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COVID-19 Impacts on Federal Government Contracts – Protecting Your Rights Associated with Delays & Suspensions of Work

The Coronavirus (COVID-19) is impacting the construction industry in both the public and private sectors. A recent Associated General Contractors online survey revealed that more than a quarter of the respondents have already been directed to halt or delay work on a project. See *Associated General Contractors, Data Digest*, Vol. 20, No. 11, March 23, 2020. Additionally, the flow and performance of work is being disrupted as contractors adjust to comply with CDC and other agency guidelines for “social distancing” and worksite safety. Contractors may also be impacted by external factors such as material and labor shortages, material price increases, and subcontractor and supplier failures to perform. As contractors continue to adapt to these impacts, it is essential for them to understand how to protect their rights to additional time and possibly compensation associated with the impacts. This alert focuses on how contractors on projects with the federal government can protect themselves under the Federal Acquisition Regulations (“FAR”).

1. Excusable Delay Resulting from COVID-19 Impacts.

The government can declare a contractor in default for failing to prosecute the work in a manner that will ensure its completion within the time specified in the contract. FAR 52.249-10(a). However, there are various excusable delay provisions in the FAR which allow contractors to seek adjustments to the contract time. For fixed-price construction contracts, the delay provision is in the Default (Fixed-Price Construction) clause, FAR 52.249-10(b). For cost-reimbursement construction contracts, the delay provision is the Excusable Delay clause, FAR 52.249-14. Both clauses provide that a contractor is entitled to a time extension – but no monetary adjustment – for excusable delays. Excusable delays are delays that “arise from unforeseeable causes beyond the control and without the fault or negligence of the contractor.” FAR 52.249-10(b)(1). Examples include acts of the Government in either its sovereign or contractual capacity, epidemics, quarantine restrictions and “delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers.” FAR 52.249-10(b). Importantly, a contractor being delayed by one of these events must notify the Contracting Officer in writing of the causes of delay “within 10 days from the beginning of any delay.” FAR 52.249-10(b)(2).

2. Suspensions Resulting from COVID-19.

The Contracting Officer may suspend work under a construction contract for a reasonable period of time. FAR 42.1302. If the suspension is for an unreasonable period of time, the contractor may submit a claim for increases in the cost of performance, excluding profit. Specifically, the Suspension of Work clause,



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FAR 52.242-14, states that the Contracting Officer may order the contractor to suspend, delay, or interrupt all or any part of the work for the period of time that the Contracting Officer determines appropriate for the convenience of the Government. If the performance of all or any part of the work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Contracting Officer in the administration of the contract or by the Contracting Officer's failure to timely act, the contractor is entitled to an equitable adjustment for any increase in the cost of performance (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption.

The contractor cannot recover costs incurred more than 20 days before the contractor notified the Contracting Officer in writing of the act or failure to act that caused the suspension, delay, or interruption. This notice requirement does not apply if the Contracting Officer ordered the contractor to suspend work in writing. In other words, if the Contracting Officer issued a suspension order, the contractor does not have to provide the notice. Regardless, the contractor must assert its claim for costs in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

However, even if a Contracting Officer does order a contractor to suspend work due to COVID-19, it is likely that the Government will take the position that the suspension was a sovereign act and the contractor is not entitled to additional compensation despite the language of the Suspension of Work clause. Under the Sovereign Acts Doctrine, the Government is not liable for delays caused by the Government's public and general acts as a sovereign as opposed to its acts as a contracting party. *Conner Bros. Contr. Co., Inc. v. Green*, 550 F.3d 1368, 1372-73 (Fed. Cir. 2008) (order directing contractor to suspend work and vacate construction site after the 9/11 attack was a sovereign act not entitling the contractor to delay damages). An act is considered to be a sovereign act if it is general and applies to all persons. An act is general and public when the impact of the act upon a government contract is merely incidental to the accomplishment of a broader governmental objective. In this case, we can anticipate that the Government will argue that suspending construction work is incidental to the broader governmental objective of stopping the spread of COVID-19.

Alternatively, the Government may argue that the contractor is not entitled to an equitable adjustment because the contract otherwise would have been delayed even if the suspension was ordered. Under the Suspension of Work clause, the contractor is not entitled to an equitable adjustment to the extent that performance otherwise would have been suspended, delayed, or interrupted by any other cause. Some Contracting Officers have advised that they view delays caused by COVID-19 to be excusable delays only entitling contractors to a time extension.

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.

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