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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

Challenges For Contractors In The COVID-19 Era: Protecting Rights And Maximizing Recoveries

*By David B. Robbins and Cynthia J. Robertson**

Government contractors have endured tremendous change in recent months. The entire industry maximized telework, changed schedules, dealt with stay-at-home orders, and scrambled to implement distancing in the workplace for essential personnel. The initial crush of change has given way to an uneasy stasis, with remote work occurring wherever it can, and industry planning for when the workplace reopens.

Government contractors have faced and will continue to face myriad contract administration challenges caused by the novel coronavirus, COVID-19. This BRIEFING PAPER endeavors to address the issues that are likely to be most prevalent over the coming months and to provide common-sense tips to minimize friction when addressing these issues with the Government customer. Specifically, the PAPER discusses relevant standard contract clauses, with a focus on the clauses for fixed-price contracts, practical considerations affecting contractors' ability to obtain relief for COVID-19 impacts under these clauses, clues for contractors in the current environment from recent, analogous case law, recently established Government assistance programs available to contractors confronting pandemic-related cost increases, and tips for mitigating resultant audit and investigation risks.

Relevant Contract Clauses

There has been one constant during the COVID-19 pandemic—

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change. Contracts are on hold or work has slowed. Places of performance are changed. Corporate offices may be shuttered or operating under reduced staff. Telework is the new normal. Some employees are unable to leave home. Health-related absences and self-quarantines have affected employee availability. And entire production lines and workplace layouts need to be rethought to accommodate distancing requirements. These are just a small sample of COVID-19's impacts on the Government contracts industry.

Government contracts have multiple clauses that can address these COVID-19-related delays and disruptions, but each clause has somewhat different requirements and variants exist for differing contract types. Government contractors are well-advised to refamiliarize themselves with these clauses and the benefits they confer. Understanding these clauses will help contractors to identify when they are entitled to relief. The clauses also instruct contractors how and when to notify the Government, thus preserving rights to extra time, extra consideration, or other relief that may be appropriate.

"Stop-Work Order" Clause

When contracting by negotiation, the Contracting Officer (CO) may insert the "Stop-Work Order" clause at FAR 52.242-15 in contracts for supplies, services, or research and development.[1] Under the "Stop-Work Order" clause, the CO has the ability, by written order, to require the contractor to stop all or part of its work for a period of up to 90 days, and for any further period to which the parties agree.[2] Stop work orders must be specifically labeled.[3] Upon receipt of an appropriately labeled stop work order, the contractor "shall 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 the work stoppage."[4]

After issuing a stop work order, a CO has two choices. The CO may either cancel the order and permit work to resume or terminate the work for default or convenience.[5] Under each scenario, the contractor is entitled to consideration, but the specifics of that consideration differ. If the CO permits the work to continue, then the contractor is entitled to an "equitable adjustment in the delivery schedule or contract price, or both." This is mandatory (e.g., "[t]he Contracting Officer shall. . . .") where the stop work order results in increased time required for performance or costs of performance.[6] But to secure the modification, the contractor must assert its right to adjustment within 30 days after the end of the work stoppage.[7]

"Suspension Of Work" Clause

The FAR requires that COs insert the "Suspension of Work" clause at FAR 52.242-14 in fixed-price construction and architect-engineer contracts.[8] When a contract contains the "Suspension of Work" clause, the CO may require the contractor to suspend, delay, or interrupt all or any part of the work on a contract for a period of time that the CO deems to be appropriate for the convenience of the Government.[9] This notice must be given in writing.[10]

If actions or omissions of the CO suspend, delay, or interrupt work for an unreasonable period, then "an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit). . .and

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the contract [shall be] modified in writing accordingly."[11] But to secure this consideration, the contractor must notify the CO in writing within 20 days of "the act or failure to act involved" unless the contractor asserts its claim, in writing and with a specific amount, as soon as practicable after the termination of the suspension, delay, or interruption but not later than the date of final payment under the contract.[12]

"Government Delay Of Work" Clause

Under the "Government Delay of Work" clause at FAR 52.242-17, which is mandatory in fixed-price contracts for supplies other than commercial or modified-commercial items and optional in fixed-price contracts for services or for supplies that are commercial or modified-commercial items,[13] a contractor is entitled to adjustment if the CO acts in a manner that is not expressly or impliedly authorized by the contract or does not act within the time for certain actions specified in the contract or within a reasonable time if a period is not specified.[14] Under these circumstances, contractors are entitled to recoup the increased cost of performance, excluding profit, caused by the delay or interruption of the contract. The contractor also receives extra time to deliver or perform its duties.[15] This clause has a 20-day timeclock to notify the Government.[16]

"Changes—Fixed Price" Clause

Note that there are multiple "Changes" clauses and alternates for various contract types and scenarios.[17] Here and throughout this BRIEFING PAPER, we discuss the "Changes—Fixed Price" clause at FAR 52.243-1, which is mandatory in fixed-price contracts for supplies and services (optional for research and development),[18] to illustrate the mechanics of the clause and the strategic considerations facing contractors.

Under the clause at FAR 52.243-1, when the CO orders a unilateral change within the general scope of the contract, such as to drawings, designs, specifications, method of shipment or packing, description of services, time and place of performance, or place of delivery, the contractor is entitled to an equitable adjustment and the contract "shall" be modified to reflect increases (or decreases) in cost and/or schedule associated with that change.[19] The contractor must assert its right to a change within 30 days from the date of receipt of the written change order.[20] If the contractor and the Government do not agree on an adjustment, then the matter is settled under the "Disputes" clause.[21] Contractors will find pursuing recovery for changes to be easier if they have separately accounted for and recorded costs of the change. Additionally, contractors may wish to seek the advice of qualified counsel if the Government does not respond to notifications in a timely manner. Depending on the availability of funds and other factors, contractors may wish to consider triggering the "Disputes" clause and escalating the matter to preserve rights and maximize the opportunity for a favorable settlement.

