

NOTICE: RECOVERING ADDITIONAL COSTS DUE TO COVID-19 IMPACTS

This post is a follow-on to our previous post: [COVID-19 Notice Requirements, Business Risk Insurance, and YOUR PROFITS!](#)

Introduction

As discussed in our previous post, which can be viewed [here](#), contractors will generally be able to invoke a “Force Majeure” clause, or similar FAR 52.249-14 – Excusable Delays to request and obtain an extension of time for delays related to the COVID-19 epidemic. But can contractors on federal projects recover their additional costs incurred due to COVID-19 delays?

Regarding the federal government, it is important to be aware that most contractors may recover those additional costs (in addition to time extensions) from the government through Requests for Equitable Adjustments (REAs) or other certified claims.

Two critical things for contractors to understand in all circumstances, is that your recovery is not automatic, so you *first* must provide NOTICE, even if [constructive notice](#); and *second*, you must request the relief desired in the form of a Request for Equitable Adjustment, Change Order request, or other contractually suitable format. While the government cannot hold a contractor liable for proven excusable delays beyond its control, the contractor must take affirmative and diligent steps to contractually establish that the delays are excusable, thus protecting its rights to recover additional costs.

As discussed below, recovery of COVID-19 related costs may be dependent on a certain contractual clause or may be accessed by utilizing multiple clauses in conjunction with the specific facts that necessitated the expenditure of additional costs. For example, while compensation may not be available under the excusable delay clause, an Excusable Delay may lead to the opportunity for additional compensation for accelerated performance, or unnecessarily elongated periods of Suspension of Work or Stop Work orders due to site access issues or other factors. See, e.g., *Pilcher, Livingston & Wallace, Inc.*, ASBCA 13391, 70-2 BCA ¶ 8,488.

Compensable vs. Non-Compensable Delays and Time Extensions

Given the widespread nature of COVID-19 and corresponding impact on many contractors and projects, many (government) owners will likely be willing and sometimes eager to treat COVID-19 delays as “no cost” impacts by granting **non-compensable time extensions** under the FAR clauses listed above. But every contractor needs to be keenly aware of its potentially recoverable additional costs that may have been incurred during this time and must pursue recovery of those costs under the proper and available contractual clause(s) in order to recover your costs.

While non-compensable delays under *Force Majeure* (on civil contracts) or FAR 52.249-14 – Excusable Delays (on federal contracts)¹ may not allow recoverability of costs directly caused by COVID-19, these clauses may not be the exclusive remedy that is actually available to contractors when all relevant factors driving your increased costs are considered.

The FAR includes a number of remedies granting clauses that permit the recovery of extra performance costs. For example, FAR 52.249-8 thru 52.249-10(b) (Default – Fixed-Price contracts) substantially states that “the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor.” Such causes include both *epidemics* and *quarantine restrictions*. While most contractors will not encounter a Default notice due to COVID-19, other FAR clauses allow for recovery of costs, and if you present them correctly, they may legally include your profit!

The key for federal contractors seeking to recover costs arising out of COVID-19 delays is **definitive proof that the government caused or exacerbated the delays and/or excess costs**. Definitive proof in this scenario requires that contractors properly support their claims for relief – including providing timely **NOTICE**, supporting documentation, and documenting good faith efforts.

Stop Work and Suspension Orders

Where Delays are outside the scope of federal or state mandates not to work and stay at home, FAR provisions for Stop Work orders (FAR 52.242-15) and Suspension of Work (FAR 52.242-14) **MAY ALLOW** for recovery of your costs, whether issued formally by the government or as a *Constructive* Stop Work or Suspension of Work (here are links to our past posts on [Stop Work](#) and [Suspension of Work](#)). These FAR clauses permit the Contracting Officer to temporarily stop or suspend performance in the best interest of the government.

Once a contractor receives a Stop/Suspension of Work order, it must take prompt and reasonable steps to *mitigate* any additional costs related to the work covered by the order. When a contractor incurs extra performance costs (in spite of these efforts), it is prudent to submit the costs to the government through an **Request for Equitable Adjustment** or **Claim**.

For example, contractors that receive a Stop-Work order may be entitled to an Equitable Adjustment **IF** “[t]he stop-work order results in an increase in the time required for, or in the Contractor’s cost properly allocable to, the performance of any part of [the] contract.” See FAR 52.242-15(b)(1).

