



COVID-19: PREPARE YOUR CHANGES AND CLAIMS WITH CONFIDENCE

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OVERVIEW

- CARES Act § 3610
- Delay and Disruption
- Force Majeure and Excusable Delay
- Q&A





CARES ACT § 3610

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OVERVIEW



- Description of Section 3610
- CARES Act Sec. 3610
- Features of Sec. 3610
- How Sec. 3610 Is Being Implemented
- How Sec. 3610 Works with Changes Clauses
- What Comes Next

DESCRIPTION OF SEC. 3610

- CARES Act signed into law on March 27, 2020
 - Sec. 3610 provides contractors the ability to seek reimbursement for employee and subcontractor workers unable to perform due to facility access restrictions during the pandemic emergency
 - Section 3610 provides a structure or framework to agencies to provide relief to contractors, subject to government-wide and agency-specific implementation guidance
- Agencies and OMB have been releasing interpretive guidance on how to implement the Sec. 3610 authorities

CARES ACT, SEC. 3610

SEC. 3610. FEDERAL CONTRACTOR AUTHORITY.

Notwithstanding any other provision of law, and subject to the availability of appropriations, funds made available to an agency by this Act or any other Act may be used by such agency to modify the terms and conditions of a contract, or other agreement, without consideration, to reimburse at the minimum applicable contract billing rates not to exceed an average of 40 hours per week any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, but in no event beyond September 30, 2020. Such authority shall apply only to a contractor whose employees or subcontractors 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 or other restrictions, and who cannot telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for COVID-19: *Provided*, That the maximum reimbursement authorized by this section shall be reduced by the amount of credit a contractor is allowed pursuant to division G of Public Law 116-127 and any applicable credits a contractor is allowed under this Act.

Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, 116th Cong. § 3610 (2020)

FEATURES OF SEC. 3610



Applicability: Notwithstanding any other provision of law, and subject to the availability of appropriations ...

Permissive authorization: ...funds made available to an agency by this Act or any other Act may be used by such agency to modify the terms and conditions of a contract, or other agreement, without consideration...

Amounts: ...to reimburse at the minimum applicable contract billing rates not to exceed an average of 40 hours per week...

Purpose: ...any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel...

Time period: ...but in no event beyond September 30, 2020....

Covered facilities: Such authority shall apply only to a contractor whose employees or subcontractors cannot perform work on a site that has been approved by the Federal Government, including a federally-owned or leased facility or site...

Condition: ...due to facility closures or other restrictions, and who cannot telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for COVID-19...

Duplicate relief: *Provided,* That the maximum reimbursement authorized by this section shall be reduced by the amount of credit a contractor is allowed pursuant to division G of Public Law 116-127 and any applicable credits a contractor is allowed under this Act.

FEATURES OF SEC. 3610

- Sweeping scope superseding other laws governing contract administration
- Does not require contracting officer cooperation
- Covers prime contractors and subcontractors
- Limited to minimum applicable billing rates at 40 hours per week
- Tied to actions needed to keep employees in a “ready state”
- Triggered by restrictions on access to government or contractor facilities
- Limited to scenarios where telework is not feasible
- No double-dipping

HOW SEC. 3610 IS BEING IMPLEMENTED

- Office of Management and Budget
 - March 20: OMB Memo M-20-18
 - April 17: OMB Memo M-20-22

- DOD: Defense Pricing and Contracting (formerly Defense Procurement and Acquisition Policy)
 - April 8: Class Deviation & Implementation Memo
 - May 18: Issued draft implementation guidance process for Sec. 3610 reimbursement for industry comment by May 22
 - DOD FAQs address several implementation questions

- General Services Administration
 - April 21: Class Deviation CD-2020-12, creates clause 552.222-70, which applies only to FAR-based contracts

- Other Guidance: ODNI, NSA, NASA, DOE

- Similarities / Differences

HOW SEC. 3610 WORKS WITH CONTRACT CLAUSES

Agencies will likely look to exhaust options in FAR clauses before turning to Sec. 3610 for authority to reimburse.

FAR 52.243-[x] – Changes Clauses

FAR 52.242-17 – Government Delay of Work Clause

FAR 52.242-15 – Stop Work Order

Recent decision, *Pernix Serka Joint Venture v. Department of State*, casts doubt on the future of COVID-19 claims.