"Disputes" Clause

The mandatory "Disputes" clause at FAR 52.233-1 that appears in almost all Government contracts separates contract disputes from ongoing contract performance.[22] Disputes are addressed through a formalized process explained in this clause, while contract performance continues. The key component of the "Disputes" clause is the "claim." A claim means "a written demand. . .seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or related to th[e] contract."[23] Claims over $100,000 must be certified.[24] Claims by contractors must be in writing, and generally must be submitted to the CO within six years after accrual.[25] Claims for $100,000 or less must be decided within 60 days.[26] Claims for more than $100,000 must either be decided within 60 days or during that period the CO must notify the contractor when the decision will issue.[27] Importantly, contractors are entitled to interest from the moment the claim is submitted to the CO.[28] Claims that cannot be resolved to the satisfaction of the parties may be appealed to the applicable board of contract appeals for further adjudication or pursued in a lawsuit in the U.S. Court of Federal Claims.[29]

"Default (Fixed-Price Supply And Service)" & "Default (Fixed-Price Construction)" Clauses

Under the "Default (Fixed-Price Supply and Ser-

vice)" clause at FAR 52.249-8, mandatory for use in fixed-price supply and service contracts exceeding the simplified acquisition threshold,[30] the Government has the right to terminate a contract completely or partially for default if a contractor fails to (1) make delivery of supplies or perform the services within the time specified, (2) perform the contract, or (3) make progress in such a manner as to endanger performance of the contract.[31] When a contract is terminated for default, the Government only pays the contract price for any completed work, plus the cost of any materials acquired by the Government.[32] Because terminations for default are reported in the Federal Awardee Performance and Integrity Information System and become part of a contractor's permanent record,[33] default terminations are scenarios to be avoided whenever possible.

Except for defaults of subcontractors at any tier, a contractor terminated for default will not be liable to the Government for any excess costs of reprocuring the terminated supplies or services if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the contractor. Examples of such causes listed in the clause include "(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."[34] If the failure to perform is due to the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the contractor and the subcontractor, and without the fault or negligence of either, the contractor will not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the contractor to meet the required delivery schedule.[35]

The "Default (Fixed-Price Construction)" clause at FAR 52.249-10 contains a similar provision addressing excusable delays, stating that the contractor's right to proceed shall not be terminated nor the contractor charged with damages under the clause if the delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the contractor. Relevant to the COVID-19 pandemic, examples of such causes cited likewise include both "epidemics" and "quarantine restrictions."[36] To obtain a time extension and avoid default termination, the contractor must notify the CO in writing within 10 days of the start of any delay.[37]

(Note that the both clause at FAR 52.249-14, "Excusable Delays," prescribed for cost-reimbursement contracts and time-and-materials and labor-hour contracts, and paragraph (f), "Excusable delays," of the clause at FAR 52.212-4, "Contract Terms and Conditions—Commercial Items," contain similar language protecting contractors from being terminated for default for certain excusable delays, including "epidemics" and "quarantine restrictions.")

Communication and documentation are key to avoiding terminations for default. If a contractor is entitled to performance delays or changes, complete and timely notice to the Government is important. It is more difficult to terminate a contractor for default when timelines for performance have not run. Additionally, contractors should be mindful of the need to push back (with an appropriately respectful tone) to create a record of adequate performance if a CO appears to be creating a record to the contrary. And if a default issues, qualified legal counsel can assist with the filing of a claim to, among other things, convert an improperly issued termination for default into a termination for convenience.[38]

"Termination For Convenience Of The Government (Fixed-Price)" Clause

Under the "Termination for Convenience of the Government (Fixed-Price)" clause at FAR 52.249-2, prescribed for use in fixed-price contracts exceeding the simplified acquisition threshold,[39] the Government may terminate contract performance, in whole or in part, if the Government determines that such termination is in the Government's interest.[40] The CO must notify the contractor in writing, explaining the extent of the termination and its effective date.[41] Upon receipt of a termination for convenience notification, the contractor must immediately undertake actions to comply with the notice. This includes stopping work as indicated in the notice, ceasing to issue subcontracts or orders, terminating all subcontracts related to the work

terminated, assigning to the Government the ability to settle or pay termination settlement proposals for subcontractors, settling outstanding liabilities and termination settlement proposals, and transferring title (where necessary) to the Government.[42]

After termination, the contractor submits a final termination settlement proposal in the form and with the certification prescribed by the Government.[43] This proposal is due not later than one year after the date of the termination.[44] At that point, the contractor and the CO negotiate a final resolution.[45] If the negotiation is unsuccessful, then the CO may decide unilaterally the amounts due.[46] This unilateral action can be appealed under the "Disputes" clause.[47]

Potential For Relief

In summary, relief may be available to Government contractors under their contracts in the form of additional time to perform, added consideration for performance, or other relief. This relief may be available under a variety of theories including delays, additional costs, terminations, and changes to production priorities, among other things. But maximizing recovery depends on timely identifying triggering events, maintaining complete files of appropriate documentation, and engaging appropriately with the Government customer.

Practical Considerations

There are no modern historical analogues to COVID-19. The path forward is unclear. Different agencies are following different policies and practices, so contractors need to be nimble. The playing field will shift—likely many times—over the next several months. To date, we have seen Government guidance change on a daily basis in certain areas. This adds to the risk and uncertainty contractors face.

Government actors are generally working their hardest to keep up with changing guidance and, in a system that is incredibly risk adverse, to operate without precedent. The current dynamic is challenging for everyone involved, including Government personnel. A commonsense approach to interactions with the Government, that recognizes the pressures on all sides, will serve contractors well. In a completely new situation such as the COVID-19 health emergency, emotional intelligence is critically important when working with COs as they exercise their discretion.

After all, for every clause that permits contractors to recover, there are countervailing considerations. While state and local government contracts more commonly have force majeure clauses, the federal system relies on reasonableness and fairness. Questions exist as to how boards of contract appeals and courts will interpret the risk of loss in a global pandemic. This uncertainty should help bring all sides to the negotiating table to work out a solution. But should negotiations fail, fulsome documentation and timely identification of recovery opportunities and reservations of rights will be critically important.

What do we mean by documentation, and how do contractors know what to document? This is not just a legal exercise. Lawyers should be communicating broadly with the business, talking through areas of delay, disruption, and potential changes. For each, the teams should discuss how to memorialize key events, how to document and preserve verbal direction from the Government customer, and how to understand and document business impacts. The teams should also be mindful of timelines to provide notice to the customer, as these vary.

