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ADG Insights

Recent federal government
developments and guidance used
to address the COVID-19 pandemic

*Special series focused on the impact of the COVID-19 pandemic
on the Aerospace, Defense, and Government Services industry*

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Through ADG Insights, we share with you the top legal and political issues affecting the aerospace, defense, and government services (ADG) industry. Our ADG industry team monitors the latest developments to help our clients stay in front of issues before they become problems and seize opportunities in a timely manner.

This issue in our special series on the impact of the novel coronavirus (COVID-19) pandemic focuses on the recent federal government developments and guidance for addressing the COVID-19 pandemic. Staying on top of the latest developments, while continuing to track the current acquisition landscape, will aid ADG companies in addressing the various government contracting issues relating to COVID-19.

As the impact of the COVID-19 pandemic continues to expand, the federal government has taken steps to ensure that ADG companies, including government contractors, receive uniform guidance for addressing the impacts of COVID-19.

Government contractors should monitor evolving contingency plans and directives of their customer agencies. For instance, on 5 March 2020, the Department of Homeland Security (DHS) issued a message to chief procurement officers on health and safety precautions for COVID-19.¹ The message provides advice about managing employee travel and illness and advises procurement officers to direct questions about contract performance to contracting officers (COs). On 10 March 2020, the National Aeronautics and Space Administration (NASA) issued a message addressing contractor travel and teleworking.² And, on 19 March 2020, the Federal Emergency Management Agency (FEMA) released a message to contractors regarding COVID-19, which provided basic guidance reminding vendors that there is “NO requirement to stop, delay or terminate

a contract during the time coronavirus is present. Contractors should ensure there are measures in place to ensure continuity of operations and delivery of services.”³ Other agencies and offices continue to issue guidance or other acquisition-related updates, some of which are addressed in more detail below.

Statutory developments

The CARES Act

The Coronavirus Aid, Relief, and Economic Security Act or the CARES Act was passed on 27 March 2020 to provide emergency assistance to institutions responding to the health care crises as well as to individuals, families, and businesses affected by COVID-19.⁴ The Act provides funding across government agencies for activity relating to the battle against COVID-19, including authorizing US\$1 billion for Defense Production Act (DPA) purchases to prevent, prepare for, and respond to COVID-19, domestically or internationally.

The CARES Act also provides increased flexibility for the Department of Defense’s (DoD) use of undefinitized contract actions (UCA). For instance, the Act waives section 2326(b)(3) of title 10 of the United States Code to any UCA related to the national emergency for COVID-19.⁵ This permits DoD to obligate an amount that is equal to more than 75 percent of the negotiated overall ceiling price prior to the contract definitization.⁶ Additionally, the CARES Act allows DoD to waive the other provisions of section 2326(b) of title 10 of the United States Code, if the head of the agency determines that the waiver is necessary due to the national emergency for COVID-19. Section (b) relates to the limitations on obligation of funds and generally prohibits a CO from entering into a UCA unless the contractual action provides for agreement upon contractual terms, specifications, and price by the earlier of the end of the 180-day period beginning on the date on

which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price; or the date on which the amount of funds obligated under the contractual action is equal to more than 50 percent of the negotiated overall ceiling price for the contractual action.⁷ This waiver authority would allow DoD to obligate certain funds above the limitations included in the statute.

Section 3610 of the Act includes federal contracting authority to allow any agency to modify the terms and conditions of a contract to reimburse paid leave, including sick leave, that a contractor provides to keep its employees or subcontractors in a ready state. The maximum reimbursement authorized by the Act, however, must be reduced by the amount of credit a contractor is allowed pursuant to the Families First Coronavirus Response Act (P.L. 116-127) and the CARES Act. This authority only applies to a contractor whose employees or subcontractors (i) cannot perform on a site approved by the federal government due to facility closures or other restrictions, and (ii) who cannot telework because their job duties cannot be performed remotely.

Agency memoranda and announcements

CISA advisory memorandum version 2.0 on essential critical infrastructure workers

On 28 March 2020, the Cybersecurity and Infrastructure Security Agency (CISA) updated its guidance on essential workers in COVID-19 crisis and relabeled it version 2.0.⁸ The guidance was updated to ensure workers in critical infrastructure sectors can reach their facilities during the COVID-19 crisis, attempting to fill in gaps identified in the initial guidance released the prior week. The guidance reaffirms the advisory list’s purpose of identifying workers who conduct a range of operations and services that are typically essential to continued critical infrastructure viability, including staffing operations centers, maintaining and repairing critical infrastructure, operating call centers, working

1. Chief Procurement Officer Message on Health and Safety Precautions for COVID-19 (Mar. 5, 2020), https://www.acquisition.gov/sites/default/files/page_file_uploads/Letter_to_DHS_Contractors_regarding_COVID-19.pdf.

