key to these clauses is the issuance of an actual order by the CO. If you have a proper order in hand, your right to an equitable adjustment will not be in dispute. Of course, the amount of that adjustment still may be in dispute.

If you are a commercial items contractor selling at fixed prices or rates under a Federal Supply Schedule contract, consider requesting an increase under the contract's Economic Price Adjustment ("EPA") clause. The standard EPA clause gives a CO discretion to approve unscheduled increases due to surprising national/international events. (See, e.g., I-FSS-969: "Notwithstanding the two economic price adjustments discussed above, the Government recognizes the potential impact of unforeseeable major changes in market conditions. For those cases where such changes do occur, the contracting officer will review requests to make adjustments, subject to the Government's examination of industry-wide market conditions . . . .")

Communicate early.

If you hold contracts that could be impacted by coronavirus (in terms of performance, schedule, or cost), reach out to your customer (specifically your customer's CO) sooner rather than later. Among other things, explore mutually acceptable ways to handle issues relating to the virus (e.g., employees at Government facilities unable to report to work, shortages of staff delaying performance, inability to access Government facilities, etc.). If possible, try to come to an agreement with the CO regarding appropriate steps to take, and memorialize that agreement in writing. Doing this will

help protect against a future Government claim, and even could help you pursue a claim of your own should the need arise.

The importance of early and accurate communications is not lost on your customers either. Indeed, some federal agencies have issued reminders to their contractor base of precisely that. DLA, for example, sent out the following guidance to its contractors:

> . . . I ask that you keep us informed of potential impacts to the welfare of your workforce or contract performance. Because each contract may have different terms or conditions, in the event your contract performance is impacted due to this evolving situation, keep in mind that it may require a variety of resolutions. The contracting officer is the agency authority and can discuss options to minimize impacts to your company's requirements . . .

And make sure your personnel know to bring such situations to their law department's attention as soon as they know. Your contract almost certainly includes an excusable delay clause (discussed above), which may cover performance delays caused by "epidemics" or "quarantine restrictions." To take advantage of such clauses, however, you will need to provide timely notice to your CO.

The importance of documenting not only any agreement but the reaching out itself can't be overstated. There are countless cases where a contractor acted on the oral advance of a government official only to find itself called onto the carpet after the fact by enforcement officials not involved in the original discussion. *See, e.g., King Fisher Co. v. United States*, 51 Fed. Cl. 94 (2001) (granting partial summary judgment to government where contractor relied on alleged approval from government inspector rather than the CO); *Edwards v. United States*, 22 Cl. Ct. 411 (1991) (dismissing case against the government where contractor alleged oral modification to contract); *Trawick Contractors, Inc.*, 07-1 BCA ¶ 33499, ASBCA No. 55097 (2007) (holding unenforceable an oral settlement agreement that would change the contract price).

Coordinate with your supply chain.

Consider the implications of production or shipping delays on your ability to comply with delivery requirements. If the virus could delay the availability of parts or components (e.g., from China), consider identifying alternative sources of supply as soon as possible if you have not done so already. Notably, standard excusable delay clauses, discussed above, also provide similar schedule relief and relief from liability for re-procurement costs for contractors whose supply chains are adversely impacted by COVID-19. However, as with other excusable delays, merely showing the existence of an epidemic is insufficient. *See, e.g., Jennie-O Foods, Inc. v. U.S.*, 580 F.2d 400, 410 (Ct. Cl. 1978).

In *Jennie-O Foods*, the contractor claimed performance was excused because its main suppliers suffered epidemics of cholera and avian influenza in their turkey flocks. Despite evidence of these diseases, the contractor's appeal was denied because the contractor failed to show that it was impractical to obtain turkeys from another source. To prevail, the contractor needed not only to show the existence of the epidemics, but also that it had exhausted all other alternatives (that the "product was unavailable within the boundaries of a reasonable area") and that performance was commercially impractical (i.e., "performance could be achieved only at an excessive and unreasonable cost").

The DPA gives the federal Government broad purchasing powers, including the right to issue "rated" orders that take priority over unrated orders when necessary to promote the national defense.

Be prepared for DPAS-rated orders.

