

COVID-Related Disruptions: A Comprehensive Approach to Contract Adjustments

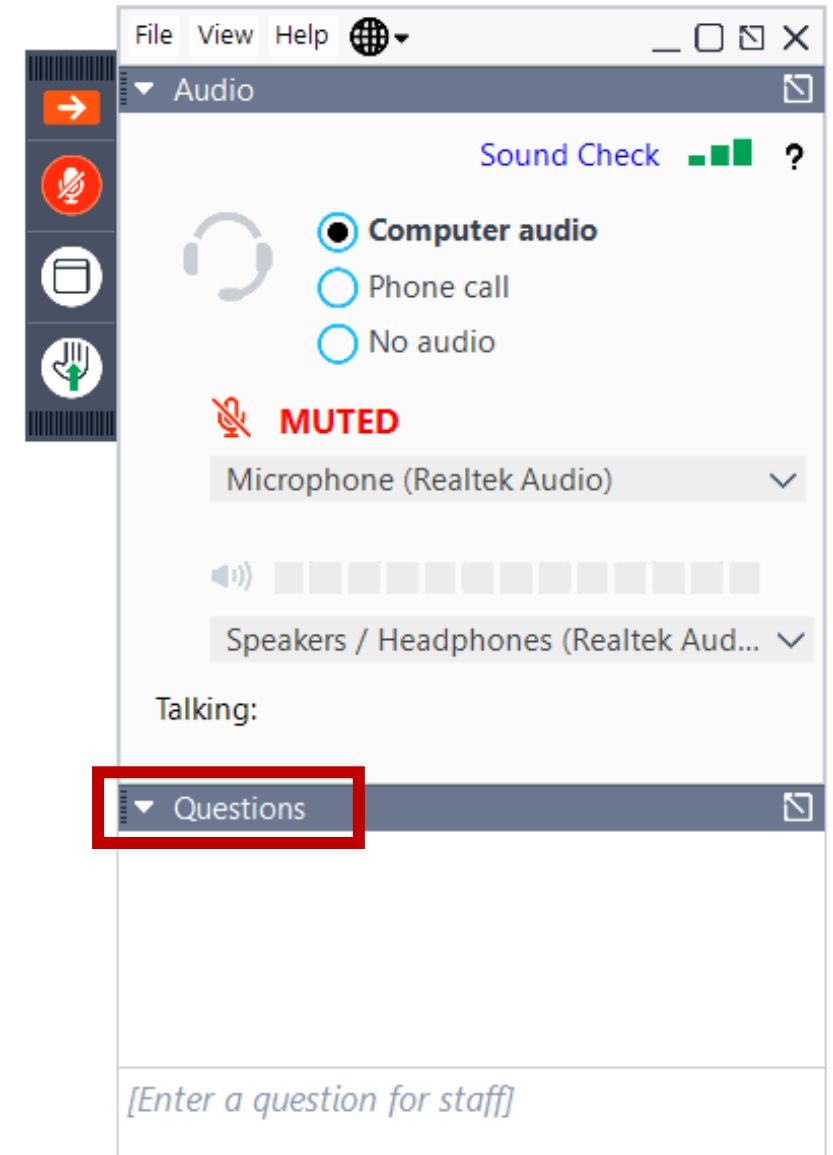
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National Defense Industrial Association

Holland & Knight

Virtual Meeting Etiquette

- All attendees are muted upon entry
- This meeting is closed to press
- If you have a question, please utilize the Question Box and our moderators will address them after the briefing



Today's Speakers

Ronald S. Perlman



- Partner, National Government Contracts Team
- Represents large and small companies in contract negotiations, counseling claims, disputes and protests.
- Government contract counseling and litigation work across spectrum of DoD and Civilian Agencies
- NDIA Senior Director, and on the Executive Committees of the NDIA Logistics, Small Business and the Manufacturing Divisions; Director, Procurement Round Table.
- Fellow of the National Contract Management Association (NCMA) and Past President, NCMA D.C. Chapter

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Practice

- Government Contracts
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Education

- Brooklyn College of the City University of New York, B.A.
- Boston College Law School, J.D.
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Bar Admission

- District of Columbia
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Today's Speakers

Terry L. Elling



- Partner, National Government Contracts Team
- Solution provider, problem solver, and trusted advisor for government contractors at all stages of growth
- Broad expertise gained in course of 35+ year career as U.S. Army Judge Advocate and in private practice
- Efficiently resolves claims, disputes, investigations, and protests
- Specific and extensive experience resolving claims and performance issues in contracts supporting Overseas and Contingency Operations and in similarly distressed environments

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Practice

- Federal Contracts & Grants
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Education

- University of Illinois, JD
- University of Illinois, BA Magna Cum Laude
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- District of Columbia
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Today's Speakers

Amy L. Fuentes



Amy L. Fuentes is an attorney who focuses her practice in government contracts, and is experienced at bid protests at both the GAO and the Court of Federal Claims, as well as claims before the ASBCA and CBCA.