WHAT COMES NEXT

Audits, Investigations, and Enforcement

- CARES Act created various oversight and enforcement mechanisms
- Ways to mitigate:
 - Careful tracking and documentation of affected employees and subcontractors
 - Coordination with contracting officers
 - Documented, auditable procedures for expense accounting and delays due to COVID-19

Returning to work facilities

- April memorandum from OMB (M-20-23) instructing contractors to follow the same guidelines the rest of the country is following

New supplemental pandemic relief legislation

- A new bill is likely at some point
- For now, there is speculation about what may be included



DELAY AND DISRUPTION

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TOPICS

1. What's the difference between delay and disruption?
2. What *really* caused the disruption?
3. Who is responsible for costs resulting from changes in laws?
4. Who bears the risk of increased costs due to supply chain disruptions?

DELAY VS. DISRUPTION

What is the difference?

“Although the two claim types often arise together in the same project, a ‘delay’ claim captures the time and cost of *not* being able to work, while a ‘disruption’ claim captures the cost of working less efficiently than planned.” *Bell BCI Co. v. United States*, 72 Fed. Cl. 164, 168 (2006).

A project that finishes on time but at greater expense because of disruptive events or scheduling errors presents a claim for disruption damages – not delay damages.

WHAT CAUSED THE DISRUPTION?

It is important to distinguish between:

1. Disruption damages caused by the force majeure event itself (such as decreased labor productivity due to illness), and
2. Disruption damages caused by some other potentially compensable event stemming from the force majeure event (such as changes in law).

Generally speaking, an excusable (non-compensable) delay does *not* form the basis for a loss of productivity claim.

To succeed in claiming for disruption damages, the contractor must therefore prove that the cause of the disruption is one for which the Government *assumed the risk*.

CHANGES IN LAW

COVID-19 is a force majeure event that has multiple impacts to a project - not just time impacts.

The pandemic has resulted in issuance of new guidance and orders from governing bodies – including CDC, OSHA, and state and local authorities – concerning if and how construction may proceed.

While these orders may result in a loss of productivity and therefore delays to the project (addressed above in disruption), they also increase the direct and actual cost of the work in a way that is wholly different from the more indirect and speculative productivity losses.

CHANGES IN LAW

Illustrative Case: *Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992).

The Federal Circuit was asked to interpret a clause that required the contractor to comply with standards "issued by the Secretary of Labor[.]”

The contract also contained the standard Permits and Responsibilities Clause, which provides that “[t]he Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work.”

While the Board below held that this Permits and Responsibilities Clause was not limited in any way, the Federal Circuit disagreed and said that “the word 'issued' in the past tense logically refers to regulations already issued, and not to changes which may occur in the future.”

SUPPLY CHAIN DISRUPTIONS

COVID-19 may cause supply chain disruptions, resulting in increased material or labor costs.

Generally speaking, the risk of price increase is with the contractor in a fixed-price contract (unless the contract contains the Economic Price Adjustment Clause at FAR 52.216-4, which is not common).

In the case of a cost reimbursement contract, the contractor is entitled to be paid for the cost of the work, subject to the guaranteed maximum. Price escalation not tied to a change in the contract (such as compensable change to legal requirements or taxes as set forth above or a price escalation clause as noted below) does not entitle the contractor to an increase in the GMP.

If the supply chain disruptions are so extensive that they result in commercial impracticability or even impossibility of performance, the contractor may be able to claim for some kind of relief under these theories.



FORCE MAJEURE & EXCUSABLE DELAY

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WHAT'S IN YOUR TOOLBOX: DEFINING FORCE MAJEURE

- Merriam-Webster's dictionary defines "force majeure" as a "superior or irresistible force" or "an event or effect that cannot be reasonably anticipated or controlled."
- **In contracts, a force majeure provision provides a legal defense that limits liability due to unforeseen events outside the control of the parties that delay performance of the contract or prevent performance entirely.**
- What constitutes a force majeure event is determined on a case-by-case basis and depends upon the terms of the relevant contract, applicable law and other relevant facts.

WHAT'S IN YOUR TOOLBOX: APPLYING FORCE MAJEURE

- Although force majeure provisions may not specifically contemplate a global pandemic such as COVID-19, these provisions typically refer to events **beyond a party's control** and **may excuse non-performance** under the contract **or allocate risks and costs differently** when such an event occurs.
- **The law of the applicable jurisdiction(s) will control when applying the terms of the contract.**
 - While many contract avoidance doctrines (such as force majeure, impracticability, etc.) are treated similarly across jurisdictions, jurisdiction-specific laws can vary significantly and may affect the analysis.
 - Further, local emergency government orders may also affect the analysis.

WHAT'S IN YOUR TOOLBOX: APPLYING FORCE MAJEURE

- Each *force majeure* provision must be considered on its own precise terms. That said, some general features common to most *force majeure* provisions include:
 - The event was outside the reasonable control of a party;
 - The event was not reasonably foreseeable by the parties at the time of contracting, and the effects therefore could not be avoided;
 - The relevant event materially affects the ability of one or more of the parties to perform their contractual obligations; and
 - The party or parties took all reasonable steps to try to provide notice and to avoid or mitigate the relevant event or its consequences.