On March 18, 2020, President Trump issued an Executive Order invoking the Defense Production Act ("DPA"), and alerting contractors that the Government is preparing to exercise its special purchasing powers under the regulations that implement the Act (generally known as the Federal Priorities and Allocations System ("FPAS"), which includes the Defense Priorities and Allocations System ("DPAS"), the Health Resources Priorities and Allocations System ("HRPAS"), and other implementing regulations).

The DPA gives the federal Government broad purchasing powers, including the right to issue "rated" orders that take priority over unrated orders when necessary to promote the national defense. Under the DPA and its implementing regulations, rated orders come in two flavors: DX orders and DO orders. DO orders take priority over unrated orders (whether commercial or Government). DX orders take priority over DO orders and unrated orders. Rated orders also can be issued by higher-tier contractors throughout the supply chain to fulfill rated orders from their customers.

The detailed rules regarding the DPAS program can be found at 15 CFR. §700. The closely-related HHS rules can be found at 45 CFR §101. Here are the highlights (in summary fashion):

- Authorized agencies can issue "rated" orders (DX or DO) that take priority over unrated orders.
- DX-rated orders take priority over DO-rated orders.
- Authorized purchasers can place rated orders with any company, whether or not the company is a federal contractor.
- Recipients of a rated order must accept the order if it can supply the requested items by the required delivery date. Orders must be filled even if inventory already has been allocated under a prior unrated order.
- If an order cannot be filled (either because the contractor does not carry the items, the items are not available within the requested time frame, or acceptance of the order would interfere with delivery of a previously accepted rated order), the contractor must "reject" the order and notify the customer promptly. (The DPAS rules describe what such a response entails.) If a company rejects a rated order because it cannot fulfill the order by the required date or the order would interfere with a previously accepted rated order, the company must inform the customer of the earliest date upon which delivery can be made and propose to accept the order on the basis of that modified date.
- A rated order authorizes the contractor to place rated orders with its suppliers to obtain items needed to fulfill its customer's rated order. When a contractor does so, it flows down all the same rules and obligations to the supplier.

A willful failure to follow the DPAS rules can constitute a criminal violation.

A willful failure to follow the DPAS rules can constitute a criminal violation.

Contractors already have seen rated orders start to come in from their Government customers in response to the COVID-19 emergency. However, not all agencies have authority to issue such orders and, more troubling, not all agencies understand when and how to issue them. On March 19, 2020, GSA published an Acquisition Letter to provide guidance to its COs with respect to issuing DPAS-rated orders. In it, GSA noted the following:

- Notwithstanding the language of the DPA, which focuses on "national defense," the DPAS program covers emergency preparedness, which includes the current COVID-19 public health emergency.
- GSA has authority to issue DPAS-rated orders through a delegation from the Department of Commerce.
- GSA has established two DPAS ratings (DO-N1 and DO-N7) for placing orders for telework support (i.e. IT) and cleaning/disinfecting supplies, respectively.
- GSA authorizes online order placement, but advises COs to reach out to vendors by phone in advance of placing rated orders.
- COs must consider existing sources of supply before going to other vendors.
- COs must follow the rules for placing rated orders, including, among other things, identifying the rating code, establishing a firm delivery date, and clearly including the language: "This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected within one (1) working day."

Presumably, other agencies will provide similar instructions to their COs over time. Nonetheless, contractors should be ready to deal with customers who do not understand the DPAS program, who issue inappropriate or incorrect rated orders, or who issue unrated "rush" orders without proper DPAS authorization.

...we recommend contractors provide advance guidance to their federal sales and support teams.