Case Law Clues

Two recent cases involving contractor claims for "outbreak-related" costs are instructive in evaluating potential COVID-19 cost recovery under the standard Government contracts clauses outlined above. The two cases, both before the Civilian Board of Contract Appeals (CBCA), have entirely different outcomes—the *Lewis* case permitted recovery[48] and the *Pernix* case did not.[49] Yet both involve firm-fixed-price contracts and contractor requests for equitable adjustment under a constructive change argument. Understanding these two cases—both of which concern a contractor's ability to recover costs in the face of a disease outbreak, enables insights into how contractors may best position themselves to obtain COVID-19 related costs.

Valerie Lewis Janitorial

Summary: In *Valerie Lewis Janitorial v. Department of Veterans Affairs*,[50] the CBCA awarded the contractor's claimed costs for enhanced cleaning following a bacterial outbreak because those costs stemmed from a change to the underlying firm-fixed-price contract for janitorial services.

Factual Background: On August 18, 2010, the Department of Veterans Affairs (VA) awarded Valerie Lewis Janitorial (Lewis) a firm-fixed-price contract for aseptic custodial cleaning services for several buildings at the VA's Northern California Health Care System. In February 2012, the VA determined that a bacterial outbreak of clostridium difficile (C. diff) had occurred at a facility. C. diff is transmitted through spores, which are difficult to eradicate. The customer's infection control organization set the guidelines for new cleaning procedures and the VA staff instructed the contractor's employees as to those methods.[51] On May 29, 2012, the CO's representative sent an email to Lewis to ensure the "housekeeping contractor" appropriately responded by using bleach and a two-step process (clean then disinfect) to be compliant with the enhanced cleaning regime.[52]

In June 2012, four months into the new cleaning regime, Lewis advised the VA of additional supplies and manpower needed to fulfill the new obligations. In response, the CO advised the contractor that "what we currently have [is] the statement of work [versus] changing conditions that are causing your increased costs."[53]

The parties continued to negotiate a contract modification to adjust locations, duration, and type of cleaning services provided (including beyond just the enhanced cleaning services associated with the bacterial outbreak). After nearly a year, the VA and Lewis still had not reached agreement on a written modification.[54]

Finally, in May 2013, Lewis requested a contract modification regarding use of the two-step process for aseptic cleaning of the C. diff outbreak. For purposes of that modification, the VA conducted a study of the amount of time required to clean each room, and included observations of how the rooms were being cleaned. In December 2013, the VA proposed a cost increase contract modification of $179,049 based on the time study and additional materials.[55]

On January 10, 2014, Lewis submitted a certified claim for $272,751 based on its estimated increase cost of the changed cleaning protocols performed at the VA's direction since February 2012. The claim included additional work and materials not outlined in the VA's estimate that Lewis alleged were due to the enhanced cleaning.[56]

On January 27, 2014, Lewis and the VA executed a bilateral modification, which added the two-step cleaning process to the SOW incorporated into the contract. The amount of consideration for the two-step process was to be determined upon resolution of the certified claim, whereupon the contract would be modified to incorporate that determination of a fair and reasonable price. Lewis agreed to continue performing the two-step process for the duration of the contract.[57]

On March 17, 2014, Lewis filed its second certified claim in the amount of $441,138.06, which included its total increased actual costs from February 2011 to April 30, 2014. Like its first certified claim, this claim included the enhanced cleaning costs, but also other costs that arose from disputed areas and frequency of cleaning that were unclear under the original statement of work.[58]

In May 2014, the VA issued the CO's final decision (COFD) denying both of Lewis' claims and counterclaiming for the costs of Lewis' use of the VA's mops and laundry service and supplemental services to cover any gaps in service provided by Lewis. Lewis timely appealed the COFD to the CBCA.[59]

Decision: Among other issues, the board examined (1) whether, after the C. diff outbreak, the VA directed Lewis to change its process of aseptic cleaning, and (2) whether such a change was compensable.

In general, a contractor asserting a claim for an equitable adjustment has the burden of proving "three necessary elements—liability, causation, and resultant injury."[60]

The board cited decisions of the former Veterans

Administration Board of Contract Appeals (VABCA) recognizing that "when the Government informally orders a method of performance more stringent than that required by the contract, a *constructive change* can be found to have occurred."[61] The VABCA also recognized the following:

> To establish a constructive change, two essential elements must be present: a change and an order or direction, by word or deed. To find the change element, one must first examine the actual performance to see whether it went beyond the minimum standards demanded by the terms of the contract. Then it is necessary to find that the change was one that the Government's representative ordered the contractor to perform.[62]

Here, the board found the increased cleaning process was a constructive change. First, although the contract required aseptic cleaning, it did not specify any particular method. The evidence demonstrated that the outbreak (in February 2012, following contract award) resulted in "a significantly heightened concern about controlling infection."[63] Further, the evidence showed that the CO directed Lewis by email to implement the two-step cleaning process with specific directions.[64]

The board faulted the VA for taking the position that Lewis was not entitled to any compensation for the enhanced cleaning. A newly installed CO supported this position by soliciting testimony from unnamed VA and Lewis employees that no additional time was needed. Yet, the board was unwilling to credit this testimony without any signed affidavits and because this purported evidence contrasted with the VA's own time study, which found that Lewis in fact needed additional time and materials to complete the enhanced aseptic cleaning. Because the CO could not reasonably refute the VA's own estimate, the board found that the VA's direction to Lewis constituted a constructive change to the contract.[65]

The board then turned to damages. Relying upon contractor-friendly case law, the board held that determining the amount of damages or of an equitable adjustment "is not an exact science, and where responsibility for damage is clear, it is not essential that the amount thereof be ascertainable with absolute exactness or mathematical precision."[66] The board further recognized that, "[a]ll that is necessary is a reasonable showing of the extra costs. [The Government] cannot be permitted to benefit from its wrong to escape liability under the guise of a lack of a perfect measure."[67]

Citing a case in which a Government estimate was sufficient to support an award under an estimated "jury verdict" approach, the board adopted the VA's time study, which the board concluded had better support than the estimated additional amounts presented by Lewis.[68]

Analysis: The *Lewis* case demonstrates that, in some circumstances, contractors seeking requests for equitable adjustments under firm-fixed-price contracts for enhanced cleaning costs due to unforeseen outbreaks may prevail under the "Changes" clause.

