
Coronavirus (COVID-19) – Federal Contracts and Excusable Delays

By J. William Eshelman, Bret S. Wacker, Eyvonne R. Mallett / Mar 23, 2020

As observed in prior client alerts, the spread of COVID-19 is and will create unique challenges for companies doing business with the Federal Government. The unprecedented public health threats of COVID-19 are causing federal agencies to curtail access to their facilities impeding contractors' ability to perform. Similarly, federal contractors may be experiencing supply chain delays or loss of its workforce due to sickness or quarantine, making it difficult if not impossible to meet contractual deadlines. In this alert, we discuss whether the "excusable delay" provisions included in most federal contracts will serve to protect contractors from incurring damages when performance is impacted by emergency situations outside their control.

The Federal Acquisition Regulation (FAR) contains clauses that excuse contractor/subcontractor non-performance in the event of certain unforeseeable activities which are outside the control of the contractor/subcontractor, including "epidemics" and "quarantine restrictions." See e.g., FAR 52.212-4(f) (for Commercial contracts), 52.249-8 (for Fixed-Price Supply and Service contracts), 52.249-10 (for Fixed-price Construction contracts); and 52.249-14 (for Cost-Reimbursement contracts). Whether these clauses afford a contractor/subcontractor a defense to a contract/subcontract default situation will be contract-and fact-specific.

Generally speaking, under the Excusable Delay clauses, contractors/subcontractors should consider promptly notifying their contracting officers (or higher tier contractors) and explain the circumstances regarding the non-performance (or possibility of future non-performance). Additionally, contractors/subcontractors should carefully document the causes of any contract non-performance. To be covered by the excusable delay provisions because of COVID-19, the contractor/subcontractor must be able to establish to the Government's satisfaction: 1) that a recognized cause for an excusable delay exists; 2) that such cause actually contributed materially to the delay; and, 3) that the actual extent of the delay was documented.

Note that an excusable delay is different than a compensable delay in that excusable delay does not entitle the contractor to additional compensation, only an extension of time. A valid excusable delay only serves to insulate contractor/subcontractor from damages or sanctions which may result in default from non-performance. The Government may still terminate the contract, although the termination would only then be for the convenience of the Government.

For additional guidance, please contact one of the members of the [Clark Hill Public Contracting team](#):

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