

# PUBLICATION

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## Coronavirus: What Government Contractors Should Do Now to Address Possible Delays or Suspensions of Work

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The coronavirus (COVID-19) outbreak has caused business disruption across the globe and government contractors are not immune. The U.S. Government and the medical community's fight to contain COVID-19 requires a broad-based commitment to social distancing and self-quarantines, which directly impacts contract completion times and employee productivity. Contractors should now review the Federal Acquisition Regulation (FAR) clauses included in their contracts related to delays, suspensions, and changes to ensure that they know their rights and how to protect their rights by providing the required written notice and adequate documentation.

### Excusable Delays Allowing a Time Extension for Performance of the Work

"A compensable delay is one for which both a time extension and monetary relief are due and an excusable delay is one for which only a time extension is due." *Appeal of – Swinerton Builders Nw.*, ASBCA No. 57329, 17-1 B.C.A. (CCH) ¶ 36738 (Apr. 24, 2017).

Excusable delays are allowed only when the delays are unforeseeable and therefore are not the fault of the contractor. The excusable delays clause in a federal government contract is similar to a *force majeure* clause that is often included in a general commercial contract. Generally, under the excusable delays clause, a contractor is not liable for any excess costs resulting from a delay if the failure to timely perform arises from causes beyond the control of and without the fault or negligence of the contractor. Significantly, the relevant excusable delays clauses list "epidemics" and "quarantine restrictions" in the list of examples of excuses that can cause an excusable delay.

The particular type of government contract will determine which excusable delay clause is applicable. For example, [FAR 52.249-14 – Excusable Delays](#) describes excusable delay rights applicable to cost-reimbursement, time-and-material, and labor-hour contracts while [FAR 52.212-4 – Contract Terms and Conditions – Commercial Items](#) provides the language applicable to commercial item contracts. Various other excusable delay clauses cover other types of contracts. For example, [FAR 52.249-8 – Default \(Fixed-Price Supply and Service\)](#) applies to Fixed-Price Contracts for supplies and service while [FAR 52.249-10 – Default \(Fixed-Price Construction\)](#) addresses excusable delays in the construction context.

If any contract delays are caused by the COVID-19 outbreak, contractors should immediately provide written notice to the contracting officer identifying that a delay is occurring and also provide contemporaneous documentation confirming how the contract is adversely impacted. A lack of written contemporaneous complaints and a failure to give timely notice can directly impact the contractor's ability to have its delay excused.

### Compensable Delays Allowing a Time Extension and Monetary Relief

Several FAR clauses also provide for compensation when a delay or change in situation is caused by the Government, depending on the particular circumstances.

[FAR 52.242-15 – Stop-Work Order](#) allows the contracting officer to, "at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by [the] contract for a period of

90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree." The COVID-19 outbreak likely will cause contracting officers to use this clause to temporarily suspend performance of certain contracts. If a contractor receives a stop-work order, it is required to "immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage." However, if a stop-work order is issued, contractors can seek an equitable adjustment in the delivery schedule and/or the contract price if the order results in an increase in the time required for, or the contractor's cost properly allocable to, the performance of any part of the contract. Significantly, the contractor must assert its rights to the equitable adjustment within 30 days after the end of the period of the work stoppage to obtain any recovery. If the stoppage does not end, the contractor may also be entitled to costs resulting from the stop-work order as part of the termination settlement upon the termination of the full contract.

If the contracting officer actually or constructively suspends the work under the contract without issuing the stop-work order, there are other clauses that may provide compensation in particular circumstances. For example, [FAR 52.242-17 – Government Delay of Work](#), provides that "an adjustment (excluding profit) shall be made for any increase in the cost of performance" if the performance of all or any part of the work under the contract is delayed or interrupted "by an act of the Contracting Officer in the administration of this contract that is not expressly or impliedly authorized by [the] contract" or "by a failure of the Contracting Officer to act within the time specified in [the] contract, or within a reasonable time if not specified." Similarly, [FAR 52.242-14 – Suspension of Work](#), which primarily is applicable to fixed-price construction or architect-engineer contracts, also allows for a price adjustment if the contract is delayed or interrupted "by an act of the Contracting Officer in the administration of this contract that is not expressly or impliedly authorized by this contract" or "by a failure of the Contracting Officer to act within the time specified in this contract, or within a reasonable time if not specified." Therefore, under certain circumstances, contractors can rely on these clauses to potentially obtain compensation for the Government's suspension of work or delay. However, any recovery under these clauses will not include profit because there is only a change in the performance period, not a change in the actual type of work.

Government contracts also include a changes clause, which provides another tool for a contracting officer to change the performance terms of a contract as a result of COVID-19. The changes clauses are found between [FAR 52.243-1](#) through [FAR 52.243-7](#). The type of contract determines which particular changes clause applies. For example, [52.243-1 – Changes – Fixed-Price](#) applies to fixed-price contracts while [FAR 52.243-2 – Changes – Cost-Reimbursement](#) applies to cost reimbursement contracts. The changes clause in a contract provides the Government with the unilateral right to "at any time, by written order, and without notice to sureties . . . make changes within [the] general scope of the contract." However, if the Government invokes the changes clause, the contractor can seek an equitable adjustment. An equitable adjustment is "[a]n appropriate modification of the amount due under a contract, or the time required for its performance, because of the issuance of a change order, which is just, fair, and right in consideration of the facts and circumstances of the individual case." [Appeal of Kenyon Magnetics, Inc.](#), GSBGA No. 5263, 80-2 B.C.A. (CCH) ¶ 14624 (July 31, 1980). Equitable adjustments typically include profit. However, similar to the other clauses discussed, timely notice and adequate documentation are essential for recovery. Notice typically is required within 30 days after the change order is issued, but contractors should review their particular contracts to confirm the relevant notice periods.

### **Communicate the Same Notices to Your Subcontractors and Suppliers**

In addition to reviewing their prime contracts for particular FAR clauses, prime contractors also should review and confirm that those same FAR clauses are included in their subcontracts. Subcontracts related to federal government contracts should include FAR flow-down clauses that ensure subcontractors are subject to the same delay, suspension, and termination requirements as the prime contractor. If these clauses are not included, prime contractors should update them at the first opportunity.

Prime contractors should also make sure to communicate with subcontractors to confirm that subcontractors are aware of any government delays. Open communication with subcontractors will ensure that subcontractors are not proceeding with work that the government has stopped, and it will also reveal any potential delays related to the subcontractor's work, including supply chain issues. Maintaining flexibility and open communication will be imperative as we progress through this crisis.

### **Be Proactive, Document, and Consistently Communicate**

COVID-19 will cause unprecedented business disruption, including for government contractors. Government contractors need to be proactive in reviewing their contracts and knowing what actions they must take to protect their rights under those contracts.

Baker Donelson's Government Contracts Team routinely assists contractors with FAR compliance, disputes, and claims. If you have any questions or need assistance with this topic, please contact any attorney on Baker Donelson's [Government Contracts Team](#). For more information, please visit the [Coronavirus \(COVID-19\): What You Need to Know](#) information page on our website.