The *Lewis* case is instructive on several measures. First, it confirms the benefits of obtaining CO direction for changes to contract performance. This may sometimes be more challenging when, as here, a single change (enhanced cleaning due to bacterial outbreak) is entwined with other perceived changes to the scope of the original work effort, thereby creating a more complex negotiation. Contractors may benefit from strategically segregating the one change that everyone agrees upon and obtaining a written modification on that key issue, rather than continuing to try to resolve all simultaneously. Lewis employed that strategy to obtain a written modification solely on the enhanced cleaning, with a later resolution of the costs associated with that change via a certified claim. Notably, Lewis had less success in arguing that other perceived changes (to the location and frequency of cleaning) were not contemplated under the original scope of work.

Second, the *Lewis* case upholds the principle that cost estimation is permissible when actual costs are not readily available or are difficult to quantify. Boards and courts may be more willing to accept estimates where the Government clearly ordered the change, and where conditions may have made it difficult to track with precision the amount of time and other costs related to that directed change.[69] Though board decisions vary in terms of how hard a line they take with respect to estimates, in this case, the board appeared sympathetic to the challenges associated with actually tracking each

staff member's additional time spent conducting enhanced cleaning for each room at each location.

Nevertheless, the board's willingness to use an estimate was not boundless. The board rejected Lewis' own estimate (substantially greater than that of the Government) because it did not have the same level of quantifiable evidence to support it when compared to the VA's estimate. Specifically, the VA conducted a time study in which it observed and recorded time needed for the enhanced, two-step cleaning.[70]

The *Lewis* case thus also confirms the need to tie estimates to actual costs and recorded time where possible to support future requests for equitable adjustment and claims. To the extent such segregation is challenging or impracticable (as might be argued in *Lewis*), contractors should seek to record as much evidence as possible (or conduct a sampling) to justify future estimates of costs and seek to obtain CO ratification of those methods where possible.

Those impacted by the COVID-19 outbreak might also note some potential distinctions between their present situation and the *Lewis* case. First, the *Lewis* case involved a contract *for cleaning services* making it far easier to demonstrate a change to the costs associated with an enhancement to those cleaning services. More difficult is demonstrating a change when its impact may not directly relate to a change to the performance specification, but instead represents a change to the *conditions* under which a contractor must perform (i.e., the social distancing, rotating work shifts, and other operational changes, including suspensions of work) that were unforeseen at the time of contracting. While these changes may affect both costs and schedule, there is less clarity as to whether such costs are as easily recoverable as those identified in *Lewis* (even if schedule relief is assured under as an "Excusable Delays" contract provision or clause).

Contractors may encounter COs who, despite DOD guidance encouraging reimbursement of COVID-19 impact,[71] may nonetheless be reluctant to provide clear direction or to modify the contract given the COVID-19 situation does not present a "traditional" change like that presented in *Lewis*. Some COs may likewise feel constrained due to funding limitations, exacerbated by the ubiquitous impact of COVID-19 on the defense industrial base.

A CO's refusal to provide direction during an outbreak is precisely the scenario outlined in the *Pernix* case. There, a contractor suspended work unilaterally to protect its employees in West Africa due to an outbreak of the Ebola virus. Despite being entitled to a schedule extension under an "Excusable Delays" clause, the contractor failed to recover any claimed costs stemming from that decision, as the agency's refused to provide that direction. We analyze that case more fully below.

Pernix Serka Joint Venture

Summary: In *Pernix Serka Joint Venture v. Department of State*,[72] the CBCA denied a contractor's appeal seeking an equitable adjustment for costs of suspending work and maintaining the health and safety of workers due to the Ebola outbreak in West Africa in 2014. The board found the contractor assumed the risk of such unforeseen costs under this firm-fixed-price contract, and that even though the contractor's delay was excused, it acted unilaterally in its decision to suspend work and could not demonstrate a change to the contract, nor a breach of the Government's implied duty to cooperate.

Factual Background: In September 2013, the Department of State awarded a firm-fixed-price contract to Pernix Serka Joint Venture (Pernix JV) to construct a rainwater capture and storage system in Freetown, Sierra Leone.[73] The contract included a State Department "Excusable Delays" clause, which provided: "The Contractor will be allowed time, not money, for excusable delays as defined in FAR 52.249-10, Default. . . .Examples of such cases include. . .epidemics [and] quarantine restrictions."[74]

In July 2014, the Ebola outbreak had spread to Freetown, Sierra Leone.[75] Pernix JV sought direction from the CO (multiple times) regarding whether it should take action to protect the health and safety of its employees.[76] The State Department refused to provide direction to Pernix JV and expressly stated that the contractor would be acting unilaterally if it determined that it needed to suspend work or evacuate employees.[77]

Pernix JV nevertheless decided to demobilize, evacuated its employees from W. Africa, and provided notice to the State Department.[78] In response, the State Department informed Pernix JV that the State Department branch working alongside the contractor had plans to continue to operate during the outbreak (pending any worsening of conditions) at the site the contractor abandoned.[79] This fact may have signaled to the board that Pernix JV took a more conservative approach than its customer in terms of the threat imposed.[80] The case does not make clear whether the contractor's actions were in line with other federal agency guidance, like the Centers for Disease Control (CDC) or others.

