

COVID-19 Liability Considerations & CARES Act

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- Licensed to practice in Washington, D.C., Tennessee, and several federal courts
- Advise Government Contractors regarding:
 - Compliance with FAR and other agency acquisition regulations
 - Compliance with state and local procurement regulations
 - Bid protests before the Federal Government Accountability Office and state governments & size protests before the SBA
 - Negotiation of teaming agreements, subcontracts, novation agreements, and other agreements related to government contracts
 - Business structure and formation issues related to SBA set-aside programs (Mentor-Protégé & joint ventures, small business, etc.)
- Mid-South *Super Lawyers Rising Star* in the area of Government Contracts (Since 2014)

Agenda

- **COVID-19 Liability Considerations & the CARES Act**
 - **Disruption of the Workplace Resulting from COVID-19**
 - **CARES Act Section 3610**
 - **Other Methods of Recovery**
 - **Excusable Delays**
 - **Compensable Delays**
 - **Questions**

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COVID-19 Impacts

- **Tennessee**
 - 264,587 Confirmed Cases; 3,379 Deaths
- **United States**
 - 9.33 Million Confirmed Cases; Approximately 231,000 Deaths
- **January 31, 2020 – Secretary of HHS Alex Azar Declared a Public Health Emergency**
 - More flexibility with federal funding to fight the virus
- **March 13, 2020 – President Donald Trump declared COVID-19 a national emergency, opening \$50 billion in funding**
 - March 12 – NCAA tournament is canceled
 - March 12 – NBA / NHL temporarily suspend seasons
 - March 12 - Governor Lee urges Tennessee's schools to close

COVID-19 Impacts (continued)

- **Economic Impacts**
 - **As of April 2nd, at least 31 States had issued stay-at-home orders (including TN)**
 - **20.6 million jobs lost between mid-March to end of April**
 - Unemployment reached 14.7%
 - Positive Point – Losses down to about 12 million
 - **S&P 500 Stock Index lost 33.9% of its value by March 23rd**
 - Positive Point – S&P 500 is currently positive
 - **Dow Jones Index dropped more than 10,000 points between Jan. 1 and March 23rd**
 - Positive Point – Up 8,334 points since March 23rd

COVID-19 Legislation

- **March 6, 2020 – Coronavirus Preparedness and Response Supplemental Appropriations Act**
 - \$8.3 billion in funding for COVID-19 response
 - \$3.1 billion for vaccine R&D
 - \$2.2 billion for CDC & state and local preparedness
 - \$1 billion for medical supplies / PPE, etc.
- **March 18, 2020 – Families First Coronavirus Response Act (FFCRA) Enacted Into Law (\$192 billion)**
 - Requires employers with less than 500 employees to provide paid benefits to employees who cannot work due to COVID-19 impacts
 - Quarantine requirements, caring for children out of school, caring for person subject to quarantine order, etc.
 - Employers receive tax credits for what they pay to employees

COVID-19 Legislation (continued)

- **March 27, 2020 – Coronavirus Aid, Relief, and Economic Security (CARES) Act signed by President Trump**
 - \$2.2 Trillion economic stimulus bill
 - \$300 billion in one-time cash payments to individual Americans
 - \$300 billion in small business Paycheck Protection Program (PPP) loans
 - \$310 billion in additional funding added to PPP on April 27th
 - Grants and funding for hospitals and telehealth services
 - Section 3610 – Authorizes (but does not require) agencies to reimburse contractors for the cost of paid leave incurred to keep contractor and subcontractor personnel in a “ready state”

CARES Act Section 3610

- **Paid Leave to Keep Contractors and Subcontractors in a “Ready State”**
 - **Agencies “may” use any funds available (i.e., CARES Act or other existing appropriations) to reimburse contractors for the costs of providing “paid leave . . . to keep its employees or subcontractors in a ready state”**
 - **Reimbursement is discretionary; not mandatory (i.e. “may use”)**
 - **Allows agencies to modify the terms and conditions of the contract “without consideration”**
 - Provides different agencies flexibility on the types of contract changes they can make
 - **Covers paid leave expenses from March 27, 2020 to December 11, 2020**
 - Original CARES Act had program ending on September 30, 2020
 - OMB - agencies can cover expenses before March 27, 2020 under other (non-Section 3610) authorities
 - BUT: DOE issued guidance stating January 31, 2020 is the start date

CARES Act Section 3610 (continued)