Just as GSA provided practical advice to its COs, we recommend contractors provide advance guidance to their federal sales and support teams. Among other things, contractors may want to alert their teams to the following:

- Watch for rated orders. They should come from a CO, but all agencies may not adhere to that practice.
- Watch for rated orders from higher-tier contractors. Under the DPAS program, higher-tier contractors may use rated orders with suppliers to support their responses to federal government rated orders.
- Contact the company's legal and/or contracts team upon receipt of a rated order. Failure to handle a rated order properly can create great risk for the contractor.
- Reject unfulfillable orders promptly and properly, and only for the reasons provided for in the relevant regulations (e.g. DPAS or the HRPAS). If an order must be rejected because it cannot be fulfilled by the required date or because it conflicts with a previously accepted rated order, propose an alternative delivery date.
- Abide by all accepted delivery dates, and notify the Government immediately of any changes to accepted delivery dates due to subsequent unavailability of items.
- Remember to review all provisions of the contract to ensure you can comply. Rated orders do NOT waive applicable contract terms and conditions. Thus, if a rated order is issued under a contract that requires compliance with the Trade Agreements Act ("TAA"), the TAA still applies to the rated order unless specifically waived.

Review your sick-leave policy.

Many contractors, like many companies generally, give their employees only limited sick leave. At the same time, having employees attend work because they are out of sick-leave creates significant risk – whether those workers work at a Government site or a company site. Contractors should consider how they plan to handle sick employees who are unwilling to stay home (or employees who need to stay home to care for a loved one). While standing outside the factory door with a thermometer may not be the answer, neither is ignoring the reality of the problem. Contractors will be well served by putting together a working group that involves HR and Legal – and probably your employment law counsel and privacy counsel – to implement a practical plan of action. For more detailed information regarding the host of labor issues implicated by COVID-19 — for contractor and non-contractors alike, see here.

Equip your employees to work remotely.

Contractors should consider providing technology that allows employees to work from home (e.g., a laptop with VPN access to your systems) if remote work is permitted under the applicable contract. If the contract does not contemplate remote work – and some federal contracts do not – then consider reaching out to the CO to discuss modifying the contract. In either case, communicate with your employees now. Give them an action plan.

On March 17, 2020, the Acting Director of the OMB issued a Memorandum for the Heads of Departments and Agencies regarding COVID-19. The Memorandum requires agencies to "[a]ssess professional services and labor contracts to extend telework flexibilities to contract workers wherever feasible." Other OMB guidance provides that the decision to allow a contractor to telework is made "by the contractor's supervisor and/or in conjunction with the contracting agency/office." Other agencies have provided the following guidance:

- The Naval Undersea Warfare Center informed contractors that "Given the national emergency surrounding the ever evolving COVID-19 response, in the interest of speed and eliminating the need for thousands of contract modifications: any specifications limiting the ability to telework contained in all NAVSEA and Navy Seaport contracts are suspended until notified otherwise. Contract workers are instructed to abide by their official company policies for telework and utilizing alternate locations to perform the Government work called for under the contract. All other terms and conditions of any NAVSEA or Navy Seaport contracts remain in full force and effect."

- The DOD Washington Headquarters Services provided a "WHS Acquisition Directorate Questions and Answers (Q&A)" on March 14, 2020 that provided that if a contract does not include telework language or does not allow telework, the Contracting Officer's Representative (COR) "can contact the contracting officer to initiate a contract modification." The CO then will review the scope changes and negotiate the modification. The Q&A notes that this change "may incur additional costs to the Government." It also prohibits CORs from taking the initiative to permit contractor telework because they are not authorized to change the contract. To the extent an agency verbally notifies a contractor of this type of policy, or a COR initiates a telework policy, the contractor should seek confirmation in writing from the CO.

On March 17, 2020, 58 Members of Congress signed a letter urging the President to issue an Executive Order "mandating telework for all eligible federal employees and contractors." Similarly, another Member of Congress sent Secretary of Defense Mark Esper a letter encouraging the Department of Defense "to implement a Department-wide policy to allow Department of Defense contractors to telework (to the maximum extent practicable)…regardless of whether or not their contracts currently include a teleworking agreement." The letter was sent in response to a March 10, 2020 memorandum from the Undersecretary of Defense which provided individual COs with authority to make teleworking determinations.

If you must layoff/terminate personnel, understand your obligations under the WARN Act.