WHAT'S IN YOUR TOOLBOX: CONSTRUCTION CONTRACTS

- The A201 (General Conditions of the Contract for Construction) addresses delays, suspension of work, and termination, all of which may result from the coronavirus pandemic and related “other causes beyond the contractor’s control.”
- If the contractor is delayed, A201 section 8.3 states that the contract time shall be extended for a reasonable amount of time. It is common practice for project architects to make this determination in collaboration with the parties involved after assessing the contractor’s position.
- The A201 document contains various other provisions that might apply to projects affected by the COVID-19 pandemic, including section 14.1.1.2 (Termination by the Contractor). The owner may also have the right to suspend and terminate the contract for convenience, as set forth in A201-2017 sections 14.3 (Suspension by the Owner for Convenience) and 14.4 (Termination by the Owner for Convenience), respectively.

WHAT'S IN YOUR TOOLBOX: FEDERAL GOVERNMENT CONTRACTS

- Although government contractors may be familiar with the concept of force majeure through commercial contracting, it is important to note that most federal prime contracts do not use the phrase “force majeure.” However, many include provisions for “excusable delays.”
- FAR Clause 52.249-14, Excusable Delay, may also be found in certain cost-type, labor hour, and time and materials contracts. The clauses provide that that delays may be excusable if the failure to perform “***arises from causes beyond the control and without the fault or negligence of the Contractor.***”

WHAT'S IN YOUR TOOLBOX: EXCUSABLE DELAY - FAR 52.249-14

FAR 52.249-14 (Excusable Delays) provides, in part:

(a) 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.

WHAT'S IN YOUR TOOLBOX: EXCUSABLE DELAY — FAR 52.249-14

(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.

(c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. **If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised, subject to the rights of the Government under the termination clause of this contract.**

WHAT'S IN YOUR TOOLBOX: EXCUSABLE DELAY

- Courts have viewed past epidemics and quarantine restrictions as excusable delays. However, the existence of an “epidemic” or imposition of a “quarantine restriction” does not necessarily mean performance is excused in the absence of showing causation and a lack of fault or negligence by the contractor (as well as other factors such as the amount of delay attributed to the specific cause). See *Big State Garment Co.*, ASBCA No. 337, 4 CCF ¶ 60,946 (1950) (a contract performance extension was granted due to employees’ need to recover from typhoid injection).
- Demonstrating excusable delay is often an uphill battle for contractors.

WHAT'S IN YOUR TOOLBOX: EXCUSABLE DELAY

- In *Ace Electrical Associates, Inc.*, the Armed Services Board of Contract Appeals confronted a contractor's contention that nonperformance was due to the excusable delay of a flu epidemic that had "passed through its plant causing a 30% to 40% rate of absenteeism over a period several weeks." ASBCA No. 11781, 67-2 BCA ¶ 6,456.
- The ASBCA rejected the contractor's position, explaining "[i]llness occasioned by the onset of a flu epidemic is in general an excusable delay provided it can be shown that performance was in fact delayed by reason of such epidemic. It is incumbent upon [the contractor] to establish not only the existence of an excusable delay as well as the actual extent of delay so caused." *Id.*; see also *Crawford Dev. and Mfg. Co.*, ASBCA No. 17565, 74-2 BCA ¶ 10,660 (appeal for excusable delay based on absence of several key employees due to flu-induced illness denied where contractor failed to show epidemic in surrounding community resulted in absence of a sufficient number of employees to cause delay).

WHAT'S IN YOUR TOOLBOX: EXCUSABLE DELAY

- The Boards of Contract Appeals have emphasized that the contractor's burden in such situations is to show that it took every reasonable precaution to avoid foreseeable causes of delay and to minimize their effect. *Asa L. Shipman's Sons, Ltd.*, GPOBCA No. 06-95, 1995 WL 818784 (Aug. 29, 1995).
- To recover under an excusable delay clause, it is imperative for contractors to establish that (i) any asserted delay in performance was, in fact, caused by the COVID-19, and (ii) the delay was beyond the control and without the fault or negligence of the contractor.
- For example, claims for an excusable delay for an influenza epidemic were denied where the contractor failed to show that the epidemic was the sole cause—not merely a contributing cause—of the performance delay. See e.g., *Ace Electronics Associates, Inc.*, ASBCA Nos. 11496, 11781, 67-2 BCA ¶ 6456 (July 18, 1967).

QUESTION & ANSWER