- **Office of Management and Budget (OMB) Memoranda**
 - **M-20-18 – March 20, 2020 – Encouraged federal government agencies to use flexible work solutions during the COVID-19 crisis (*Pre-CARES Act*)**
 - Encouraged teleworking and the use of the Changes Clauses (FAR 52.243-1 through FAR 52.243-7) to address COVID-19 concerns
 - <https://www.bakerdonelson.com/coronavirus-OMB-guidance-on-managing-government-contract-performance-issues>
 - **M-20-22 – April 17, 2020 – Provided OMB’s first guidance on Section 3610**
 - Provides “guiding principles” on how federal agencies should use Section 3610
 - **M-20-27 – July 14, 2020 – Additional Guidance on Federal Contracting Resiliency in the Fight Against COVID-19**
 - Provides Detailed responses to various questions related to Section 3610
 - <https://www.whitehouse.gov/wp-content/uploads/2020/07/M-20-27.pdf>

CARES Act Section 3610 (continued)

- **Reimbursement authority applies only to a contractor whose employees or employees of its subcontractors**
 - (1) Cannot perform work on a site that has been approved by the Federal Government, including a federally-owned or leased facility or site due to facility closures and other restrictions; and
 - (2) Cannot telework because their job duties cannot be performed remotely
 - “[S]ite that has been approved by the Federal Government” is any place of performance identified in the contract or otherwise agreed upon by the contracting parties
- **What happens if a contractor needed to reduce workforce to meet social distancing guidelines, but still has several employees working because they meet the “essential” exemption for shelter-in-place orders?**
 - Contractors are eligible to receive Section 3610 reimbursement for those employees who are not working because of the reduced workforce so long as other Section 3610 criteria are met

CARES Act Section 3610 (continued)

- **Section 3610 Funding “shall be reduced” by the amount of credit a contractor receives under division G of the FFCRA and any applicable credits received under the CARES Act**
 - Contractors cannot double-dip
 - Examples:
 - If contractor gets a tax credit for paying sick or family medical leave to employees under division G of the FFCRA, that contractor cannot get Section 3610 funding for the same employees
 - If a contractor gets a Paycheck Protection Program (PPP) loan based on payroll to federal contractor employees who could not work due to COVID-19, that same contractor could not get Section 3610 funding for those same employees
 - But, if a contractor gets a PPP loan for only its commercial employees and properly segregates and confirms that the PPP loan amount had no relation to separate work by federal contractor employees, then that same contractor could get Section 3610 funding for employees performing federal work if all other Section 3610 criteria are met

CARES Act Section 3610 (continued)

- **Section 3610 Reimbursement allowed only at the minimum applicable contract billing rates not to exceed an average of 40 hours per week of paid leave, including sick leave**
 - Should be limited to actual cost incurred, and should not include profit
 - To lessen the administrative burden, agencies have discretion to calculate a profit decrement from random sampling at the company or industry level
 - Costs must be reasonable and validated
 - If an employee can be charged at different rates depending on the task, reimbursement should be made at the lowest applicable rate

CARES Act Section 3610 (continued)

- **Contractors must fully support and maintain documentation for claims made under Section 3610**
 - Contractors should segregate and report the actual costs of leave payments for each employee (actual cost of each employee's paid leave, including names of employees and number of leave hours)
 - The contracting officer *must make clear* to the contractor that the contractor is responsible for reporting on the status of credits requested and received and for making any repayments that are necessary in the future
 - Contractor's responsibility to ensure no double-dipping between other sections of the CARES Act and FFCRA
 - The government may audit the billed costs in order to ensure the accuracy and compliance with the law

CARES Act Section 3610 (continued)

- **Contractors must fully support and maintain documentation for claims made under Section 3610**
 - OMB suggests that agencies require the following
 - Contractor's identification of (i) the employees who were provided paid leave, (ii) the contract(s) those employees are performing under, and (iii) the amount and dates of the paid leave provided
 - Contractor's confirmation that the identified employees:
 1. Work on a site approved by the Federal Government pursuant to the contracts under which the claimed costs are sought;
 2. Could not perform work due to closures or other restrictions resulting from COVID-19;
 3. Were unable to telework or otherwise work remotely under the applicable contract;
 4. Have been kept in a ready state and the contractor is prepared to resume performance in a timely manner; *and*
 5. Were provided paid leave based on the rates the contractor would have paid the employees but for the COVID-19 pandemic.

