

COVID-19 and Federal Procurement Contracts

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The [COVID-19 pandemic](#) and related mandates and recommendations to practice social distancing, work from home, shelter in place, and self-quarantine impact government contracts by disrupting supply chains and business operations. These disruptions may make it difficult and potentially impossible for some federal contractors to perform government procurement contracts as originally contemplated. Disruptions will likely alter government procurement priorities and have prompted questions about how the novel COVID-19 pandemic might affect federal acquisitions and government contractor performance. The pandemic's effect on existing federal contracts will depend in large part upon agency needs, the duration of pandemic response actions, and each contract's type and terms. Legal principles underlying standard contract clauses that often must be incorporated in procurement contracts under the [Federal Acquisition Regulation](#) (FAR) and agency-specific FAR supplements like the Department of Defense's (DoD's) [Defense Federal Acquisition Regulation Supplement](#) (DFARS) will likely guide how agencies and contractors respond to the pandemic. Additionally, federal emergency response laws, such as the [Robert T. Stafford Disaster Relief and Emergency Assistance Act](#) (Stafford Act) and the [Defense Production Act of 1950](#) (DPA), could impact how agencies acquire goods and services to respond to the COVID-19 outbreak.

OMB Guidance on Contract Performance

On March 20, the Office of Management and Budget (OMB) issued [guidance](#) on “steps to help ensure [] safety while maintaining continued contract performance in support of agency missions, wherever possible and consistent with [public health] precautions.” Although contractors establish many of their own workplace standards, the guidance recommends that agencies “work with their contractors . . . to evaluate and maximize telework for contractor employees, wherever possible.” It also encourages agencies to be flexible when administering contracts by providing extensions on deadlines when necessary because of “COVID-19 related interruptions.” The guidance also notes that agencies should evaluate “whether it is beneficial to keep skilled professionals or key personnel in a mobile ready state for activities the agency deems critical to national security or other high priorities.” Finally, the guidance urges agencies, when appropriate, to use procurement law flexibilities triggered when the President [declared](#) the COVID-19 outbreak an emergency under the [Stafford Act](#).

[Under some circumstances](#), an agency can use more streamlined procurement procedures, called “[simplified acquisition procedures](#),” for small-dollar purchases. The [thresholds](#) for simplified acquisition procedures are higher for procurements that support a federally declared major disaster or emergency.

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Additionally, the Competition in Contracting Act of 1984 (CICA) [permits](#) agencies to make [sole-source](#) (i.e., noncompetitive) awards when [justified](#), including when the need for the service or good is of such an “unusual and compelling urgency” that the government potentially could suffer serious harm if it followed typical competition procedures. Agency acquisitions in response to the COVID-19 pandemic might trigger circumstances that justify sole-source awards.

Legal Mechanisms to Address COVID-19-Related Performance

Several standard federal procurement contract provisions provide processes by which the government and contractors can adapt to COVID-19-related unexpected circumstances. The clauses include [Excusable Delay](#) provisions, [Changes](#) clauses, [Stop-Work Order](#) provisions, [Termination for Convenience](#) clauses, and [Continuation of Essential Contractor Services](#) provisions. Use of these clauses could affect the cost and timing of contract performance.

Excusable Delays

The FAR requires that many federal contracts include an [Excusable Delay](#) contract provision. This provision provides contractors protections from default liability for delays triggered by events outside a contractor’s or contracting agency’s control. Triggering events can include “acts of God,” “unusually severe weather,” as well as “epidemics” and “quarantine restrictions.” This clause potentially could authorize contractors who cannot perform work on time because of the COVID-19 pandemic more time to complete performance without suffering contractual consequences (such as payment of [liquidated damages](#)). While some contractors might receive schedule relief (i.e., more time to perform) under this clause, it likely would not authorize additional compensation, even if the COVID-19 pandemic increases contract costs. However, other contract provisions potentially could allow COVID-19-related cost relief, under other contract clauses described below.

Changes

Federal procurement contracts generally must include some variation of a [Changes](#) clause. These clauses authorize contracting officers to enter into a [change order](#) to address changed realities that were not contemplated at contract consummation. In some cases, the parties can negotiate an “[equitable adjustment](#)” to account for reasonable increases or decreases in costs associated with such changes, when warranted. Depending on the facts and circumstances, some contracts might need to be performed during the COVID-19 pandemic, while other contracts could be curtailed or terminated.

The Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency, for example, issued guidance identifying *essential critical infrastructure* contractors that are “needed to maintain the services and functions Americans depend on daily and that need to be able to operate resiliently during the COVID-19 pandemic response.” The guidance identifies essential operations in several industries, including healthcare, public health, communications, information technology, and law enforcement. If a contract is performed but is subject to COVID-19-related adjustments, those adjustments might justify reasonable cost increases or schedule relief under a Changes clause. For example, if a contractor must comply with new, agency-mandated COVID-19 security and sanitation protocols, the contractor might be able to recover the reasonable cost increases of following the heightened standards.

In other instances, the pandemic could reduce the government’s need for supplies or services. These circumstances might warrant a reduction in contractor compensation. For example, if virtually all employees that would normally work in a building are working remotely because of COVID-19’s health risks, it may be unnecessary and contrary to the health-based telework policy for contractors to perform non-essential administrative services in federal buildings during the COVID-19 pandemic. Similarly, an agency might not need the same quantity of supplies originally contemplated with the bulk of its

employees working remotely. This could prompt agencies, unilaterally or through negotiations, to execute [changes](#) to contracts to reflect the reduced need for supplies and services, along with reduced costs commensurate with those changes.

Stop-Work Orders

In some cases, an agency might order a contractor to suspend or delay performance on a specific contract under a [Stop-Work Order](#) clause. These clauses, which are required in certain non-construction contracts, permit agency personnel to order a contractor to “stop all, or any part, of the work called for by this 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.” When Stop-Work Order clauses are triggered, contractors generally have a right to an [“equitable adjustment”](#) of the contract to receive reasonable costs associated with halting and restarting the contract. When implementing stop-work orders, contractors also are generally [required](#) to “take all reasonable steps to minimize the incurrence of costs” to the government, which [could](#) force contractors to reassign employees to other projects, place employees on unpaid leave, or terminate employees, at least temporarily.

Termination for Convenience

Contracting officers, in some cases, can exercise the right to [terminate a contract for the government’s convenience](#). For example, a commonly required [Termination for Convenience](#) clause states, in its entirety:

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the Government shall be liable only for payment under the payment provisions of this contract for services rendered before the effective date of termination.

After terminating for convenience, the government is generally only required to pay for work performed before the termination.

Continuation of Contractor Services to DoD

The COVID-19 pandemic also could trigger contractor responsibilities under a [Continuation of Essential Contractor Services](#) clause included in certain DoD contracts. The clause generally [requires](#) contractors that perform an [essential contractor service](#) or [mission-essential functions](#) for DoD to execute plans to continue providing those services, “during periods of crisis,” which potentially could include the COVID-19 pandemic. The clause defines “essential contractor service” as a “service provided by a firm or individual under contract to DoD to support mission-essential functions, such as support of vital systems.” Under the clause, “[s]ervices are essential if the effectiveness of defense systems or operations has the potential to be seriously impaired by the interruption of these services.” The clause defines *mission-essential functions* as “those organizational activities that must be performed under all circumstances to achieve DoD component missions or responsibilities.” A contractor that may not be able to continue performance of these essential functions must inform agency personnel “as expeditiously as possible and use its best efforts to cooperate with the Government in the Government’s efforts to maintain the continuity of operations.” The DFARS authorizes the parties to make reasonable cost adjustments to the contract to account for any increase or decrease in “costs incurred in continuing performance of essential services in a crisis situation.”

Defense Production Act

On Wednesday, March 18, the President issued an [executive order](#) (EO) delegating certain powers under the DPA to account for the national security concerns posed by the COVID-19 outbreak. The DPA authorizes the federal government to mobilize private industry to provide the government with various supplies and services necessary to support the [national defense](#). The law defines the term *national defense* to cover various military activities, “homeland security, stockpiling, space, and any directly related activity,” including public health emergency preparedness activities under the Stafford Act. The DPA authorizes the President, among other things, to require private businesses to accept and prioritize federal government procurement contracts and to incentivize private industry to produce goods and materials needed to support the national defense, through purchase commitments, loans, loan guarantees, and other mechanisms.

In the [DPA EO](#), the President delegated certain DPA authorities to the Secretary of Health and Human Services (HHS), in consultation with other agency heads, to establish “the proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials (including applicable services) in the civilian market, for responding to the spread of COVID-19 within the United States.” [Observers](#) have discussed the [potential](#) that the HHS Secretary could exercise this delegated DPA authority to enter into contracts with private businesses to acquire medical supplies used in treating COVID-19 patients that [reportedly are](#) in short supply in the United States. Additional CRS products on the DPA are available in this [CRS Report](#), [Insight](#), and [Legal Sidebar](#).

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