The State Department acknowledged receipt of the notice provided by Pernix JV but stated that it would not pay any additional incurred costs. Specifically, the State Department's CO indicated that "we perceive no basis upon which you [Pernix JV] could properly claim an equitable adjustment from the Government with respect to additional costs you may incur in connection with your decision to curtail work on this project."[81] Further, the State Department refused to provide any instructions or direction with regarding to CDC travel warnings because that agency is not under any direct control of the State Department.[82]

Pernix JV understood the risks inherent in suspending performance. Pernix JV internal emails stated that, "[i]t is now obvious [the State Department] will neither provide directions, nor approve or pay extra money over this Ebola thing, and we will have to take the risks and bite the bullet to go back and get the job done, then seek compensation."[83]

In March 2015, Pernix JV returned to the jobsite and the State Department accepted Pernix JV's revised schedule, extending the time of performance by 195 days. Pernix JV submitted two requests for equitable adjustment, one for "additional Life, Safety, and Health provisions undertaken to enable the return" of workforce and another for "time and cost impacts."[84] The CO rejected the first and did not take action on the second. Requests for equitable adjustment were discussed but no agreement was reached.[85]

Pernix JV submitted a claim for increased costs for differing site conditions, disruption of work, and demobilization and remobilization of personnel, all related to its response to the Ebola epidemic. The State Department denied the claim and Pernix JV appealed it to the CBCA.[86] During litigation, the State Department moved for judgment as a matter of law.[87]

Decision: The board granted the State Department's motion for summary judgment, concluding that the contract permitted Pernix JV to an extension of time caused by the Ebola epidemic but not additional costs. In its decision, the board stated that firm-fixed-price contracts allocate the risk of increased costs for unexpected events to contractors. Moreover, the "Excusable Delay" clause in this contract, which was similar to the clause at FAR 52.249-10, "Default (Fixed-Price Construction)," permitted the contractor time extensions only and not increased costs.[88]

Pernix JV argued that the Ebola virus constituted a cardinal change, that the changed conditions constituted a constructive change, and that the State Department breached an implied duty to cooperate.[89] The board found none of these arguments persuasive.

A *cardinal change* is a breach that occurs if the Government effects a change in the contractor's work so drastic that performance is materially different. The board found the "Government never changed the description of work it expected from the contractor" and did not give directions to the contractor on how to respond to the outbreak.[90] The board described changes caused by the Ebola virus as "interstitial in nature and [thus]. . .not materially alter[ing] the nature of the bargain into which the plaintiff has entered."[91]

"A *constructive change* occurs where a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government."[92] "To recover on a constructive change claim, a contractor must show that (1) it performed work beyond the contract requirements and (2) the Government ordered—expressly or implicitly—the contractor to perform the additional work."[93] A contractor cannot invoke a claim for constructive change against the Government unless the Government "effects an alteration in the work to be performed."[94]

The board held the demobilization and remobilization of contractor personnel and additional site safety measures were not constructive changes because the Government did not order the contractor to take action and because no change to the contract occurred. The contractor remained obligated to perform the same statement of work to which it agreed under a firm-fixed-price contract.[95]

Finally, although Pernix JV argued *constructive suspension of work*, the board found this claim untimely and did not otherwise address it in its opinion.[96]

Because of the fixed-price nature of the contract, the language in the "Excusable Delays" clause, and Pernix JV's inability to demonstrate a change or a breach by the State Department, the board granted the State Department's motion and denied Pernix JV's appeal.

Analysis: The *Pernix* case highlights the challenges a contractor may face in demonstrating entitlement to a change where its agency customer has refused to provide direction in the face of an outbreak, like COVID-19. Outside of suspending work and evacuating employees, contractors could face substantial costs arising from the COVID-19 outbreak, such as delays in accessing facilities or supplies, staffing shortages, and reduced productivity. Yet as *Pernix* makes plain, where these risks fall will depend on the type of contract at issue and the specific clauses contained in the contract.

An "Excusable Delays" provision or clause is naturally implicated by COVID-19 as it lists events giving rise to an excusable delay, including "epidemics" and "quarantine restrictions." But an excusable delay is not necessarily a compensable delay. A contractor's chances of recovery of costs hinge on several factors.

The first is the type of contract. Contract type (fixed-price contract versus cost-reimbursement contract) serves to allocate risk between the Government customer and the contractor. For fixed-price contracts, the risk of increased costs generally resides with the contractor, unless the contractor is able to demonstrate that its additional costs were incurred due to some Government action requiring out of scope work, which would then entitle it to an equitable adjustment. Cost-reimbursement contracts, on the other hand, place the risk of increased costs on the Government, subject to certain limitations, such as the "Limitation of Cost" and "Limitation of Funds" clauses at FAR 52.232-20 and FAR 52.232-22. Additionally, cost-reimbursement contracts may include fixed-price contract line items (CLINs) or indirect rate ceilings, which may likewise impose limitations on risk allocation.

The second is whether, under fixed-price contracts, contractors can demonstrate sufficient Government action to allow entitlement for COVID-related costs. As evidenced by *Pernix*, a contractor will not be entitled to additional costs under a fixed-price contract if it unilaterally decides to alter its contract work. The change must come from a Government action.

Under the current COVID-19 pandemic, the defense industrial base (among other industries) was identified as a Critical Infrastructure Sector by the Department of Homeland Security and required to continue to perform.[97] At the same time, contractors were directed to "follow guidance from the Centers for Disease Control and Prevention (CDC) as well as State and local government officials regarding strategies to limit disease spread."[98]

Recognizing that "COVID-19 will affect the cost, schedule, and performance of many DoD contracts,"[99] the DOD (among other agencies) has provided "cover" for COs to direct changes or otherwise modify contracts to allow contractors' recovery for COVID-related costs. The DOD states that COs should use "regulatory tools" to address impacts of COVID-19.[100] Indeed, the DOD recognizes that "[w]here the contracting officer directs changes in the terms of contract performance, which may include recognition of COVID-19 impacts on performance under that contract, the contractor may also be entitled to an equitable adjustment to contract price using the standard FAR "Changes" clauses (e.g., FAR 52.243-1 [fixed-price contracts] or FAR 52.243-2 [cost-reimbursement contracts])."[101]

One thing is clear. Contractors must engage their COs with candid, early discussions regarding COVID-19 expected impacts. Doing so will enable a contractor to obtain the direction and/or ratification needed to demonstrate it has not acting unilaterally.

Documenting those communications and costs is likewise imperative, given it is the contractor's burden to demonstrate entitlement and injury.

Government Assistance

Contractors must also be aware that recent legislation has established a number of assistance programs that, among other things, provide temporary revenue and/or liquidity to Government contractors.