2. Assistant Administrator for Procurement Message on Coronavirus (Mar. 10, 2020), https://www.acquisition.gov/sites/default/files/page_file_uploads/Coronavirus%20Contractor%20Message%203-10-2020.pdf.

3. Message to FEMA Contractors regarding COVID-19 (Mar. 19, 2020), [https://beta.sam.gov/opp/2e10ac0778cc4e929c23b2a5cd9368d9/](https://beta.sam.gov/opp/2e10ac0778cc4e929c23b2a5cd9368d9/view?keywords=coronavirus&sort=-modifiedDate&index=opp&is_active=true&page=1)

[view?keywords=coronavirus&sort=-modifiedDate&index=opp&is_active=true&page=1](https://beta.sam.gov/opp/2e10ac0778cc4e929c23b2a5cd9368d9/view?keywords=coronavirus&sort=-modifiedDate&index=opp&is_active=true&page=1).

4. Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Mar. 27, 2020), <https://on24static.akamaized.net/event/22/40/22/9/rt/1/documents/resourceList1585228210963/finalcaresact1585228207508.pdf>.

5. CARES Act § 13004.

6. 10 U.S.C. § 2326(b)(3).

7. 10 U.S.C. § 2326(b).

8. CISA Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (Mar. 28, 2020), https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf.



construction, and performing operational functions, among others. This also includes workers who support crucial supply chains and enable functions for critical infrastructure. The industries they support represent, but are not limited to, medical and healthcare, telecommunications, information technology (IT) systems, defense, food and agriculture, transportation and logistics, energy, water and wastewater, law enforcement, and public works.

Similarly, while adhering to relevant public health guidance, critical infrastructure owners and operators are expected to use their own judgment on issues related to the prioritization of business processes and workforce allocation to best ensure continuity of the essential goods and services they support. The guidance updates workforce categories, and expands the list of communications and IT workers, to include:

- Government and private sector employees (*including government contractors*) with work related to undersea cable infrastructure and support facilities, including cable landing sites, beach manhole vaults and covers, submarine cable depots, and submarine cable ship facilities.
- Government and private sector employees (*including government contractors*) supporting DoD internet and communications facilities.

The guidance also updates the description of the Defense Industrial Base (DIB) workforce as follows (emphasis added):

- Workers who support the essential services required to meet national security commitments to the federal government and U.S. Military. These individuals include, but are not limited to, space and aerospace; mechanical and software engineers (*various disciplines*), manufacturing/production workers; IT support; security staff; security personnel; intelligence support, aircraft and weapon system mechanics and maintainers; and sanitary workers who maintain the hygienic viability of necessary facilities.

- Personnel working for companies, and their subcontractors, who perform under contract *or subcontract* to DoD, *as well as personnel at government-owned/contractor-operated and government-owned/government-operated facilities*, and who provide materials and services to the DoD, *including support for weapon systems, software systems and cybersecurity, defense and intelligence communications and surveillance, space systems and other activities in support of our military, intelligence, and space forces.*

DoD joint acquisition task force

On 25 March 2020, Ellen Lord, DoD Under Secretary of Defense for Acquisition and Sustainment, announced a Joint Acquisition Task Force (JATF) established to address the daily requests that DoD is receiving for medical and personal protective equipment (PPE) from the Federal Emergency Management Agency, the Department of Health and Human Services (HHS), DHS, and others.⁹ The JATF is led by Principal Deputy Assistant Secretary of Defense Stacy Cummings.

The task force was formed to synchronize the DoD acquisition response to the COVID-19 crisis and will leverage DoD authorities for maximum acquisition flexibility, such as the DPA authorities and funding in response to the crisis. The JATF scope also includes building capacity in identified areas of fragility in the Defense Industrial Base, both the industrial capability and workforce, with a focus on reducing reliance on foreign supply sources.

OMB memorandum on managing federal contract performance

On 20 March 2020, the Office of Management and Budget (OMB) issued guidance to federal agencies on contract issues associated with COVID-19.¹⁰ OMB's memorandum focuses on three specific issues: teleworking for contractors; mitigating the impact of COVID-19 on federal contractors; and utilizing procurement flexibility. OMB also provided a list of frequently asked questions on those topics.

Within the memorandum OMB urges federal agencies to work with their contractors to evaluate and maximize telework for contractor employees, wherever possible.¹¹ This could include modifying contracts that do not currently allow for telework or allowing more flexibility on delivery schedule or contract completion dates if a contract does not lend itself to telework. The memorandum also encourages clear and timely communication between agencies and their industry partners, as it is critical to supporting the government's response to COVID-19 and to meeting other mission needs during this highly dynamic situation.