CARES Act Section 3610 (continued)

- **Contractors must fully support and maintain documentation for claims made under Section 3610**
 - Contractors should validate that the costs claimed:
 1. Are only for paid leave meeting the requirements discussed on the prior pages of this presentation; and
 2. Constitute the only reimbursement or payment it has received or expects to receive for this purpose.
 - No double-dipping: If the contractor is subsequently paid, reimbursed, or receives other credits for relief for those same employees, it must promptly notify the government, provide the relevant documentation, and submit repayment as required by Section 3610
 - Purpose is to keep contractors and subcontractors in a “ready state”
 - “Ready state” is a contractor’s ability to mobilize and resume performance in a timely manner as local conditions permit, consistent with national guidelines

CARES Act Section 3610 (continued)

- **Department of Energy Policy Flash 2020-53 - Guidance for using DOE's Clauses developed to implement Section 3610 of the CARES Act**
 - Issued October 1, 2020
 - Includes guidance to contracting officers on the use of Section 3610
 - Also includes two clauses that may be used to modify DOE contracts
 - Clause for Cost-Reimbursement type contracts
 - Clause for Fixed-Price and Time-and-Materials type contracts
 - Requires a contractor representation about no double-dipping
 - States that costs must be incurred between January 31, 2020 and December 11, 2020

CARES Act Section 3610 (continued)

- **Best Practices for Submitting Claims Under Section 3610**
 - Communicate early with contracting officer about particular documentation requirements
 - The documentation suggested by OMB M-20-27 is specific and detailed
 - DOE clause is more broad
 - Obtain written confirmation from contracting officer about all documentation required
 - Collect and maintain documents showing eligibility and rationale
 - Even if the contracting officer does not require it, collect and maintain all documents suggested by OMB M-20-27
 - Segregate costs in detail to show how costs were determined, to whom paid leave was paid, and what amounts were paid to justify your current reimbursement request and to have it for future audits or challenges

CARES Act Section 3610 (continued)

- **Best Practices for Submitting Claims Under Section 3610**
 - Before making representations, communicate with all your divisions and departments to confirm that you are not double-dipping
 - Consider CARES Act tax credits, PPP loans, FFCRA, etc.
 - Maintain communications and triggers for any later changes
 - Seek written confirmation from contracting officer confirming that he/she agrees that the contractor incurred paid leave costs because it:
 - (1) Could not perform work on a site that has been approved by the Federal Government, including a federally-owned or leased facility or site due to facility closures and other restrictions; and
 - (2) Cannot telework because their job duties cannot be performed remotely
 - Maintain all of this documentation with the expectation that you will be audited in the future

Contract Relief Unrelated to Section 3610

- **According to GAO, DOE reimbursed contractors for almost \$550 million in paid leave costs through existing contract obligations (i.e., not Section 3610)**
 - GAO Report, GAO-20-662, *Observations on Contractor Paid Leave Reimbursement Guidance and Use*, <https://www.gao.gov/assets/710/709128.pdf>
 - Contractors who could telework or never experienced any site closures that would make them eligible for Section 3610 should evaluate the traditional Request for Equitable Adjustment and Claims Processes
 - *Coronavirus: What Government Contractors Should Do Now to Address Possible Delays or Suspensions of Work* (March 19, 2020)
 - <https://www.bakerdonelson.com/coronavirus-what-government-contractors-should-do-now-to-address-possible-delays-or-suspensions-of-work>

Compensable Delays

- **Compensable delay** - delay for which both a time extension and monetary relief are due
 - **FAR 52.242-15 – Stop-Work Order**
 - Allows the contracting officer to, by written order, 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, and for any further period to which the parties may agree.
 - 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.
 - 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, contractor may also be entitled to costs as part of the termination settlement

Compensable Delays (continued)

- **FAR 52.242-17 – Government Delay of Work**

- If the performance of all or any part of the contract is delayed or interrupted by a failure of the Contracting Officer to act within the time specified in this contract, or within a reasonable time if not specified, an adjustment (excluding profit) shall be made for any increase in the cost of performance of the contract caused by the delay or interruption and the contract shall be modified in writing accordingly
 - A claim under this clause shall not be allowed unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the delay or interruption, but not later than the day of final payment under the contract.
 - *Examples:* Government fails to conduct required inspections, fails to give required direction on a key issue, etc.

Compensable Delays (continued)

- **Changes Clauses (FAR 52.243-1 through FAR 52.243-7)**
 - **Type of contract determines which Changes Clause is included**
 - FAR 52.243-1 – Changes - Fixed Price
 - FAR 52.243-2 – Changes – Cost Reimbursement
 - FAR 52.243-3 – Changes – Time-and-Materials or Labor-Hours
 - The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of the contract
 - If any such change causes an increase or decrease in the cost of, or the time required for, performance under the contract, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

Compensable Delays (continued)

- **Changes Clauses (FAR 52.243-1 through FAR 52.243-7)**
 - The Contractor must assert its right to an adjustment under the Changes within 30 days from the date of receipt of the written order
 - However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract
 - Several different costs could fall under the changes clause
 - Costs resulting from travel restrictions, facility closures, etc.
 - Cost resulting from staggering work schedules
 - Orders to provide PPE or additional cleaning
 - Requirements to provide unexpected training
 - Unavailable customer inspections or delayed inspections

Excusable Delays

- **Excusable Delay** – A delay for which only a time extension is due (i.e., no compensation)
 - Generally, under the excusable delay clauses, a contractor is not liable for any excess cost resulting for a delay if the failure to timely perform arises from causes beyond the control of and without fault of the contractor
 - Excusable delays clauses are similar to *Force Majeure* clauses in commercial contracts
 - Excusable delay FAR clauses make reference to “epidemics” and “quarantine restrictions”

Excusable Delays (continued)

- **Excusable Delay Clauses**

- **FAR 52.249-14 – Excusable Delays** - Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor.
 - Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. *Default* includes failure to make progress in the work so as to endanger performance.