CARES Act § 3610

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act),[102] signed by the President on March 27, 2020, was offered as a form of economic stimulus at the start of the COVID-19 quarantine period. It provides specific relief for federal contractors whose employees or subcontractors cannot perform work on an approved site during the COVID-19 public health emergency and who cannot telework because their job duties cannot be performed remotely. This assistance, contained at CARES Act § 3610, authorizes agencies to use available funds to modify affected contracts to reimburse paid leave, including sick leave, contractors offer to keep employees and subcontractors in a ready state. This assistance is available without consideration. Relief under the statue is available up to an average of 40 hours per week, billed at "applicable contract billing rates."[103] However, the statute describes certain other relief that could not be used at the same time.[104]

Some federal agencies attempted to push § 3610 funds to the contractor workforce quickly to inject much needed liquidity. Others were slower to move. As of the time of this writing, the Government has yet to solidify around a single standard. Instead, multiple agencies have issued evolving guidance documents that some contractors feel amount to moving the goal posts. Additionally, agencies are beginning to alert Congress to funding concerns and pressures the agencies expect to face because of § 3610 payments.

The unfortunate reality is § 3610 is permissive, and not mandatory. As contractors work through the challenges with § 3610 payments, they should not lose sight of other opportunities to recover lost time and money from the Government discussed herein.

Paycheck Protection Program

The CARES Act also appropriated hundreds of billions of dollars (more than $650 billion) for the Paycheck Protection Program (PPP).[105] The PPP offered forgivable loans to cover payroll and other related expenses for small businesses in the hopes of avoiding mass layoffs due to COVID-19 related quarantines. PPP funds were dispersed through traditional lenders and administered by the Small Business Administration (SBA). Forgiveness was set to be available on a sliding scale and any nonforgivable amount has a two or five-year repayment period at 1% interest.

The PPP has served as a much-needed lifeline for smaller Government contractors. However, the way the program began—with applications in and funds disbursed before guidance was issued—created compliance risks. PPP funds were to be distributed on a "first-come, first-served" basis, causing a rush of applications before companies had fully vetted their eligibility. Additionally, in the weeks and months that followed, the SBA and the Department of the Treasury issued additional guidance (often on a daily basis) concerning PPP eligibility. Confusion was so prevalent that the Government created a safe harbor period to encourage return of funds for those who did not meet PPP qualifications.

Compliance Considerations

Contractors that have taken advantage or hope to take advantage of § 3610 or the PPP are well served by maintaining a detailed chronology of when they applied and the assumptions they made when applying. It is possible that an application could be compliant at the time it was made, but subsequent guidance could render the same application noncompliant. Qualified counsel can assist with risk mitigation strategies for any contractors in that situation.

For contractors that have not yet conducted a full compliance review, there is still time to step back and conduct that review. Companies conducting compliance reviews should consider whether to involve quali-

fied counsel in that effort so legal privilege applies. That may be important if the review uncovers noncompliance. To be clear, we are not advocating that any contractor keeps any funds to which the contractor is not entitled. However, the substantial uncertainty surrounding these stimulus programs may mean that strategies are available to keep the funds, along with possible disclosure and communication with the Government. These discussions are most effectively accomplished under legal privilege.

Audit/Investigation Response Tips

Given the vastness of the CARES Act stimulus, and the dramatic changes wrought on the Government contracts landscape, Government contractors should expect a substantial number of audits and investigations in the coming months and years. The Government's well-intentioned effort to push out liquidity quickly was appreciated by industry, but the stimulus-first, guidance-later approach to some CARES Act funds increases audit and investigation risk.

To give a historical parallel, recovery spending following Hurricanes Katrina and Rita in 2005 was substantial, but still 20 times less than the CARES Act. Various oversight agency reports indicate that their Katrina and Rita recovery efforts involved 465 Government auditors, reviewing significant numbers of contracts, conducting hundreds of investigations, and charging more than 250 defendants—all in the first year after the storms hit.[106] Again, those numbers resulted in the first year after Government spending totaling 20 times *less* than the CARES Act.

When functioning properly, the Government's remedies coordination process cross-pollinates cases among various interested federal agencies. Auditors talk to enforcement officials. Civil coordinates with criminal. COs communicate broadly. As such, any inquiry (audit, investigation, or CO outreach) carries enforcement risk.

Documentation is vital to reducing enforcement risk. Many contractors were absorbed with the near-term tasks of moving to telework, focusing on supply chain concerns, and economic survival early in the pandemic. But as contractors consider reopening plans, they are well-advised to evaluate their audit and enforcement risk. Compliance checks, evaluation of ongoing and constantly changing Government guidance, reviews of existing documentation concerning contracting efforts during quarantine, and establishing procedures for escalation of any Government inquiry to legal for assistance may be helpful.

Guidelines

These *Guidelines* are intended to assist you in understanding key issues faced by Government contractors addressing contract administration challenges resulting from the COVID-19 pandemic. They are not, however, a substitute for professional representation in any specific situation.

1. *Be aware of deadlines*: As Government contractors and award recipients progress toward normal business operations and the COVID-19 emergency wanes, timelines for requesting relief from the Government begin to accelerate. Government contractors and award recipients should schedule out and track deadlines for requesting relief so they do not miss out on opportunities because of inaction.

2. *Communicate frequently with the Government customer about challenges*: At least for the near term, everyone is likely to understand the challenges posed by COVID-19. Frequent, respectful communication with the Government customer may result in relief from certain requirements and schedule obligations that may not be necessary or possible.

3. *Document communications with the Government customer*: Over time, the urgency of COVID-19 will fade. Accommodations made during the peak of the pandemic may make less sense when viewed in hindsight or by oversight officials. Contemporaneous documentation, either by email to the Government or detailed memorandum format in a contract file, is important to memorialize relief received.

4. *Consider requests for equitable adjustment and claims*: COs may be overwhelmed by requests for relief and be unable to respond, or budgetary and schedule pressures might cause them to deny otherwise available relief. Contractors should actively consider using requests for equitable adjustment and claims where

helpful to expedite relief. If nothing else, the additional Government stakeholders who become involved when a claim is filed may have different perspectives and may help resolve the issue.