The Federal WARN Act requires employers to provide 60 days' notice to employees (and the relevant state agency) when an anticipated lay off of 50 or more employees at a single worksite is expected to be permanent and/or last more than six months. However, in situations like COVID-19, there is an exception to the notice requirement. Specifically, 60 days' notice is not required when the layoff is a result of "unforeseeable business circumstances" and/or a "natural disaster." In such a case, if the layoff event normally would trigger WARN, because 60 days' notice is not feasible, an employer should issue a WARN notices as soon as it is reasonably foreseeable that a triggering event, i.e. a layoff of more than 50 employees at one site, will occur. Moreover, in addition to Federal WARN, individual states also have "mini-WARN" acts that have their own unique requirements and exceptions – some of which have been waived due to the COVID-19 pandemic.

...your federal contracts may incorporate data security provisions requiring that sensitive information be maintained on secure systems with specific protections.

Consider your cybersecurity obligations if you have personnel working from home.

Remember, your federal contracts bring with them a number of cybersecurity rules. For example, your federal contracts may incorporate data security provisions requiring that sensitive information be maintained on secure systems with specific protections. (Our colleagues just published a useful blog on this topic, which you can access here.)

Employees should be reminded of these provisions and that transmitting information to or from their home systems may run afoul of these rules.

Unfortunately, scammers and cyber criminals see the PHE as an opportunity to exploit system vulnerabilities. Recently, the Department of Health and Human Services experienced a cyber incident likely caused by a malicious foreign entity. It appears the incident was meant to disrupt HHS's efforts to respond to the COVID-19 pandemic. Contractors should keep this in mind and reach out to employees with best practices while working from home. This includes, for example, not clicking on links from unknown addresses claiming to be providing COVID-19 resources or providing personal or sensitive information to unknown sources. Other cybersecurity best practices include password protection for any home wireless network and a secure VPN connection. Remember too that your data security obligations cover your physical paper documentation and equipment as well. Make sure you communicate with employees regarding the proper way to dispose of physical materials they may have at home (e.g., shred all documentation or save in a secure location until it can be brought back to work for disposal).

If your employees are direct billers on federal contracts, working at home could bring their home technology (e.g., computers, laptops, routers, etc.) within the scope of Section 889.

Consider the potential implications of Section 889 on telework.

As most everyone has heard by now, Section 889 of the 2019 NDAA imposes stringent prohibitions on the sale of products to the Government that incorporates certain technology (e.g., Huawei technology), as well as a contractor's use of equipment that incorporate such technology to perform services for the Government. If your employees are direct billers on federal contracts, working at home could bring their home technology (e.g., computers, laptops, routers, etc.) within the scope of Section 889. (We'll spare you all for now the complications contractors will face in August when Section 889 expands to cover any "use" of banned technology whether or not related to a federal contract.) For more information regarding Section 889, you can check out Jonathan's recent 889 webinar with GSA here and his blog here.

Be prepared for novel customer requests.

Like contractors, federal agencies are struggling to adapt to the realities of a COVID-19-fueled purchasing and performance landscape. As federal agencies send their own employees to work at home, they are going to face a host of questions not contemplated by their current contracts. Do they have enough laptops? How can they buy more quickly without a contract in place? Do the end user licenses ("EULAs") for their software permit work from home? Will an agency need to purchase additional software "seats" for every teleworker? What does an agency do if it doesn't have the necessary funding in hand? While the answer to these questions will be driven by the terms of the particular contracts and EULAs in play, regardless of those terms contractors should keep a fundamental rule in mind: Get It In Writing! While most contractors will want to show themselves to be nimble, accommodating, and mission-oriented, an oral agreement is not worth the paper it is written on. It's admirable to want to help a customer, but that help need not put the company at risk.

Further on the topic of wanting to help the Government through this troubling time, many contractors have taken — or are preparing to take — impressive actions to provide the Government free goods and services. Notwithstanding a persistent myth that the Government cannot accept things of value without charge, there is nothing wrong with offering items or services to help the Government in times of need, subject to certain limitations.

- While the Anti-deficiency Act, 31 U.S.C. § 1341 et seq., prohibits the Government from accepting "voluntary" services, the Government is permitted to accept "gratuitous" services. So, how do you ensure your free services are gratuitous and not voluntary? By stating, in writing, that the services you are providing are gratuitous, they are being offered with no expectation of payment, and you expressly waive any future claims for payment against the Government relating to these gratuitous services. (Ideally, you also would obtain written confirmation from the CO acknowledging your generosity as a gratuitous service.)