Additionally, the memorandum addresses procurement flexibilities and advises that agencies should be flexible in providing extensions to performance dates based on COVID-19 interruptions. For instance, the memorandum discusses some of the special emergency procurement flexibilities of Federal Acquisition Regulation (FAR) 18.202, Defense or recovery from certain events, which are available for use in addressing requirements connected to COVID-19 as a result of the president's emergency declaration under the Stafford Act.¹² These flexibilities include increases to the micro-purchase threshold, the simplified acquisition threshold, and the threshold for using simplified procedures for certain commercial items.¹³

Further, the memorandum provides that agencies should also consider whether contracts that include capabilities for addressing requirements such as security, logistics, or other functions may be retooled for pandemic response consistent with the scope of the contract. Contractors may thus see their work being used for purposes other than initially anticipated.

DoD memorandum on contract place of performance – public health considerations

On 20 March 2020, DoD issued a memorandum addressing contract place of performance and public health considerations.¹⁴ DoD specifically asked that

the same maximum telework flexibilities extended to DoD service members and civilians be made available to contractors when contract services can be delivered, without mission degradation, while offsite. The memorandum notes that this flexibility should be allowed and encouraged where appropriate, and done so without need for further consideration during the national emergency.

DoD memorandum on managing impacts of COVID-19

On 30 March 2020, DoD issued another memorandum discussing the challenges and impacts that DoD and the DIB face in response COVID-19.¹⁵ Specifically, DoD emphasizes that COVID-19 will affect the cost, schedule, and performance of many DoD contracts. Many contractors that ordinarily work side-by-side with the DoD workforce may be unable to access their work sites, and most contractors are coping with employees who are unavailable for work due to quarantine and state and local requests to restrict movement of their personnel. Because of these issues, DoD identifies the regulatory tools that can be leveraged by DoD and the DIB. For instance, DoD contracts contain clauses that excuse performance delays, including FAR 52.249-14, excusable delays; various termination clauses; and FAR 52.212-4 for commercial contracts. Where a CO directs changes in the terms of contract performance, which may include recognition of COVID-19 impacts on performance under that contract, the contractor may be entitled to an equitable adjustment to contract price using the standard FAR changes clauses (e.g., FAR 52.243-1 or FAR 52.243-2).

The DoD memorandum notes that requests for equitable adjustment must be considered on a case-by-case basis, in consideration of the particular circumstances of each contract and impact of COVID-19. The memorandum tells COs to take into account whether the requested costs would be allowable, allocable, and reasonable to protect the

9. Department of Defense Acquisition and Sustainment Leaders Hold a Press Briefing on the Defense Department's COVID-19 Acquisition Efforts (Mar. 25, 2020), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2125737/department-of-defense-acquisition-and-sustainment-leaders-hold-a-press-briefing/>.

10. OMB Memorandum M-20-18, Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19) (Mar. 20, 2020), https://www.acquisition.gov/sites/default/files/page_file_uploads/M-20-18.pdf.

11. FAR Part 7.108 (instructing agencies not to discourage contractor use of telework when consistent with contractual requirements).

12. FAR Part 18, *Emergency Acquisitions* was published in 2006, which provides an index of the emergency flexibilities available to agencies. See <https://www.acquisition.gov/content/part-18-emergency-acquisitions>.

13. So far, the DoD, VA, GSA, and Internal Revenue Service (IRS) have raised their thresholds.

14. DoD Memorandum on Contract Place of Performance – Public Health Considerations (Mar. 20, 2020), <https://www.acq.osd.mil/dpap/policy/policyvault/USA000643-20-DPC.pdf>.

15. DoD Memorandum 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.

health and safety of contract employees as part of the performance of the contract. Equitable adjustments to the contract or reliance on an excusable delay should not negatively affect contractor performance ratings.

The memorandum also discusses the CARES Act and Section 3610, federal contractor authority, which provides discretion for the agency to modify the terms and conditions of the contract to reimburse paid leave where contractor employees could not access work sites or telework, but actions were needed to keep such employees in a ready state. The memorandum notes that Defense Pricing and Contracting (DPC) will provide implementing guidance for this section as soon as practicable. However, the memorandum also states that the OMB memorandum promulgated similar guidance regarding management of contract performance impacts due to COVID-19.¹⁶

DoD memorandum on commercial item procurements

On 31 March 2020, DoD prepared another memorandum that addressed commercial item procurements in response to COVID-19.¹⁷ Because most of the supplies and services needed by DoD in response to COVID-19 will be urgent commercial item procurements, the Defense Contract Management Agency's (DCMA) commercial item group (CIG) prepared a class commercial item determination (CID) pertaining to COVID-19. Specifically, the class CID lists items that meet the definition of commercial item in FAR 2.101, including certain vaccines, medical supplies, and facility related services. DoD notes that the list is not exhaustive and will be updated as additional commercial items become known.