5. *Recognize that any request for audit or information is a potential prelude to an investigation*: The arc of prior national emergencies includes substantial spend during the crisis, followed by a surge in Government enforcement efforts. The Government procurement fraud remedies apparatus is already working through how to communicate concerns broadly. Any request for audit or information or documents is a potential prelude to a Government investigation and should be treated as such, including by engaging competent counsel

6. *Document eligibility for Government stimulus funds*: The CARES Act was intended to be a vitally important source of funds for the U.S. economy. Perhaps as could be expected given the chaotic times, its rollout was confused, halting, and inconsistent. Eligibility guidance changed daily for some programs. Recipients should document their eligibility at the time of application, as that may be vitally important to defend against allegations of misuse of stimulus funds later.

ENDNOTES:

[1]FAR 42.1305(b)(1).

[2]FAR 52.242-15(a).

[3]FAR 52.242-15(a).

[4]FAR 52.242-15(a).

[5]FAR 52.242-15(a).

[6]FAR 52.242-15(b)(1).

[7]FAR 52.242-15(b)(2).

[8]FAR 42.1305(a).

[9]FAR 52.242-14(a).

[10]FAR 52.242-14(a).

[11]FAR 52.242-14(b).

[12]FAR 52.242-14(c).

[13]FAR 42.1305(c),

[14]FAR 52.242-17(a).

[15]FAR 52.242-17(a).

[16]FAR 52.242-17(b).

[17]See FAR 43.205; see, e.g., FAR 52.243-1 ("Changes—Fixed-Price" clause); FAR 52.243-2 ("Changes—Cost-Reimbursement" clause); FAR 52.243-3 ("Changes—Time-and-Materials or Labor-Hours" clause); FAR 52.243-4 ("Changes" clause) (fixed-price construction and dismantling, demolition, or removal of improvements contracts exceeding the simplified acquisition threshold).

[18]FAR 43.205(a).

[19]FAR 52.243-1(a)–(b) & Alts I-V.

[20]FAR 52.243-1(c).

[21]FAR 52.243-1(e); see FAR 52.233-1.

[22]FAR 52.233-1(h); see FAR 33.215.

[23]FAR 52.233-1(c).

[24]FAR 52.233-1(d)(2).

[25]FAR 52.233-1(d)(1).

[26]FAR 52.233-1(e).

[27]FAR 52.233-1(e).

[28]FAR 52.233-1(h).

[29]FAR 52.233-1(f); see 41 U.S.C.A. § 7104.

[30]FAR 49.504(a)(1); see also FAR 52.249-9 ("Default (Fixed-Price Research and Development" clause); FAR 52.249-10 ("Default (Fixed-Price Construction)" clause); FAR 52.249-7 ("Termination (Fixed-Price Architect-Engineer)" clause); FAR 52.249-6 ("Termination (Cost-Reimbursement)" clause).

[31]FAR 52.249-8(a)(1); see FAR 49.402.

[32]FAR 52.249-8(f).

[33]FAR 49.402-8.

[34]FAR 52.249-8(c) (emphasis added).

[35]FAR 52.249-8(d).

[36]FAR 52.249-10(b)(1).

[37]FAR 52.249-10(b)(2).

[38]See FAR 52.249-8(g); FAR 52.249-10(c).

[39]FAR 49.502(b)(1)(i); see also FAR 52.249-3 ("Termination for Convenience of the Government (Dismantling, Demolition, or Removal of Improvements)" clause); FAR 52.249-4 ("Termination for Convenience of the Government (Services) (Short Form)" clause); FAR 52.249-5 ("Termination for the Convenience of the Government (Educational and Other Nonprofit Institutions)" clause); FAR 52.249-7 ("Termination (Fixed-Price Architect-Engineer)" clause); FAR 52.249-6 ("Termination (Cost-Reimbursement)" clause).

[40]FAR 52.249-2(a).

[41]FAR 52.249-2(a).

[42]FAR 52.249-2(b).

[43]FAR 52.249-2(e).

[44]FAR 52.249-2(e).

[45]FAR 52.249-2(f); see FAR subpt. 49.2.

[46]FAR 52.249-2(g).

[47]FAR 52.249-2(j); see FAR 52.233-1.

[48]Valerie Lewis Janitorial v. Dep't of Veterans Affairs, CBCA No. 4026, 2020 WL 2507940 (May 5, 2020), slip op. available at https://www.cbca.gov/files/decisions/2020/KULLBERG_05-05-2020_4026__VALERIE_LEWIS_JANITORIAL%20(Decision).pdf.

[49]Pernix Serka Joint Venture v. Dep't of State, CBCA No. 5683, 2020 WL 1970843 (Apr. 22, 2020), slip op available at https://www.cbca.gov/files/decisions/2020/SOMERS_04-22-20_5683__PERNIX_SERKA_JOINT_VENTURE%20(Decision).pdf.

[50]Valerie Lewis Janitorial v. Dep't of Veterans Affairs, CBCA No. 4026, 2020 WL 2507940 (May 5, 2020), 62 GC ¶ 164, slip op. available at https://www.cbca.gov/files/decisions/2020/KULLBERG__05-05-2020__4026____VALERIE__LEWIS__JANITORIAL%20(Decision).pdf.

[51]Valerie Lewis Janitorial, slip op. at 20.

[52]Valerie Lewis Janitorial, slip op. at 20 (quoting Exhibit 9 at 1).

[53]Valerie Lewis Janitorial, slip op. at 21 (quoting Exhibit 10 at 5).

[54]Valerie Lewis Janitorial, slip op. at 22.

[55]Valerie Lewis Janitorial, slip op. at 23.

[56]Valerie Lewis Janitorial, slip op. at 25–26.

[57]Valerie Lewis Janitorial, slip op. at 26.

[58]Valerie Lewis Janitorial, slip op. at 26–27.

[59]Valerie Lewis Janitorial, slip op. at 28–30.

[60]Valerie Lewis Janitorial, slip op. at 30 (quoting Servidone Constr. Corp. v. United States, 931 F.2d 860, 861 (Fed. Cir. 1991), 33 GC ¶ 139 (citations omitted)).