In addition to her litigation practice, Ms. Fuentes represents clients in government contracts mergers and acquisition transactions, and is experienced at counseling prime contractors and subcontractors on a variety of matters in federal government contracting, including regulatory compliance with the FAR and DFARS.

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Today's Speakers

Kelsey M. Hayes



Kelsey Hayes is a government contracts attorney based in Holland & Knight's Tysons, Virginia office. Ms. Hayes litigates bid protests, claims and disputes before the U.S. Government Accountability Office (GAO), Civilian Board of Contract Appeals (CBCA), Armed Services Board of Contract Appeals (ASBCA) and U.S. Court of Federal Claims (COFC). Ms. Hayes advises and represents clients on a wide range of government contracts matters, including suspension and debarment proceedings, requests for equitable adjustment and terminations. She also handles prime/subcontractor disputes and has experience in federal district court and alternative dispute resolution.

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Introduction

- The novel (new) coronavirus caused outbreaks of the COVID-19 disease globally, leading to a pandemic
- The pandemic has given rise to a number of issues or potential issues impacting government contracts
 - Unavailability of material or personnel, restricted access to worksites and delivery locations, availability of Government Personnel
- This presentation addresses those issues and potential bases for recovery
 - Contractual bases for relief
 - Section 3610 of the CARES Act
- Importance of integrated approach to resolving and preventing performance issues and claims
 - Early and frequent communications
 - Transparency in discussions with government
 - Timely submission of requests for direction and requests for equitable adjustment

Issues arising from COVID-19 Impacts

- Quarantine (actual or potential exposure)
 - Usually for 14 day period
- Employee leave to care for self or others due to risks of contracting COVID
- Unavailability of government personnel to grant access or accept deliveries
- Unavailability of in-plant government auditors, QA/QC inspectors
- Delays in the availability of material and equipment
- “Stay at Home” orders
 - Usually under state law
 - Federal contract work often exempt
- Other location-specific guidance (e.g., recent CENTCOM restrictions)

CONTRACTUAL BASES FOR ADJUSTMENT

Contractual Bases for Adjustment (Time Extensions)

- **Excusable delay**

- Excuses contractor default for failure to perform if the failure arises from causes beyond the control and without the fault or negligence of the contractor
- Entitles contractor to a revised delivery schedule (NOT increased costs)
- Examples of excusable delay events include epidemics and quarantine restrictions
 - See, e.g., FAR 52.249-14 (cost reimbursement, time and materials, and labor hour contracts); FAR 52.212-4(f) (commercial contracts)
 - A contractor's performance is not automatically excused by an epidemic or pandemic such as COVID-19
 - A contractor will have to establish that the COVID-19 epidemic and surrounding events such as quarantine restrictions caused the contractor's performance delay

- **Termination for default with excusable delay provision**

- Generally excuses contractor default/liability for excess costs attributable to excusable delays
 - See, e.g., FAR 52.249-8 (fixed price supply and service contracts); FAR 52.249-9 (fixed price research and development contracts); FAR 52.249-10 (fixed price construction)
- Converts the termination for default into one for convenience

Contractual Bases for Adjustment

- Changes
 - Permits the contracting officer to make changes within the general scope of the contract
 - Entitles the contractor to an equitable adjustment if any change causes an increase or decrease in the cost of or time required for performance
 - See, e.g., FAR 52.243-1 (fixed price contracts), FAR 52.243-2 (cost reimbursement), FAR 52.243-3 (time and materials), and FAR 52.243-4 (construction); FAR 52.212-4(c) (commercial item contracts)
- Stop work
 - FAR 52.242-15 (supplies, services, and research and development contracts)
 - Permits a contracting officer to require a contractor to stop all or any part of the work for a period of 90 days
 - Requires contractor to minimize the incurrence of costs allocable to the work
 - Contractor entitled to reasonable costs incurred as result of stop work order
- Suspension of work
 - FAR 52.242-14 (fixed price construction or architect-engineer contracts)
 - Permits a contracting officer to suspend, delay, or interrupt any part of the work for the period of time that he or she determines appropriate
 - Contractor entitled to adjustment in price for cost increases resulting from suspension (notice required within 20 days of incurrence of increased costs!)