Unlike Stop Work orders, Suspension of Work orders are not limited to 90 days, and contractors may be entitled to Equitable Adjustments if the work is suspended “for an unreasonable amount of time” and performance would not have otherwise been impacted. See FAR 52.242-14(b). Under this clause, the contractor must assert the claimed amount in writing as soon as practicable after the Suspension has been lifted, and:

“A claim under this clause shall not be allowed (1) for any costs incurred more than 20 days before the Contractor shall have **NOTIFIED the Contracting Officer in writing** of the act or failure to act involved (but this requirement shall not apply as to a claim resulting

¹ Other FAR clauses also cover both “standard commercial item” and “non-commercial Item” contracts for certain delays or non-performance; see also FAR 52.212-4(f). Providing notice to the Contracting Officer and conducting discussions with (and obtaining buy-in from) the customer on how to handle the delay are best practices in seeking protection under either clause.

from a suspension order). . . .” See FAR 52.242-14(c). **NOTE TO READER:** *Assume the delay was 60 days in length, and you provide written notice on the 60th day, you would only be allowed to recover costs pertaining to 20 of those days (the 20 days prior to the date on which you provide written notice of the claim).*

Therefore, in seeking recovery under the Stop Work or Suspension of Work clauses, the contractor should pay special attention to the type of order issued by the Contracting Officer. Each clause requires particular circumstances to recover costs, but NEITHER CLAUSE allows for profit on the additional costs.

Government Delay of Work

Contractors on fixed-price contracts should also be aware of potential recovery under [FAR 52.242-17 – Government Delay of Work](#). Under this clause, the contractor may be entitled to an Equitable Adjustment of time or cost when the government’s act or failure to act delays or interrupts the work. This could manifest where the Contracting Officer does not lift a Suspension of Work order in a reasonable amount of time, is slow in providing requested direction to the contractor regarding mobilization and de-mobilization matters or Requests for Information (RFI), or allows interruptions from other contractors (stacking of trades) to occur. Cost recovery under this clause is not available in circumstances where the government-caused delays are concurrent² with delays caused by any other cause (including contractor-caused delays) or for which an equitable adjustment is provided or excluded under any other term or condition of the contract. Thus, this clause should be utilized sparingly and with caution because of these restrictions, and also because it **DOES NOT ALLOW FOR PROFIT** under an Equitable Adjustment.

Changes to the Work

[FAR 52.243-4 – Changes](#) allows for profit in an equitable adjustment attenuate to the Changed work, i.e., a direct or indirect Change to the means, method, and manner of accomplishing the contractor’s work. The Government (or other owner) may direct Changes resulting from COVID-19 disruptions. Thus, it is imperative to review the specific Changes clause under your contract and follow the prescribed **NOTICE** requirements.

Again, **profit is allowed on recoverable costs under the Changes clause**. Therefore, if at all possible, contractors should look to the Changes clause to recover excess performance costs due to COVID-19. It is possible (and perhaps likely on certain projects) that Contracting Officers will implement Changes to scopes of work, schedules, project access, and completion milestones or quantities (among many other things) that will fall under that Changes clause. Many times, delay or other impact costs that appear to fall under a different clause may actually be couched under the Changes clause if looked at with experienced and outside-the-box thinking. In fact, this is Excell’s bread and butter!

Let’s not forget that all of these circumstances could form the basis for a claim of actual or [Constructive Changes](#) under FAR 52.243-4(d), which allows for an Equitable Adjustment when the government’s action or inaction, expressly or impliedly, caused a Change to the contractor’s performance requirements without a formal modification. See [Nova Group/Tutor-Saliba v. United States](#), 125 Fed.Cl. 468 (2016).

² For purposes of FAR 52.242-17(a), concurrent delay means “[...] any delay or interruption to the extent that performance would have been delayed or interrupted by any other cause....”

Accordingly, it is therefore imperative that contractors stay on top of project correspondence, communicate with the government, and provide prompt **NOTICE** in order to recover their additional costs and profit associated with contract Changes.

Conclusion

As you scramble to continue the success of your business, you will need to pursue recovery of every dollar that is possibly recoverable. Proper **NOTICE** to the government that you have experienced impacts due to COVID-19 and other factors, along with timely submitting a factually and contractually supported REA or claim are all imperative to making you as close to whole as possible in these uncertain times. The guidance of an expert in government contracting can mean the difference between recovering profit on your additional costs or not recovering any costs at all.

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