



OFFICE OF THE UNDER SECRETARY OF DEFENSE

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WASHINGTON, DC 20301-3000

ACQUISITION
AND SUSTAINMENT

MEMORANDUM FOR COMMANDER, UNITED STATES CYBER
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Managing Defense Contracts Impacts of the Novel Coronavirus

The challenges that the Department of Defense (DoD) faces in response to the Novel Coronavirus (COVID-19) are historic, borne across the total force, including our military, civilian, and Defense Industrial Base (DIB) communities. We must work hand in hand to recover from this pandemic and maintain mission readiness. The effects of COVID-19 will affect the cost, schedule, and performance of many DoD contracts. Many contractors that ordinarily work side-by-side with the DoD workforce may be unable to access their work sites, and most contractors are coping with employees who are unavailable for work due to quarantine and state and local requests to restrict movement of their personnel. We must do our utmost to ensure that both the Department and the vital industrial base that support us remain healthy for the duration of this emergency and emerge as strong as ever from the challenges of this pandemic. Fortunately, we have the regulatory tools to take action to address these impacts.

DoD contracts contain clauses that excuse performance delays, including Federal Acquisition Regulation (FAR) 52.249-14, Excusable Delays; various "Termination" clauses; and FAR 52.212-4 for commercial contracts. Each of these clauses provides that a contractor will not be in default because of a failure to perform the contract if the failure arises beyond the control and without the fault or negligence of the contractor. In the event of such a delay, the contractor is entitled to an equitable adjustment of the contract schedule. 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).

Requests for equitable adjustment must be considered on a case-by-case basis, in consideration of the particular circumstances of each contract, impacts realized from COVID-19, applicable law, and regulations, and inclusive of any relief that may be authorized by laws

enacted in response to this national emergency. When reviewing requests for equitable adjustment, contracting officers are to take into account, among other factors, whether the requested costs would be allowable, allocable and reasonable to protect the health and safety of contract employees as part of the performance of the contract. Equitable adjustments to the contract or reliance on an excusable delay should not negatively affect contractor performance ratings.

In response to this national emergency, on March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act (CARES). Most notable within the act is Section 3610, Federal Contractor Authority, which provides discretion for the agency to modify the terms and conditions of the contract to reimburse paid leave where contractor employees could not access work sites or telework but actions were needed to keep such employees in a ready state (Attachment 1). Section 3610 is included for information only. DPC will provide implementing guidance for this section as soon as practicable.

The Office of Management and Budget, and many senior procurement officials of the Military Departments and Agencies have promulgated guidance similar to that in this memo regarding management of contract performance impacts due to COVID-19, many of which are available at <https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html>. They share the common theme that contracting officers are trusted and empowered to make the difficult decisions on appropriate adjustment to each contract. Both during and after the COVID-19 emergency, contracting officers must work closely with our industry partners to ensure continuity of operations and mission effectiveness, while protecting the continuing vitality of the DIB that is so critical to our national security.

Please ensure widest distribution of this guidance. My point of contact for this memo is Mr. Mike Pelkey at 571-309-8553 or by email at michael.f.pelkey.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachment:
As stated.

SECTION 3610. FEDERAL CONTRACTOR AUTHORITY. 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 division G of Public Law 116-127 and any applicable credits a contractor is allowed under this Act.