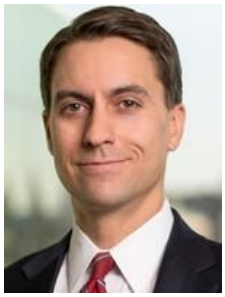
A Gov't Contractor's Guide To Excusable, Compensable Delay

By **Aron Beezley and Sarah Osborne**



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With the recent and rapid spread of COVID-19 in the U.S., government contractors have already started experiencing contract performance delays, which inevitably will have a significant financial impact.

Recognizing the challenges federal contractors face with the COVID-19 pandemic, the Office of the Under Secretary of Defense recently issued a memorandum entitled "Managing Defense Contracts Impacts of the Novel Coronavirus," outlining the regulatory tools to equitably address contract performance delays caused by COVID-19.[1]

Federal contractors, accordingly, should be prepared to establish that such delays are compensable as well as excusable under the applicable contract principles.

Compensable Delays

According to the 2006 edition of "Administration of Government Contracts",[2]
A contractor's ability to recover increased costs resulting from delays will depend upon the cause of the delay, the nature of its impact on the contractor, and the contractual provisions dealing with compensation for delays.

Broadly speaking, there are two types of compensable delays: (1) government-ordered suspensions; and (2) constructive suspensions.

Government-Ordered Suspensions

Government-ordered suspensions arise when the contracting officer issues a directive to stop or suspend work. These suspensions are generally covered by Federal Acquisition Regulation 52.242-14 addressing suspension of work, and FAR 52.242-15, addressing stop-work orders.

Both clauses give the government the unilateral right to stop or suspend part of all of the work, but contain different remedies for the contractor in seeking adjustment for increased costs resulting from the government's direction.

FAR 52.242-14 — suspension of work — allows the contracting officer to unilaterally suspend, delay, or interrupt all of part of the contractor's work for the convenience of the government.

If the delay or suspension to performance is for an unreasonable period of time and caused by the contracting officer's conduct or failure to act within a time specified in the contract (or a reasonable time if none specified), then "an adjustment shall be made for any increase in the cost of performance of [the] contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing

accordingly."[3]

The contractor may not seek adjustment for costs incurred more than 20 days before the contractor notifies the contracting officer of the failure to act giving rise to the request (in cases where no suspension order is issued), or if the claim is not submitted as soon as practicable or prior to the closing date for final payment under the contract.

The U.S. Court of Appeals for the Federal Circuit has recognized a four-part test to recover an equitable adjustment under the FAR suspension of work clause:
First, there must be a delay of unreasonable length extending the Contract completion time. Second, the delay must have been proximately caused by the [government's] action or inaction. Third, the delay resulted in some injury[.] [F]ourth, there is no delay concurrent with the suspension that is the fault of [the contractor].[4]

The contractor will bear the burden of proving the extent of a delay and the causal link between the government's conduct and the delay.

Notably, the suspension of work clause does not allow for adjustments for suspensions or delays "for which an equitable adjustment is provided for or excluded under any other term or condition of [the] contract."[5]

Thus, to the extent suspension or delay results from a change order or constructive suspension, contractors may have the option to seek adjustments under one of the applicable FAR changes clauses.[6] Constructive suspensions, discussed further below, provide such an opportunity.

FAR 52.242-15, the stop-work order clause, in turn provides the contracting officer with the unilateral right to stop any or part of work under a contract for 90 days. Once a stop-work order is received, the contractor is required to immediately comply with its terms.

This obligation includes taking "reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage." [7]

Following those 90 days, the contracting officer may then extend the order with consent of the contractor, cancel the order, or terminate the work covered under the termination for convenience or default clause. Absent one of these actions, the contractor is expected to resume work at the expiration of the stop-work order.