- The Government may choose to solicit proposals for a no-cost contract. To the extent the Government chooses this path, the typical contracting rules apply, but for the benefit of payment. Historically, contractors have viewed no-cost contracts as marketing tools, with the hope of receiving paying awards in the future based on the exposure gained through the no-cost contract.

- Typically, the Federal gift rules prohibit Government employees and grant recipients from accepting items of value, but we've now seen at least one exception to these gift rules during the COVID-19 PHE. On March 18, 2020, the Federal Communications Commission waived its gift rules under certain circumstances, allowing regulated companies to donate equipment like Wi-Fi hotspots and to allow for free upgrades to broadband network capacities for hospitals, schools, and libraries. While this particular exception has limited application, prior to providing any items of value to an agency or grantee, contractors are well advised to check whether the receiving agency has enacted a similar waiver.

Regardless of how a contractor opts to provide free goods or services to an agency or grantee, it is a best practice to state in writing that the goods or services are being provided to the receiving agency, not to any individual, and are not being provided to influence any official act. This may help to mitigate the risk that your generosity could be construed down the road as a criminal violation of the Federal bribery laws.

Finally, remember, the PHE does not entitle the Government to anything without paying for it. If the Government wants extra software seats to accommodate its employees who now are working from home, the Government should pay for those extra seats. If the Government wants you to perform work beyond the scope of your current contract, the Government should pay for that, too. While, as noted above, contractors are permitted to provide goods and services for free, they are not required to do so.

...the existence of an emergency does NOT give contractors a pass with respect to contract compliance.

A PHE does not excuse non-compliance.

While, unquestionably, the current National Emergency has us all fielding unique customer requests and scrambling to find innovative ways to meet the Government's and the country's needs, the existence of an emergency does NOT give contractors a pass with respect to contract compliance. With some very limited exceptions, all the procurement rules that typically apply continue to apply. The TAA continues to apply to Schedule orders. NDAA Section 508 continues to control a contractor's use of technology in the performance of federal contracts. The terms and conditions of your contracts continue to govern your performance.

There are a few limited exceptions to this general rule that do materialize in times of National Emergency. For example, the Office of Federal Contract Compliance Programs (OFCCP) announced on March 17, 2020 that certain new contracts would be temporarily immune from certain social-economic rules. According to the Director:

> OFCCP regulations authorize me to exempt contracts from requiring the inclusion of any part of the equal opportunity clause in any specific contract when I deem that special circumstances in the national interest so require, when it is impracticable to act upon requests for exemptions individually, and where such waiver will contribute to convenience in the administration of the authorities enforced by OFCCP. 41 CFR 60-1.5(b)(1), 60-300.4(b)(1), and 60-741.4(b)(1).

Accordingly, the Director issued full or partial waivers to a number of standard contract clauses for contracts entered into to provide Corona relief. The list includes 52.222-26, -35, and -36. The waiver applies "for a period of three months, from March 17, 2020 to June 17, 2020, subject to

an extension should special circumstances in the national interest so require." The Director went on to note that the "exemption and waiver pertain only to the three programs administered by OFCCP and should not be interpreted as applicable to any other programs or laws administered by the Department of Labor."

The OFCCP waiver is an exception that highlights the general rule: Unless explicitly authorized and invoked by an authorized public official, the terms of your contracts remain in place. And, while auditors and agents may not be focusing on these things now, once the emergency comes to an end (and it will come to an end), the federal enforcement community will make up for lost time. As noted below, the Department of Justice already has warned contracts that it will be enforcing all the nations antitrust rules and that the current PHE does not give contractors a hall pass in that regard.

Similarly, GSA also is on the lookout for fraudulent contractor practices. On its Interact discussion board, GSA included the following warning to Schedule purchasers:

> **IMPORTANT: COVID-19 Fraud and Price Gouging** GSA has received reports of companies fraudulently claiming to be GSA vendors attempting to exploit legitimate COVID-19 concerns to mislead consumers into paying exorbitant prices for products associated with COVID-19. If a supplier claims to be a GSA vendor, please verify by checking prices and details on GSA Advantage or validate the contract number and supplier details on GSA eLibrary vendor database. Even if information seems credible, take a moment to verify. If you have questions or suspect fraudulent activity or price gouging with companies claiming to be GSA vendors, please contact GSA's National Customer Service Center at (800) 488-3111 or email NCSCcustomer.service@gsa.gov.

