



Government Contractors Have Choices in the Face of Coronavirus

The outbreak of the Coronavirus (COVID-19) and the nation's responses to dealing with its spread throughout the country has had and will continue to have a significant impact on the nation's businesses. Companies who do business with all levels of government (federal, state and local) are among those who will be particularly affected, and it is important to keep in mind that they have a number of rights and remedies available to them.

To understand what steps contractors can and should be considering, it is important to keep in mind that there are different types of contracts ranging from firm fixed price (FFP) contracts to cost reimbursement contracts with a fixed fee (CPFF). Also, there are different sectors involved which broadly speaking are services, supplies and construction. Finally, it is important to keep in mind that contractors perform work either at their own locations or at government furnished locations.

Dealing With Disruptions

When there is a disruption of the magnitude of the Coronavirus outbreak and the commensurate dislocations that occur, it is likely that government contractors will encounter disruptions in their ordinary way of doing business.

They may need to adjust:

- Staffing locations, including working from home
- Supply chains
- Subcontractor support
- Flow of other work (may drop off causing a spike in overhead rates)

Possible Remedies

In these situations, it is important to look carefully at each contract that the company has with the government to determine what protections and remedies are available. For example, when faced with delays or work stoppages, there may be a *force majeure* clause that offers relief. Situations may give rise to the assertion of impossibility of performance or commercial impracticability. There may be facts and circumstances that allow for the assertion of constructive changes.

For prime contractors, there may be the ability to help subcontractors and suppliers to assert claims to the government through sponsorship arrangements; and prime contractors may have claims against their subcontractors and suppliers. Sureties who back performance and payment bonds may weigh into the picture.

Communicate

Each company likely has a mix of contracts with different types of pricing or cost arrangements, different locations where the work is performed, and even different market sectors. So, it is impossible to offer specific advice without doing a careful review of the contracts; but a key point of departure is to read each contract carefully and then open up a dialog with the contracting officer overseeing the performance of each contract when it looks like there will be a disruption. Contracting officers have at their disposal a number of tools that they can bring to bear to offer some relief including entering into advance agreements that resolve possible disputes before they flare up and eliminate the possibility of second guessing by auditors years later when things have calmed down and second guessing may come into play.

Legislative Relief

Also, there likely will be legislative relief offered to companies including government contractors to offset financial losses, employee furloughs or layoffs, partial or total facility closures, etc. To the extent that financial relief is offered to government contractors and their employees, there is the possibility that the government may want to claw back some of those payments if it looks like there has been double recovery. The key is to keep very good records of all of these activities and payments so that there is a clear audit trail to follow.

These are unprecedented and free-wheeling times. Nobody has seen anything quite like the scale and pace of what has transpired over the past few weeks. But we have been through situations like this, and it is important to keep the above thoughts in mind as companies, including government contractors, navigate the next several weeks and months.

For more information, please contact your Kutak Rock attorney or learn more about our [Government Contract group](#).