



COVID-19 and the Government Contractor-FAR Clauses for Performance Impacts

Most Government Contracts include provisions that may be applicable to the COVID-19. Here are some and the application.

- FAR 52.249-14 Delay Clause-
- FAR 52.249-8, -9, -10 Default for Fixed Price Contracts
- FAR 52.243-1, -4 or FAR 52.212(c) Changes

In FAR 52.249-14, the delay clause should result in an amendment to the schedule to take into account the delay. If not, the contractor may claim acceleration. Track those costs and look at the elements detailed below for some justifications in putting together such a claim.

In FAR 52.249-8 Default (Fixed-Price Supply and Service) states as an excusable delay that the contractor shall not be responsible for any excess costs if the reason is epidemic or quarantine as such events are beyond the control and without fault or negligence of the contractor. It further goes on to state that it will be treated as a termination for convenience. More common sense would dictate that this would be treated as a delay rather than shopping the contract anew.

In at least two cases, epidemics of the flu have been used as excusable delays when the contractor cannot source the work another way (this other way of sourcing mostly applies to supply contracts). Generally, the contractor should be present evidence of (1) when the epidemic occurred; (2) the precise (or near precise) duration; (3) the personnel affected and absent; (4) when the personnel were absent; (5) whether their absences in fact caused the delay; or (6) what efforts were made to continue work despite those absences.

To prove the above elements, think about the following:

1. Track your COVID-19 impacts-when they occurred, how long they lasted, and who was affected.
2. Track the causation. X personnel was absent and X personnel affected the performance of the contract If the causation is due to supplier absences or disruptions, track it and prove it in much the same manner.
3. Document all mitigation efforts and reasonable efforts to lessen the impacts.

FAR 52.243.-1-4 Changes, FAR 52.212 (Changes-bilateral to a commercial contract).

Determine which clause applies.

1. The Government may make changes to your contract because of COVID-19 effects.
2. Look at any deadlines such as 30 days for non-commercial contracts to notify the Government of cost or schedule changes.
3. Track and document changes separately (as you would any change).
4. Look also at constructive changes such as those mention above (acceleration, disruption, trade stacking, etc.)
5. If subcontractors are going to try to make claims, the same documentation will be needed.

This is not legal advice and you should consult your attorney for further information.