The contracting officer may modify the contract to account for impacts to schedule or price where the stop-work results in an increase to the time or costs properly allocable to the contractor's performance under the contract and the contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage.[8]

If the contract is terminated for default or convenience, the contractor may still recover reasonable costs resulting from the stop-work order by equitable adjustment or settlement.[9]

Importantly, costs for idled facilities or labor may be recoverable following a stop-work order, subject to the contractor's demonstrated efforts to reasonably mitigate those costs.

Whether the stop-work order indicates that the contractor would be expected to remain available to proceed following an end to the shut-down may affect the reasonableness of salary and other costs paid to retain skilled employees while work is stopped.[10]

Accordingly, federal contractors should be ready to timely assert requests for equitable adjustments and demonstrate the reasonable cost impact on the contractor, ideally using actual cost data, resulting from any COVID-19-related government-ordered suspension or delay.

Constructive Suspensions

According to the 2006 edition of "Administration of Government Contracts,"[11] Constructive suspensions occur when work is stopped absent an express order by the contracting officer and the government is found to be responsible for the work stoppage.

When a contractor's performance is effectively suspended, but the government does not formally direct suspension of performance, "the law considers that done which ought to have been done" and characterizes the suspension to be a constructive suspension.[12]

Under these circumstances, the contractor may recover under the applicable "changes" clause.

The requirements for a constructive suspension claim are similar to those required for a government-directed suspension. Importantly, the contractor must put the government on notice that the government's conduct has constructively suspended work.

Common examples of constructive suspensions include the government's failure to timely approve specifications or submittals, unreasonably delaying the contractor from proceeding with related work.

In addition, a constructive suspension may occur when the government advises the contractor that it intends to issue a change, causing the contractor to "suspend that work rather than continue performance which would be rendered useless or wasteful by the change."[13]

Regarding COVID-19, contractors should look out for constructive delays arising from restrictions of access to facilities, or other actions by the government that may impact or delay performance.

In such a case, the contractor should promptly notify the contracting officer of the impacts associated with these directives or restrictions. If the directive did not come from the contracting officer, the contractor should seek ratification or direction on how to proceed with performance from the contracting officer, which may provide the opportunity for recovery under the changes clause.

Thus, government contractors should be mindful of whether a government action or change creates constructive suspensions or delays.

Contractors who have been constructively suspended should be ready to timely assert a constructive suspension claim. Contractors should also be diligently documenting the actual cost impact resulting from any constructive suspension.

Excusable Delays

Whereas the focus of compensable delays is on compensating the contractor for the cost impact resulting from the delay, the focus of an excusable delay "is to protect the contractor

from sanctions for late performance."[14]

Whether or not a delay is excusable usually depends on the language of the contract provision at issue. Several FAR provisions address excusable delays relating to quarantine restrictions or epidemics that may apply to COVID-19-related delays on federal contracts.

For example, excusable delays in fixed-price construction contracts are addressed in FAR 52.249-10, the default fixed-price construction clause. Importantly, FAR 52.249-10 lists epidemics and quarantine restrictions as excusable delays.

The contractor has only 10 days from the beginning of any such excusable delay to notify the contracting officer in writing of the causes of delay to performance to receive an extension for the time for completion.

Excusable delays in fixed-price supply and service contracts, in turn, are addressed in FAR 52.249-8, the default fixed-price supply and service clause. FAR 52.249-8 similarly lists epidemics and quarantine restrictions, as excusable delays. Commercial contracts covered by FAR Part 12, FAR 52.212-4 contain a similar listing of "excusable delays. FAR 52.212-4(f) lists epidemics and quarantine restrictions as possible excuses for delays.

While inarguably disruptive, the spread of COVID-19 within the U.S. does not create an excusable delay per se. Cases analyzing delays claimed from the onset of an epidemic require that the contractor prove both the occurrence of the epidemic and that the epidemic was the material contributing cause of the performance delay.[15]

Thus, the contractor should be prepared to prove aspects of the onset of the epidemic or mandated quarantine that materially impacted performance and the extent of delay directly caused by the epidemic.

