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# Key Considerations for Government Contractors During the COVID-19 Pandemic

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The COVID-19 (more commonly known as the coronavirus) pandemic has brought about massive uncertainty for companies across all sectors, government contractors included. While many open questions remain, this article covers key legal updates pertinent to government contractors to assist in navigating unfamiliar terrain. Many Venable practice groups are providing updates regarding various aspects of the impacts of COVID-19 that affect our clients. The regulatory landscape is as fluid as the virus itself. To keep abreast of all relevant content, please visit our [COVID-19 webpage](#).

Congress, OMB, and the Navy have all weighed in. Until there is a uniform contract clause providing economic relief from increased costs due to COVID-19, no contractors, other than small business contractors with fixed-price contracts, will be able to obtain schedule relief, and economic relief will depend upon the willingness of agencies to pay.

## Coronavirus Aid, Relief, and Economic Security Act (the CARES Act)

On March 27, 2020, Congress passed the CARES Act, which includes loans that may be forgiven under certain circumstances to small businesses and cost relief to contractors who have been prevented from working. While the portions of the Act that appropriate funds will have a present effect, to the extent that the CARES Act sets forth new structures and rules for loans, loan forgiveness, and other relief for contractors, the executive agencies must pass rules, whether interim or final, to implement such portions.<sup>1</sup>

While other Venable articles will cover the Act in full, this portion focuses on those sections that will impact government contractors.

### Title I, Keeping Workers Paid and Employed Act, Section 1102: Paycheck Protection Program

Section 1102 offers relief in the form of Paycheck Protection Program (PPP) loans that may be forgiven to small business concerns in addition to both for-profit and nonprofit business concerns that employ not more than **500** employees (or, if the North American Industrial Classification (NAICS) code provides for a higher threshold, the higher employee threshold will govern). While the loans will be administered by the U.S. Small Business Administration (SBA), the definition of eligible concerns is different from the traditional definitions of size at 13 C.F.R. Part 121.

The CARES Act also waives the SBA's affiliation rules for (a) concerns in the accommodation and food services industry (NAICS code of 72) with not more than 500 employees, (b) franchisees on the SBA franchise list, or (c) concerns that are owned by a Small Business Investment Act company.

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<sup>1</sup> While we anticipate that the executive agencies will move swiftly, as of the publication of this article, the only reference in the *Federal Register* to the CARES Act is an interim rule from the Office of the Comptroller of the Currency, Treasury; the Board of Governors of the Federal Reserve System; and the Federal Deposit Insurance Corporation, which does not relate to the subjects discussed in this article. 85 Fed. Reg. 17723 (March 31, 2020). In addition, the Department of Treasury released guidance regarding the Paycheck Protection Program on March 31, 2020. That guidance is located here: <https://home.treasury.gov/policy-issues/top-priorities/cares-act/assistance-for-small-businesses>. SBA has similar guidance here: <https://www.sba.gov/funding-programs/loans/paycheck-protection-program-ppp>.

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The loans may be used for certain enumerated purposes, including payroll costs, group healthcare benefits, rent, utilities, and interest on obligations incurred before the loan. The term “employees” includes both full-time and part-time workers. The maximum loan amount is the *lesser* of annual wages calculated pursuant to a formula (which includes consideration of average total monthly payroll payments) or \$10 million.

### **Title I, Section 1106(b): Loan Forgiveness Under the Paycheck Protection Program**

Loans received under the Paycheck Protection Program can have up to 8 weeks’ worth of payroll, rent, utility costs, or mortgage interest forgiven. This forgiveness is tax exempt.

Section 1106(b) states:

A recipient “ shall be eligible for forgiveness of indebtedness on a covered loan in an amount equal to the sum of the following costs incurred and payments made during the covered period:

1. Payroll costs.
2. Any payment of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation).
3. Any payment on any covered rent obligation.
4. Any covered utility payment

The loans will be administered by the U.S. Small Business Administration and repayment may be deferred or forgiven if certain conditions are met.