When times get tough, companies and individuals often become single-mindedly focused on solving the current problem. But, it would be a big mistake to think the rules go out the window in a Public Health Emergency. In fact, it's just the opposite. Vigilance becomes even more important.

Also keep in mind the Government is debating rolling out over one trillion dollars in funding in response to the Corona PHE. As past is often prologue, we expect this new round of massive government spending (if it materialized) to someday be subjected to strict government oversight, targeted audits and investigations, and whistleblowers all searching for potential fraud, waste, and abuse. Economic downturns and the unfortunate necessity of layoffs also may lead to an increased risk of whistleblower claims by former employees. Flooding the healthcare industry and other negatively impacted industry streams with hundreds of billions in aid will no doubt prove too tempting for the ever-present fraudsters in society who are always looking to take advantage. As we have learned from past crises, however, when government enforcement eventually gets around to casting its False Claims Act (FCA) nets far and wide in search of potential fraud and abuse, many unwary businesses may be ensnared along with the usual fraudsters because of their sloppy or reckless practices. Deficient practices today could trigger an FCA investigation or enforcement action tomorrow along with all of its draconian treble damages and penalties. For a more detailed discussion of potential crises-related FCA risks and how to protect against them, check out our colleagues' blog here.

Response dates from auditors and investigators remain unchanged.

The PHE does not excuse late filings.

While the calendar seems to be standing still lately as we all adjust to working from home, the federal Government's calendar still is functioning as it always has. Accordingly, unless deadlines are modified by clear written direction from a CO, deadlines remain in place notwithstanding the PHE. Proposal due dates remain in place. Response dates from auditors and investigators remain unchanged. GAO protest deadlines are as firm as they have always been. Contractors should keep in mind, of course, that agencies may no longer be readily accessible to the public. Thus, if you're working on a project that requires an in-person deliverable, check with the CO early and often to ensure you are aware of any modified delivery rules. And, of course, document any changes in writing!

The Government declared a PHE at the end of January and the President declared a National Emergency in March.

Understand the availability of the GSA Schedule Program to state and local contractors.

If you are a GSA Schedule contractor, keep in mind that state, local, territorial, and tribal governments are authorized to purchase through the MAS program when the Government declares a Public Health Emergency. The Government declared a PHE at the end of January and the President declared a National Emergency in March. Accordingly, some state, local, territorial, and tribal governments that previously were not permitted to make Schedule purchases now may be permitted to make such purchases through GSA's Cooperative Purchasing Program.

GSA has three state/local purchasing programs that likely will be receiving a lot of attention as a result of the PHE: Cooperative Purchasing, Disaster Purchasing, and the PHE program. Each program permits authorized purchasers (states, localities, territorial, and tribal governments, or any instrumentalities thereof, including educational institutions) to take advantage of the GSA Schedule, but each has slightly different rules. Here is a summary of each:

- **Cooperative Purchasing.** Authorized purchasers are permitted to use the Cooperative Purchasing program at any time, for any reason. The scope of the program, however, is limited to (former) Schedules 70 (Information Technology) and 84 (Security, Fire, Law Enforcement) – and now the NAICS codes that align with those former Schedules.

- **Disaster Purchasing Program ("DPP").** On March 13, 2020, when the President declared an emergency under the Stafford Act for all 50 states and the U.S. Territories, authorized purchasers gained access to GSA's DPP. The DPP allows authorized purchasers to procure Schedule products and services under *any Schedules/NAICS codes*, as long as the products/services will be used for "disaster preparation, response, or recovery." This authority will remain in effect through the duration of the declared emergency. Opting into this program is voluntary for contractors. Note - Schedule contractors that have opted in and receive an order they cannot or do not wish to fulfill may reject the order for any reason within 5 days.