RECOVERABLE COSTS

Potentially Recoverable Costs

- Direct costs
 - Costs incurred to maintain readiness
 - Increases in labor, material and subcontractor costs
 - Demobilization, remobilization costs
 - Subcontractor costs for the above
- Indirect costs
 - Cost reimbursement (overhead, G&A, reasonable fee)
 - Fixed price (any re-allocation of unabsorbed indirect costs originally priced in contract reasonably necessary to make contractor whole)
- Other costs and entitlements
 - Professional assistance to prepare an REA
 - Prompt Payment Act interest on past due invoices

EXISTING BOARD AND COURT DECISIONS

*Pernix Serka Joint Venture vs.
Department of State,
CBCA No.5683 (Apr. 22, 2020)*

Pernix Serka Joint Venture vs. Department of State

- **Facts:**

- April 2020 Decision by CBCA
- Pernix Serka Joint Venture (“Pernix”) faced concerns about performing a contract abroad in Freetown, Sierra Leone during the Ebola virus outbreak and sought guidance from the Department of State (“DOS”) contracting officer as to how to respond
- DOS provided no guidance and instead instructed Pernix to make its own decisions regarding contract performance
- Pernix demobilized temporarily and then returned to the site with additional medical services for its employees
- Pernix requested an equitable adjustment for costs incurred after contract completion
- DOS argued the performance risk remained with Pernix because it was a FFP contract and because Pernix made the unilateral decision to demobilize temporarily

Pernix Serka Joint Venture vs. Department of State

- **Board's Analysis:**

- The Prime Contract is a FFP contract and included FAR 52.249-10 (Default (Fixed-Price Construction), which “explicitly addresses how acts of God, epidemics, and quarantine restrictions are to be treated.” The contract's provision regarding excusable delays also stated that Pernix would be allowed time (not money) for excusable delays.
- “[G]iven the Excusable Delays clause, PSJV has not identified any clause in the contract that served to shift the risk to the Government for any costs incurred due to an unforeseen epidemic. Nor does the contract require the Government to provide PSJV with direction on how to respond to the Ebola outbreak. Thus, under a firm-fixed-price contract, PSJV must bear the additional costs of contract performance, even if PSJV did not contemplate those measures at the time it submitted its proposal or at contract award.”

Pernix Serka Joint Venture vs. Department of State

- **Board's Analysis (continued):**

- Rejects Pernix's arguments of: (1) cardinal change, (2) constructive change, and (3) constructive suspension of work.
 - **(1) Cardinal change:** breach that occurs if the Government effects a change in the contractor's work "so drastic that it effectively requires the contractor to perform duties materially different from" those found in the original contract.
 - **(2) Constructive change:** occurs where a contractor performs work "beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government."
 - **(3) Constructive suspension of work:** dismissed as an untimely new claim that does not arise from the same set of operative facts as the legal theories raised in its certified claim.

Pernix Serka Joint Venture vs. Department of State

- **Lessons Learned:**

- Pernix failed to keep the Government sufficiently informed of the performance problems it was facing and to seek timely direction as curtailment of operations.
- *Pernix* likely to be utilized as part of the analysis for COVID-19 related claims.
- May be distinguished in that DOS in *Pernix* did not close the job site but Pernix elected to temporarily demobilize and then returned to the site with additional medical services for its employees.
 - Many DoD sites, in comparison were closed, which prevented contractor performance.

SECTION 3610 OF THE CARES ACT

CARES Act, Section 3610

- On March 27, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act
 - \$2 trillion economic relief bill
- Section 3610 of the Act, Federal Contract Authority, authorizes agencies to reimburse federal contractors any paid leave provided to keep employees or subcontractors in a ready state
 - Authorization, ***not a mandate***
 - Considered on a case-by-case basis, subject to the availability of funds
- Agencies have issued specific guidance on implementation
 - Implementation (e.g., retroactivity, recovery of profit/fee, etc.) varies

Section 3610, Federal Contract Authority (emphasis added)

- Notwithstanding any other provision of law, and ***subject to the availability of appropriations, funds*** made available to an agency by this Act or any other Act may be used by such agency to ***modify the terms and conditions of a contract***, or other agreement, without consideration, ***to reimburse at the minimum applicable contract billing rates not to exceed an average of 40 hours per week any paid leave, including sick leave***, a contractor provides ***to keep its employees or subcontractors in a ready state***, including to protect the life and safety of Government and contractor personnel, but in no event beyond September 30, 2020. ***Such authority shall apply only to a contractor whose employees or subcontractors cannot perform work on a site that has been approved by the Federal Government***, including a federally-owned or leased facility or site, due to facility closures or other restrictions, ***and who cannot telework*** because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for COVID-19. Provided, that ***the maximum reimbursement authorized by this section shall be reduced by the amount of credit a contractor is allowed*** pursuant to [Families First Coronavirus Response Act] and any applicable credits a contractor is allowed under this Act.