Generally, contractors should carefully document: (1) the onset and duration of the epidemic; (2) which personnel were affected by the epidemic, and for what periods they were absent or quarantined as a result of the disease; (3) whether or how such absences caused a delay in performance and the duration of that delay; and (4) what reasonable efforts were made during those epidemic-related absences to continue operations.[16]

Accordingly, contractors who have experienced delays because of COVID-19-related events and occurrences should also be prepared to timely demonstrate that such delays were, in fact, caused by a recognized excuse. Indeed, failure to do so could result in harsh sanctions, including but not limited to being terminated for default.

Other Monetary Recovery For Impacted Performance Under the CARES Act

Notably, the Section 3610 of the CARES Act, "Federal Contractor Authority," allows contracting officers to modify a contract to reimburse a contractor, without consideration, at the minimum applicable contract billing rates 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."

This authority is limited to contractors who cannot perform work on an approved government-owned or leased site due to facility closures or other restrictions, and who cannot telework during the COVID-19 public health emergency because their job duties cannot be performed remotely.

Contractors should be mindful of this authority when their ability to perform has been effected by facility closures or restrictions. Importantly, while costs to keep contractors in a ready state may be recoverable, this section does not otherwise allow for contract modifications to address schedule delays.

Key Takeaways

Government contractors need prepare now if they are to be able to demonstrate compensable or excusable delays resulting from COVID-19-related occurrences and events. Failure to prepare now could result in significant negative financial and other impacts.

Contractors should be mindful of any orders received by the contracting officer, or other epidemic-related developments that directly delay or impact performance. When faced with a delay or suspension, contractors should be careful to:

- Consult the applicable contract clauses in their contract;
- Timely notify the contracting officer of anticipated or experienced delays and seek additional direction where appropriate;
- Mitigate costs during suspensions where safely able to do so;
- Diligently document schedule and cost impacts.

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[1] https://www.acq.osd.mil/dpap/policy/policyvault/Managing_Contracts_under_COVID-19_Memo_DPC.pdf.

[2] John Cibinic, Jr., et al., Administration of Government Contracts, Ch. 6, II. Compensable Delays (5th ed. 2006).

[3] FAR 52.242-14(b).

[4] P.J. Dick Inc. v. Principi, 324 F.3d 1364, 1375 (Fed. Cir. 2003)(quoting P.J. Dick, Inc., VABCA No. 5597, 01–2 BCA ¶ 31,647, 2001 WL 1219552, 2001 LEXIS 12 at *120 (Sept. 27, 2001)).

[5] FAR 52.242-14(b).

[6] See, e.g., FAR 52.243-2 (Changes — Fixed Price).

[7] FAR 52.242-15(a).

[8] FAR 52.242-15(b).

[9] FAR 52.242-15(c) & (d).

[10] See, e.g., Raytheon Stx Corp., GSBCA No. 14296-COM, 00-1 B.C.A. (CCH) ¶ 30632 (Oct. 28, 1999).

[11] John Cibinic, Jr., et al., Administration of Government Contracts, Ch. 6, II. Compensable Delays (5th ed. 2006).

[12] Merritt-Chapman & Scott Corp. v. U.S., 429 F.2d 431, 443 (Ct. Cl. 1970).

[13] Piland Corp., ASBCA No. 22560, 78-2 B.C.A. (CCH) ¶ 13503 (Oct. 12, 1978).

[14] John Cibinic, Jr., et al., Administration of Government Contracts, Ch. 6, I. Excusable Delays (5th ed. 2006).

[15] Ace Elecs. Assocs., Inc., ASBCA No. 11496, 67-2 B.C.A. (CCH) ¶ 6456 (July 18, 1967) (analyzing claimed delay resulting from a flu endemic).

[16] See, e.g.¸ Asa L. Shipman’s Sons, Ltd., GPOBCA No. 06-95 (Aug. 29, 1995) (analyzing claimed delay resulting from a flu endemic).