### **Title III, Section 3610, Federal Contractor Authority**

With the exception of Federal Acquisition Regulation (FAR) Clauses 52.242-15, Stop-Work Order and 52.243-1, Changes, most of the provisions in the FAR<sup>2</sup> provide only schedule relief for excusable delays caused by pandemics and do not compensate the contractor in fixed-price contracts for the significant costs that come with those delays. To keep employees and subcontractors in a ready state, the CARES Act addresses this gap in relief by encouraging federal agencies to modify the terms and conditions of their contracts with business concerns of all sizes to reimburse the contractor for certain costs based on “the minimum applicable contract billing rates not to exceed 40 hours” a week of leave. The full text of Section 3610 follows:

*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*

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<sup>2</sup> For example, FAR 52.249-14, Excusable Delays provides only for revision of the delivery schedule.

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*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.*

For businesses with more than 500 employees or who otherwise cannot qualify for a PPP loan, this may provide significant relief.

## **Title IV, Coronavirus Economic Stabilization Act – Loans to Distressed Businesses**

The Coronavirus Economic Stabilization Act, Section 4003, appropriates \$500 billion for air carriers, states, municipalities, and other “United States business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act,” related to losses incurred as a result of the coronavirus in the form of loans, loan guarantees, and investments. The \$500 billion is further subdivided by category.<sup>3</sup> The largest portion of the appropriation, \$454 billion, plus any amounts not obligated in the other categories, is available “to make loans and loan guarantees to, and other investments in, programs or facilities established by the Board of Governors of the Federal Reserve System.” *Id.* For example, the Federal Reserve Board may “(A) purchase obligations or other interests directly from issuers of such obligations or other interests”; (B) purchase “obligations or other interests in secondary markets or otherwise”; or (C) make “loans, including loans or other advances secured by collateral.” The Federal Reserve Board and Department of Treasury are expected to release guidance in the near future regarding these “programs or facilities.”

## **OMB Memorandum – Managing Federal Contract Performance Issues Associated with the Novel Corona Virus**

On Friday, March 20, 2020, the U.S. Office of Management and Budget (OMB) issued government contractor-specific guidance to all executive departments and agencies regarding the federal government’s management of federal contract performance issues occurring as a result of COVID-19: *Managing Federal Contract Performance Issues Associated with the Novel Corona Virus (COVID-19)*, March 20, 2020 (OMB Memorandum).

The OMB memorandum “urged” agencies “to work with their contractors, if they haven't already, to evaluate and maximize telework for contractor employees, wherever possible,” and “be flexible in providing extensions to performance dates if telework or other flexible work solutions, such as virtual work environments, are not possible, or if a contractor is unable to perform in a timely manner due to quarantining, social distancing, or other COVID-19 related interruptions.” OMB also encouraged agencies to “leverage the special emergency procurement authorities authorized in connection with the President’s emergency declaration under section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207 (the Stafford Act),” including flexibilities such as “increases to the micro-purchase threshold, the simplified acquisition threshold, and the threshold for using simplified procedures for certain commercial items, all of which are designed to reduce friction for contractors, especially small businesses, and the government and enable more rapid response to the many pressing demands agencies face.”

In its Frequently Asked Questions section, OMB highlighted Federal Acquisition Regulations (FAR) clauses regarding excusable delays and noted that “[e]xcusable delays that result in adjustments to the contractor's delivery schedule should not negatively impact a contractor's performance ratings.” OMB encouraged agencies to maintain open lines of communication with its

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<sup>3</sup> For example, the amounts appropriated except for the loans and loan guarantees under the Federal Reserve Board, are \$25 billion for passenger air carriers and related eligible businesses such as those providing inspection, repair, replace, or overhaul services, and ticket agents; \$4 billion for cargo air carriers; and \$17 billion for businesses critical to maintaining national security.

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government contractor partners, and provided a one-time 60-day extension to current registrants in SAM with active registrations expiring before May 17, 2020.

## Defense Production Act and Public Law 85-804

On March 18, 2020, President Trump signed an Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19. The Executive Order provided that “[t]o ensure that our healthcare system is able to surge capacity and capability to respond to the spread of COVID-19, it is critical that all health and medical resources needed to respond to the spread of COVID-19 are properly distributed to the Nation’s healthcare system and others that need them most at this time.” Accordingly, President Trump invoked the “Priorities and Allocations” provisions of the Defense Productive Act (DPA), 50 U.S.C. §§ 4501, et seq., determining that “health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators, meet the criteria specified in section 101(b) of the Act (50 U.S.C. 4511(b)).”