Breaking Down Section 3610

- Employees or subcontractor employees are or were ***unable to work***;
- Costs are associated with keeping employees in a “***ready state***”;
- Not to exceed an average of ***40 hours per week***;
- Costs are ***related to COVID-19 impacts***; and,
- ***Funds are available.***
- Maximum reimbursement authorized is subject to a reduction for recoveries under other provisions of CARES Act (e.g., Paycheck Protection Program, Family/Medical leave tax credits).

Section 3610 Challenges and Opportunities

- Determination of lowest “applicable rate” for COVID leave under Firm-Fixed Price type contracts
- Impact on Contract funding – potential for reduction in work scope or convenience termination
- Retention of highly-qualified/high performing workforce with other opportunities
- Opportunity for proactive discussions between Contractor and Agency
 - Restructure SOW/PWS to provide for remote work
 - Restructure work flow to perform phases and tasks that do not require access to Government work site
- Implementing controls to prevent or account for double-recovery for PPP loans

DoD Class Deviation 2020-O0013

- DoD Class Deviation 2020-O0013 (Apr. 8, 2020)
 - Established to implement DFARS clause 231.205-79, *CARES Act Section 3610 Implementation*
 - Provides a new cost principle for “affected contractors” whose personnel are unable to work because of the pandemic
 - Available at: https://www.acq.osd.mil/dpap/policy/policyvault/Class_Deviation_2020-O0013.pdf

DOD DRAFT GUIDANCE

DoD Guidance (DRAFT – May 2020): The Basics

- ***Who can seek reimbursement?***

- “Affected contractors”

- Requires a CO determination

- Based on the Class Deviation and implementing guidance/FAQs – a contractor whose employees or subcontractor employees are unable to work due to COVID-19 impacts and were paid leave to maintain them in a “ready state”

- ***What can be reimbursed?***

- “Appropriate rates” for up to an average of 40 hours per week

- Does not include profit or fees

- Costs incurred beginning January 31, 2020 through September 30, 2020

- Subject to reduction by the amount of credit a contractor is allowed under the Families First Coronavirus Response Act and “any applicable credits the contractor is allowed under the CARES Act or other credit allowed by law that is specifically identifiable with the public health emergency”

- Contingent upon the availability of funds

DoD Guidance: Checklist for Submission of Reimbursement Requests

- Requires contractors to list all contracts with DoD and other federal agencies under which the contractor is seeking Section 3610 reimbursement
- A narrative identifying the circumstances that impacted paid leave costs and performance under each DoD contract for which Section 3610 reimbursement is requested
- Supporting information on the paid leave's impact on cost or pricing, including a description of how the contractor developed "appropriate rates"
- Information identifying "eligible hours" and employees for whom the contractor is requesting reimbursement for
- Average sick leave hours budgeted
- Actual paid labor rates
- The Forward Pricing Rate Proposal (FPRP), Forward Pricing Rate Agreement (FPRA), or DCMA Forward Pricing Rate Recommendation (FPRR), and provisional billing rates as applicable
- Subcontractor labor impacts
- A spreadsheet supporting calculations
- TINA certification, if applicable

STRATEGIES FOR ADDRESSING COVID IMPACTS

COVID Impact – Strategies and Lessons Learned

- **Review contract clauses**
 - Initial approach should be based on contractual relief
 - View Section 3610 as alternative for workers unable to access directed work site or telecommute
- **Assess cost, schedule and other impacts of COVID Response related matters**
- **Establish cost codes to track various impacts**
 - idled workers, workers on reduced shifts, workers in quarantine
 - storage costs of material that cannot be shipped/received
 - Impact of delayed government inspection and acceptance

COVID Impact – Strategies and Lessons Learned

- **Engage in early communication with the contracting officer**
 - Give early notice of delays, changes and disruptions due to COVID Response
 - Expressly ask for direction to authorize alternate work arrangements (e.g., telecommuting) or to place employees on paid leave
 - Provide suggested solutions
- **Prepare contemporaneous written communications, with supporting documentation**
- **For Section 3610 relief:**
 - Circumstances that made it necessary to place employee on leave
 - The date the circumstances began and ended
 - Actions taken to continue performance (mitigation)
 - Reasoning as to why Section 3610 applies (e.g., lack of ability to telecommute, CO direction to maintain staff ready to return to work immediately)
 - Other stimulus relief obtained

COVID Impact – What's Next?

- Resurgence of performance impacts as regional COVID infection rates rise?
- Negotiation (or litigation) of final adjustments and claims
- New challenges and issues once pandemic subsides
 - Deductive changes, nonexercise of options, and terminations due to lack of funding
 - Acceleration of performance as pandemic subsides
- “Post-COVID” audits and investigations

Questions?

Thank you.