[61]Valerie Lewis Janitorial, slip op. at 30 (quoting Caddell Constr. Co., VABCA No. 5608, 03-2 BCA ¶ 32,257 (citations omitted) (emphasis added)).

[62] Valerie Lewis Janitorial, slip op. at 30–31 (quoting John R. Hundley, Inc., VABCA Nos. 3493, 3495, 95-1 BCA ¶ 27,494 (citations omitted)).

[63]Valerie Lewis Janitorial, slip op. at 31.

[64]Valerie Lewis Janitorial, slip op. at 31.

[65]Valerie Lewis Janitorial, slip op. at 31.

[66]Valerie Lewis Janitorial, slip op. at 32 (quoting Elec. & Missile Facilities, Inc. v. United States, 416 F.2d 1345, 1358 (Ct. Cl. 1969)).

[67]Valerie Lewis Janitorial, slip op. at 32 (quoting Dawco Constr. Inc. v. United States, 18 Cl. Ct. 682, 698 (1989), aff'd in part, rev'd in part, 930 F.2d 872 (Fed. Cir. 1991) (citations omitted)).

[68]Valerie Lewis Janitorial, slip op. at 32 (quoting Freeman Gen., Inc., ASBCA No. 34611, 02-1 BCA ¶ 31,758 (1991)).

[69]Valerie Lewis Janitorial, slip op. at 32.

[70]Valerie Lewis Janitorial, slip op. at 31.

[71]See Memorandum from Kim Herrington, Acting Principal Dir., Defense Pricing and Contracting, Office of the Under Sec'y of Defense (Acquisition & Sustainment), Managing Defense Contracts Impacts of the Novel Coronavirus, (Mar. 30, 2020), https://www.acq.osd.mil/dpap/policy/policyvault/Managing_Contracts_under_COVID-19_Memo_DPC.pdf.

[72]Pernix Serka Joint Venture v. Dep't of State, CBCA No. 5683, 2020 WL 1970843 (Apr. 22, 2020), slip op available at https://www.cbca.gov/files/decisions/2020/SOMERS_04-22-20_5683__PERNIX_SERKA_JOINT_VENTURE%20(Decision).pdf.

[73]Pernix Serka Joint Venture, slip op. at 2.

[74]Pernix Serka Joint Venture, slip op. at 2.

[75]Pernix Serka Joint Venture, slip op. at 2.

[76]Pernix Serka Joint Venture, slip op. at 2–4.

[77]Pernix Serka Joint Venture, slip op. at 4.

[78]Pernix Serka Joint Venture, slip op. at 4–5.

[79]Pernix Serka Joint Venture, slip op. at 5–7.

[80]Pernix Serka Joint Venture, slip op. at 6–8. Though the State Department evacuated family members of embassy employees, embassy staff were not evacuated, and the Office of Overseas Building Operations continued to maintain a presence at the worksite.

[81]Pernix Serka Joint Venture, slip op. at 4.

[82]Pernix Serka Joint Venture, slip op. at 4–5.

[83]Pernix Serka Joint Venture, slip op. at 6.

[84]Pernix Serka Joint Venture, slip op. at 6–7 (ellipsis omitted).

[85]Pernix Serka Joint Venture, slip op. at 7.

[86]Pernix Serka Joint Venture, slip op. at 7.

[87]Pernix Serka Joint Venture, slip op. at 2.

[88]Pernix Serka Joint Venture, slip op. at 8.

[89]Pernix Serka Joint Venture, slip op. at 8.

[90]Pernix Serka Joint Venture, slip op. at 9.

[91]Pernix Serka Joint Venture, slip op. at 10 (quoting Aragona Constr. Co. v. United States, 165 Ct. Cl. 382, 391 (1964)).

[92]Pernix Serka Joint Venture, slip op. at 10 (quot-

ing Int'l Data Prods. Corp. v. United States, 492 F.3d 1317, 1325 (Fed. Cir. 2007) (emphasis added)).

[93]Pernix Serka Joint Venture, slip op. at 10 (quoting Bell/Heery v. United States, 106 Fed. Cl. 300, 313 (2012), aff'd, 739 F.3d 1324 (Fed. Cir. 2014) , 56 GC ¶ 24).

[94]Pernix Serka Joint Venture, slip op. at 10 (quoting Bell/Heery v. United States, 739 F.3d 1324, 1335 (Fed. Cir. 2014) , 56 GC ¶ 24 (alteration omitted)).

[95]Pernix Serka Joint Venture, slip op. at 10–11.

[96]Pernix Serka Joint Venture, slip op. at 11.

[97]Memorandum from Kim Herrington, Acting Principal Dir., Defense Pricing and Contracting, Office of the Under Sec'y of Defense (Acquisition & Sustainment), Defense Industrial Base Contract Considerations (Mar. 20, 2020), https://www.acq.osd.mil/dpap/policy/policyvault/Defense_Industrial_Base_Contract_Considerations_DPC.pdf.

[98]Id.

[99]Memorandum from Kim Herrington, Acting Principal Dir., Defense Pricing and Contracting, Office of the Under Sec'y of Defense (Acquisition & Sustainment), Managing Defense Contracts Impacts of the Novel Coronavirus, (Mar. 30, 2020), https://www.acq.osd.mil/dpap/policy/policyvault/Managing_Contracts_under_COVID-19_Memo_DPC.pdf.

[100]Id.

[101]Id.

[102]Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

[103]Pub. L. No. 116-136, § 3610, 134 Stat. at 414.

[104]Pub. L. No. 116-136, § 3610, 134 Stat. at 414.

[105]Pub. L. No. 116-136, § 1102, 134 Stat. at 286 (amending 5 U.S.C.A. § 636).

[106]Office of Inspector General, Dep't of Homeland Security, OIG-06-32, A Performance Review of FEMA's Disaster Management Activities in Response to Hurricane Katrina (Mar. 2006); President's Council on Integrity and Efficiency & Executive Council on Integrity and Efficiency, Oversight of Gulf Coast Hurricane Recovery A Semiannual Report to Congress 57 (Apr. 30, 2006); Homeland Security Briefing, Report Examines Inspectors General Work After Katrina to Audit Contracts, Fight Fraud, Bloomberg (BNA) (Sept. 5, 2006).

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