On March 27, 2020, President Trump signed Executive Order 13911, titled Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources To Respond to the Threat of COVID-19, 85 Fed.Reg. 63 at 18403, which delegated DPA authority to both the Secretaries of Homeland Security and Health and Human Services to further United States policy of expanding “domestic production of health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators.” *Id.*

The DPA provides the executive branch with an “array of authorities to shape national defense preparedness programs and to take appropriate steps to maintain and enhance the domestic industrial base.” As is relevant to government contractors, the DPA effectively authorizes the President to direct private sector entities to prioritize providing necessary resources to support national security. Specifically, the DPA provides that the “President may require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order,” and to “allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.” In simpler terms, the DPA provides the President with authority to prioritize contract actions in support of the national defense and allocate materials in a similar fashion.

President Trump invoked the DPA on March 27, 2020 to require General Motors to produce ventilators, and federal and state legislators are urging him to expand the scope of medical equipment and supplies that require priority. Companies tapped to provide such resources pursuant to the terms of the DPA should understand that unless an exception exists, compliance with the DPA and relevant priorities is not optional. To the contrary, contractors should embrace the opportunity to work alongside the federal government in combating the COVID-19 pandemic, particularly in light of the protections afforded under the DPA.

Another authority not yet invoked to respond to the COVID-19 pandemic is Public Law 85-804, which “empowers the President to authorize agencies exercising functions in connection with the national defense to enter into, amend, and modify contracts, without regard to other provisions of law related to making, performing, amending, or modifying contracts, whenever the President considers that such action would facilitate the national defense.” 48 C.F.R. § 50.101-1(a). Under 48 C.F.R. § 50.104-3, and if certain conditions are satisfied, the government has the authority to indemnify contractors against “unusually hazardous or nuclear risks” in carrying out U.S. government contracts. Commentators have called for President Trump to utilize this authority to protect contractors who may assist in the development of a COVID-19 vaccine, though it remains to be seen what action will occur as a result.

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## General Best Practices

While many open questions remain, government contractors continuing to operate in quarantine limbo should consider the following guidance to minimize current and future headaches regarding contract performance:

- Make all efforts to comply with guidance from the Centers for Disease Control and OMB, including engaging in telework or, alternatively, ensuring that your company provides goods or services within the 19 critical infrastructure sectors described in the March 19, 2020 Memorandum from the Cybersecurity and Infrastructure Security Agency (CISA), part of DHS, and confirming that continued performance is consistent with the rules of your state and locality.
- Determine whether any existing contracts are rated orders under the DPA. If so, determine and comply with applicable priorities.
- If your federal contracting agency has requested that you stop operations, ask for a formal stop work order pursuant to FAR 52.242-15.
- If the agency with which you contract has requested a reduction of operations, you may request continued funding under Section 3610 so that your company may maintain the reduced personnel on leave.
- Keep open lines of communication with contracting officers (generally the only position with authority to make commitments under existing contracts) and other agency representatives regarding obstacles encountered as a result of COVID-19, as well as subcontractors or other team members who may be seeking guidance. Remember, however, to memorialize any non-written guidance from government officials and confirm authority exists for any advice given.
- Take care to document all costs incurred as a result of interruption or changes to work required by COVID-19, such as by creating a separate charge number to document all costs, whether for labor or materials related to COVID-19. Should a contractor seek reimbursement for these costs, careful documentation will be key to successful recovery.
- Review all government contracts to determine whether any escape valve or protections exist to account for COVID-19 related disruptions, for instance, excusable delay or *force majeure* clauses.
- Should layoffs occur, ensure compliance with the Worker Adjustment and Retraining Notification (WARN) Act requirements. However, certain provisions of the CARES Act, including the PPP and some tax credits, hinge on retaining workers or not reducing salaries.
- Where questions arise, as always, Venable LLP is available to assist government contractors in navigating the unique issues arising from the COVID-19 pandemic.