- **Public Health Emergencies (PHE) Program.** As noted above, on January 27, 2020, the Secretary of Health and Human Services declared COVID-19 a PHE. As a result, just like the DPP, authorized purchasers are permitted to procure products or services under any Schedules/NAICS codes. Unlike the DPP though, purchases must be made using Federal grant funds received as a direct result of the PHE, and GSA provides language authorized purchasers must use when placing the order. While this authority seems redundant of the DPP, it is invoked far more commonly (as evidenced by its invocation 6 weeks prior to the declaration of an emergency), and this authority may persist long after the emergency declaration under the Stafford Act expires.

It is important for contractors to understand the rules and scope of each program. Failure to do so could put the contractor into breach of its Schedule contract. And while few within the Government are thinking or worrying about a breach at the moment, once the world returns to normal rest assured auditors and agents will be looking back at industry's sales practices during the PHE and attending to issues when they find them.

In addition to opening up these purchasing programs, the Government also has made it easier for agencies to acquire products and services to support COVID-19 response efforts through traditional contracting means by increasing the Micro-Purchase and Simplified Acquisition Thresholds. In its March 20 Memorandum discussed previously, OMB increased the Micro-Purchase Threshold to $20,000 for domestic purchases (up from $10,000) and the Simplified Acquisition Threshold to $750,000 (up from $250,000). These threshold changes will permit agencies to acquire goods and services more quickly, with less agency review, and fewer regulatory requirements (e.g,, the Trade Agreements Act does not apply to non-Schedule purchases under the Micro-Purchase Threshold).

Pay attention to antitrust rules.

Just because we are in the midst of a national (nay, international) crisis, as noted above, the rules do not go out the window. Indeed, in such situations, the Government becomes hypersensitive about the rules. The Department of Justice, for example, recently issued this notice regarding contractor compliance with the antitrust rules:

> The Department of Justice today announced its intention to hold accountable anyone who violates the antitrust laws of the United States in connection with the manufacturing, distribution, or sale of public health products such as face masks, respirators, and diagnostics. The department's announcement is part of a broader administration effort to ensure that federal, state, and local health authorities, the private healthcare sector, and the public at large are in the strongest possible position to respond to the outbreak of the respiratory disease named coronavirus disease 2019 (COVID-19). . . . Individuals or companies that fix prices or rig bids for personal health protection equipment such as sterile gloves and face masks could face criminal prosecution. Competitors who agree to allocate among themselves consumers of public health products could also be prosecuted. . . .

The DOJ went on to note that they will be coordinating its enforcement efforts with members of the Procurement Collusion Strike Force, described here.

As you may recall, DOJ's Strike Force is made up of prosecutors and OIG agents from various federal offices and agencies focusing on "deterring, detecting, investigating and prosecuting antitrust crimes, such as bid-rigging conspiracies and related fraudulent schemes . . . ." DOJ's press release announcing the Strike Force described it as "an interagency partnership" consisting of prosecutors from both the Antitrust Division and 13 different U.S. Attorneys' Offices, as well as investigators from the FBI and 4 OIGs (DOD, GSA, DOJ, and USPS). According to Antitrust Division AAG Makan Delrahim, the Strike Force has two primary goals: education and enforcement. Delrahim described it this way: "The [Strike Force] will train and educate procurement officials nationwide to recognize and report suspicious conduct in procurement, grant and program funding processes. We will aggressively investigate and prosecute those who violate our antitrust laws to cheat the American taxpayer."

Consequently, the moment we get past the current crisis, we likely can expect to see more audits and investigations in this area, often focused on certain industries the Government believes are high risk. Also, we think we are more likely to see collusion issues raised even in the course of routine audits and reviews – e.g., GSA OIG audits, GSA CAVs, VA OIG audits, and DCAA business systems reviews. And remember, the FAR directs COs to "be sensitive to indications of unlawful behavior by offerors and contractors," and to "report, in accordance with agency regulations, evidence of suspected antitrust violations in acquisitions for possible referral" to the Department of Justice. FAR 3.301(b). So perhaps even COs will jump on the anti-collusion bandwagon. Collectively, this greater scrutiny will result in more questions being asked – and, perhaps, more referrals being made – which, obviously, is what the Strike Force hopes for.

No one wants to be implicated in an outbreak caused by a failure to adhere to industry "best practices."

