

April 2, 2020

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

Secretary Lord,

We again appreciate the guidance Kim Herrington released in his recent memo on *Managing Defense Contracts Impacts of the Novel Coronavirus*. Also, thanks again to you and your team for the calls with industry to determine challenges affecting the Defense Industrial Base and how to mitigate them through communication and collaboration. We are especially appreciative of the Friday Focus on small business challenges.

One of the key challenges remains as the consistent application of the issues addressed in Mr. Herrington's memo. We have pushed his memo out to our membership. However, due to the contract-by-contract basis of determinations, several members are receiving conflicting messaging from other Department agencies.

One of example of this situation is Mr. Herrington's statement that "Where the contracting officer directs changes in the terms of contract performance, which may include recognition of COVID-19 impacts on performance under that contract, **the contractor may also be entitled to an equitable adjustment to contract price using the standard FAR changes clauses (e.g., FAR 52.243-1 or FAR 52.243-2).**" Referencing the USAF JAG's recent FAQ 2 attached in my previous letter dated March 18, the USAF's position is that there is no entitlement to an equitable adjustment in price due to COVID-19 or quarantine restrictions. Unfortunately, even after Mr. Herrington's memo went out, many contracting officers in the field remain wedded to previous Service or other agency guidance hampering relief and putting many businesses at risk. We encourage DoD to adopt guidance that aligns with the OMB Memorandum M-20-18, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)*, that recognizes the essential role of federal contractors, highlights the need for continued contractor support, and encourages agencies to be flexible in finding solutions. Additionally, OMB acknowledges the value of reimbursing contractors to maintain a mobile and ready position to start work again.

NDIA suggests more universal, directive guidance to include:

- Contractor delays and cost increases
  - o Additional clarity for contracts experiencing delays due to the COVID-19 crisis is needed to reassure contractors and reduce uncertainty from inconsistent positions. Instead of relying on the Sovereign Acts Doctrine to deny claims, the guidance to contracting officers should emphasize the need to support and find solutions. Switching the presumption helps contracting officers justify reimbursement while still authorizing them to determine that a specific contract is not entitled to an equitable adjustment. The inconsistency is exacerbated for companies that hold multiple contracts, each of which may be treated differently by the associated contracting officer. Finally, more clarity and specificity are needed on allowable equitable adjustment to price to enable speedier determinations.
- Performance at government facilities
  - o We have several members experiencing performance disruptions due to the closure of government facilities. While guidance has been issued that these contractors are mostly entitled to relief, more guidance is needed to ensure this interruption of work is actually excusable. We have evidence that individual subagencies are narrowly interpreting this excuse and holding contractors in violation for not continuing work on contracts that would typically be done in a

government facility. If the Government denies access to the facilities, then the contractor should not bear the cost. Instead, the Contracting Officer should issue a stop-work order, modify the contract, or take other action to support the contractor.

- Paid Sick Leave
  - o We encourage you to release additional guidance on how the Department plans to invoke Sec. 3610 of the Coronavirus Aid, Relief, and Economic Security Act (CARES) across contracts. We support a uniform policy being put in place that broadly applies this authority across the defense industrial base to avoid unnecessary administrative issues and to quickly provide relief to workers experiencing disruptions related to the COVID-19 crisis. Some agencies are communicating to contractors that they still must provide personnel in the event that their on-contract workers are out sick. This communication runs counter to the aim of the statute in allowing agencies to issue paid sick leave to those workers that are impacted by this crisis. Contractors are often not able to easily “slot in” one employee for another. Please provide additional details on how the Department plans to address this issue.

Sincerely,



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