Excusable Delays (continued)

- **Excusable Delay Clauses**
 - **Can be used to address supply chain and subcontractor issues**
 - **FAR 52.249-14 – Excusable Delays - (b)** If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be deemed to be in default, unless—
 1. The subcontracted supplies or services were obtainable from other sources;
 2. The Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and
 3. The Contractor failed to comply reasonably with this order.

Excusable Delays (continued)

- **Excusable Delay Clauses**
 - **FAR 52.212-4 – Contract Terms and Conditions – Commercial Items**
 - Provides the excusable delay language related to commercial item contracts
 - **FAR 52.249-8 – Default (Fixed-Price Supply and Service)**
 - Applies to Fixed-Price Contracts for supplies and service
 - **FAR 52.249-10 – Default (Fixed-Price Construction)**
 - Addresses excusable delays in the construction context

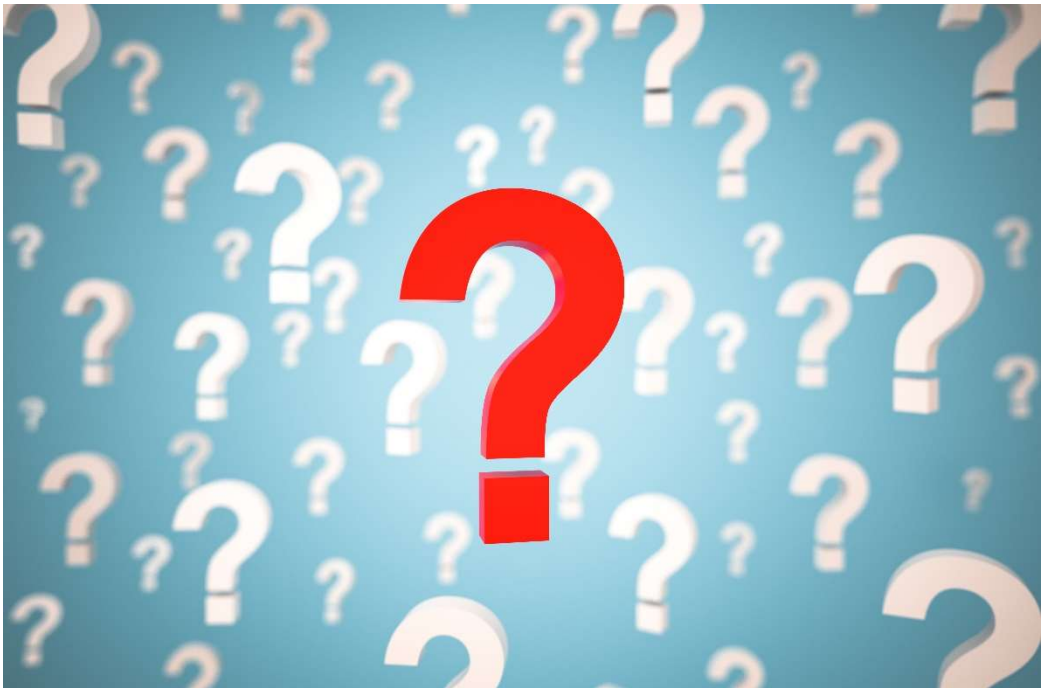
Compensable/ Excusable Delays Best Practices

- Review your contracts closely to confirm which FAR clauses are included
- Identify those issues that might lead to a cost or schedule adjustment if they occur
- Track the costs of events contemporaneously as they occur
 - Document how the new direction has caused a delay, increased a cost, etc.
- Send notice to contracting officer in writing as issues arise
- Request contracting officer to provide direction in writing on how to handle issues
- Engage legal counsel to the extent you have a large Request for Equitable Adjustment or Claim that is not getting resolved

Use All the Tools in the Toolbox

- **Section 3610 is not an exclusive remedy**
 - Contractors can still pursue a request for equitable adjustment under other contract clauses (but not for the same costs if you seek Section 3610 funds)
- **Contractors should review the available tools, talk with your contracting officer, and talk with legal counsel about the best solutions**

Questions?



Ethics & Compliance Issues for Government Contractors



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