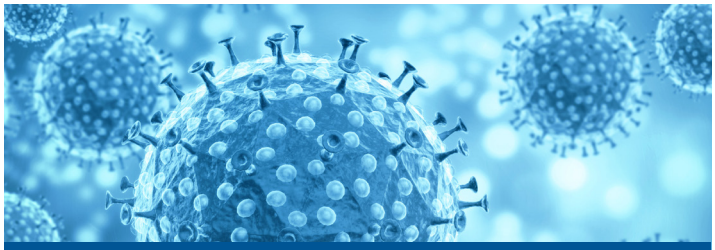
Look around. Other companies are being proactive.

Airlines have sent emails to their customers outlining the steps they are taking to keep them safe (and keep them flying). Among other things, they have started wiping armrests and tray-tables with sanitizing wipes between flights. (As frequent flyers, we had hoped they were doing that previously, but alas . . .) As these things become the norm, equivalent steps (tailored to the given industry) will be expected of other companies as well. No one wants to be implicated in an outbreak caused by a failure to adhere to industry "best practices." And, of course, if you say you are going to do something, make sure you do it so you don't end up with a misrepresentation on your hands.

Be guided by your corporate values.

Companies are going to face a host of difficult challenges and questions as the ongoing PHE proceeds and evolves.

Do we (and how do we) have our folks work from home? What will that do to our corporate culture? How can we try to maintain our culture as folks work remotely? How will we be perceived by our customers? Do I continue to pay hourly employees who have no work? For how long? Can I afford to do so? These are difficult questions that often pit equally important values against one another. As Joe Jay, one of the founding members with Jonathan of our firm's Organizational Integrity Group, says, organizations best respond to crises when they stay true to their values. Companies should use those values as a compass to navigate the uncharted waters in which we all are sailing. Thankfully, none of us has experienced a crisis like this in our lifetime. We (and our organizations) will be judged in the aftermath by how we respond. Thus, in addition to asking whether a certain activity is legal, ask whether it is within the spirit of your contract. Ask how it will be viewed by your many stakeholders. Ask how it will be viewed by a suspension or debarment official. And, perhaps most important, ask if the action is consistent with your stated corporate values.



Think through the various ways the coronavirus could impact performance, schedule, and/or cost, and develop a concrete mitigation plan.

A final word.

Finally, in addition to the foregoing, federal contractors, like all companies, will be well served by developing a detailed plan of action. While many companies did that last week (or even the week before), it is not too late to start thinking about that now. The contracting landscape continues to change day by day. Tomorrow is a new day that will bring new challenges, just as yesterday brought new challenges. Think through the various ways the coronavirus could impact performance, schedule, and/or cost, and develop a concrete mitigation plan. The earlier you get started on that, the better off you'll be down the road.

Obviously, we're dealing here with a "live event," and the facts continue to change. The steps outlined above, however, should keep you ahead of the curve at least contractually. But you'll still have to wait in a long line to buy your hand sanitizer like everyone else.

Stay safe!

The Sheppard Mullin Government Contracts Team

P.S. And now an important word from OUR in-house counsel (yes, we have lawyers too): Like all Blogs, this one is for information purposes only. It is not legal advice and does not form an attorney client relationship. As you are aware, things are changing quickly and there is no clear-cut authority or bright line rules in this area. This Blog does not reflect an unequivocal statement of the law, but instead represents our best interpretation of where thing currently stand. This Blog does not address the potential impacts of the numerous other local, state and federal orders that have been issued in response to the Covid-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay and other issues.

P.P.S. This article is expanded from an article that originally appeared in The Coalition for Government Procurement Friday Flash 3/13/20. The original article was prepared by Jonathan Aronie (JAronie@sheppardmullin.com) and Ryan Roberts (RERoberts@sheppardmullin.com.) In addition to Jonathan and Ryan, Anne Perry, Nikki Snyder, Denise Giraudo, Keeley McCarty, Shaunna Bailey, Ariel Debin, Scott Roybal, John Chierichella, Joseph Jay, Emily Theriault, Jennifer Le, and Laura Alexander all participated in the preparation of this Survival Guide 2.0.