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Recovering COVID-19 Costs Where Section 3610 of the CARES Act Does Not Apply

By Stephanie M. Harden*

This article provides a brief refresher of key considerations for contractors considering COVID-related Requests for Equitable Adjustments or claims.

The financial relief offered to contractors under Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") is limited to contractors who: (1) cannot perform work at their approved sites due to site closures, and (2) cannot telework. For contractors that do not meet these two conditions, the traditional Request for Equitable Adjustment ("REA") and claims processes are still available and may permit recovery of some cost increases due to COVID-19.

This article provides a brief refresher of key considerations for contractors considering COVID-related REAs or claims. Of course, the particular facts and terms of each contract will ultimately determine whether cost increases are recoverable.

WHAT TYPES OF COSTS MAY BE RECOVERED?

Costs stemming from COVID-19 may be recoverable under several Federal Acquisition Regulation ("FAR") clauses:

- *The Changes Clause*:[1] A wide array of costs may fall under the Changes clause, such as costs stemming from government direction to alter or stagger work hours, provide additional personnel, use more costly procedures, use procedures requiring additional training for personnel, provide personal protective equipment, or perform additional cleanings. A recent Department of Defense Memorandum[2] is instructive as to how such costs are likely to be viewed, advising that contracting officers should consider whether such costs are "reasonable to protect the health and safety of contract employees as part of the performance of the contract."

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[1] FAR 52.243-1.

[2] https://www.acq.osd.mil/dpap/policy/policyvault/Managing_Contracts_under_COVID-19_Memo_DPC.pdf.

- *The Stop Work Order Clause*:[3] Costs stemming from the government's direction to stop work will generally be recoverable under this clause. This may include the cost of "idle time" where employees are unable to access work sites, potentially providing some relief to contractors who are not covered by Section 3610 of the CARES Act. Arguably, this clause should cover situations in which employees cannot work due to government-required quarantine procedures or government-caused delays, even if the work site is technically open – though this remains an open issue.
- *The Government Delay of Work Clause*:[4] Where the government causes a delay, the costs stemming from such a delay, such as increased material costs, may be recoverable under this clause.

Notably, while the Excusable Delays clause[5] excuses a contractor's failure to perform for reasons including "epidemics" and "quarantine restrictions," this clause does not provide financial relief, but rather, provides a basis for excusing what might otherwise give rise to a termination for default.

WHAT IS THE DIFFERENCE BETWEEN AN EQUITABLE ADJUSTMENT AND A CLAIM?

A claim is a formal written demand subject to the detailed procedures set forth in the Contract Disputes Act ("CDA"). Once a claim is made, the Contracting Officer must issue a final decision within 60 days (or, for claims over $100,000, provide a firm date by which a final decision will be issued), which may be appealed to the Boards of Contract Appeals or the Court of Federal Claims. Claims must include a "sum certain" – i.e., the amount of damages being claimed – and claims of $100,000 or more must be certified by the contractor as current and accurate.

An REA is generally considered less adversarial than a claim and is not subject to a formal disputes process. There is no set timeline for resolution of an REA; however, if an REA is not resolved satisfactorily, it can be converted into a claim.

In the context of COVID-related costs, there are advantages and disadvantages of both options. The less formal REA process provides agencies more leeway as they work to coordinate internally on how to address costs relating to COVID-19, which may ultimately be to the benefit of contractors. However,

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[3] FAR 52.242-15.

[4] FAR 52.242-17.

[5] FAR 52.249-14.

the claims process puts the government "on the clock" and, thus, may result in a faster response. Note that contractors are entitled to interest that accrues while a claim is pending, but not while an REA is pending. As for legal costs, they are allowable when incurred to support an REA, but are unallowable when incurred in support of a claim.

TIMING CONSIDERATIONS

Whether a contractor ultimately submits a request for equitable adjustment or claim, it must notify its Contracting Officer of the delay, disruption, or right to an adjustment, with different deadlines depending upon which clause applies. For example:

- FAR 52.242-15 (Stop Work Order Clause) requires contractors to assert their right to an adjustment within 30 days after the end of the period of work stoppage;
- FAR 52.242-17 (Government Delay of Work) requires contractors to notify the Contracting Officer within 20 days of the act or failure to act giving rise to the delay; the contractor must also assert the amount of the claim 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; and,
- FAR 52.243-1 (Changes) requires the contractor to assert its right to an adjustment within 30 days from the date of receipt of a written change order. There is an exception "if the Contracting Officer decides that the facts justify it," where the request is made before final payment of the contract.

Claims are also subject to a six-year statute of limitations.