GSA guidance on rated orders

In our previous *ADG Insights* on special contracting authorities, we noted that the General Services Administration (GSA) provided an update relating to Defense Priorities Allocation System (DPAS)

rated orders. Specifically, on 19 March 2020, GSA released guidance for placing rated orders in response to the COVID-19 emergency.¹⁸ Through DPAS, the Department of Commerce (DOC) has given authority to GSA through GSA Acquisition Regulation (GSAR) 511.6 to place rated orders for key items for essential operations of federal buildings or other government functions, including laptop computers, accessories, and other IT products to support sharply increasing levels of telework. The priority rating for telework emergency response equipment is "DO-N1" and the priority rating for cleaning supplies is "DO-N7." GSA recommended that COs utilize existing sources of supply, and COs should contact vendors by phone when placing a rated order because many companies are unfamiliar with DPAS.

GSA memorandum on acquisitions and contracts for essential critical infrastructure activities

On 26 March 2020, GSA issued guidance regarding acquisitions and contracts for GSA essential critical infrastructure activities.¹⁹ The memorandum reiterates GSA's position of supporting remote working, but also acknowledges that some work may need to be performed on-site despite state and local shelter-in-place/stay-at-home orders. For instance, work involving the construction, operation, and maintenance of federally-owned and leased facilities, working with classified information, and many other types of work for which an on-site presence is required. Accordingly, GSA has created its own guidance on what constitutes essential critical infrastructure activities and provides direction both for assisted acquisition and for GSA contracts and task orders. GSA directs attention to the DHS 19 March 2020 memorandum, which provides a definition for essential critical infrastructure workers, but GSA's memorandum also indicates that various additional factors may deem GSA contracts essential.

Thus, GSA directs the GSA heads of contracting activities to determine whether contracts are essential, and the authority cannot be delegated.

The guidance also permits heads of contracting activities to issue letters to GSA contractors, attesting to the activities that are determined to be in support of essential critical infrastructure activities. The guidance includes a sample letter that contractors will in turn be able to permit their employees to carry the letters. The guidance also includes a frequently asked questions section relating to contact administration and performance disruptions.

Agency class deviations and waivers

DoD interim vouchers class deviation

On 27 March 2020, DoD issued a class deviation, effective immediately, requiring that COs direct contractors to submit interim vouchers under classified contracts.²⁰ These interim vouchers must be submitted directly to the disbursing office listed in the contract through an appropriate method. Generally, contractors are required to submit interim vouchers to the Defense Contract Audit Agency (DCAA) in accordance with FAR 42.803(b)(1) and Defense Federal Acquisition Regulation Supplement (DFARS) 242.803(b)(i)(A) and (B). For some classified contracts, contractors submit interim vouchers outside the Procurement Integrated Enterprise Environment (PIEE) or other authorized unclassified system because of security restrictions. This particular deviation relieves the requirement for the interim voucher to be submitted to DCAA prior to payment. Thus, interim vouchers under classified contracts are considered provisionally approved by DCAA. This deviation also requires contractors to follow all program security protocols and to continue to safeguard program

information when submitting interim vouchers that are considered provisionally approved.

DoD acquisition threshold class deviation

Both the DoD and GSA are encouraging agencies to use available emergency acquisition flexibilities.²¹ For instance, on 6 March 6, DoD issued a memorandum reminding heads of contracting activity that they have delegated authority to invoke emergency acquisition flexibilities including the increase of acquisition thresholds.²² DoD later invoked Class Deviation 2018-00018, micro-purchase threshold, simplified acquisition threshold, and special emergency procurement authority,²³ for DoD acquisitions of supplies or services funded by DoD appropriations that the head of the contracting activity determines are to be used to support COVID-19 emergency assistance activities.

Specifically, the direction increases the micro-purchase threshold for contracting performed in the United States to US\$20,000 and the simplified acquisition threshold to US\$750,000. For contracts performed or purchases to be made outside the U.S., the micro-purchase threshold is increased to US\$30,000, while the simplified acquisition threshold increased to US\$1.5 million. For the acquisition of commercial items, the threshold for use of simplified acquisition procedures for certain commercial items was designated as US\$13 million.

The increased dollar thresholds for use of micro-purchase and simplified acquisition procedure will result in more contracts being awarded through streamlined procedures and with fewer burdensome clauses that typically are required by regulations.

DCMA deviation for progress payments

On 20 March 2020, the DCMA issued a Class Deviation on progress payments, which raises the progress payment rates at DFARS 232.501-1 from 80

16. See OMB Memorandum Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19) (Mar. 20, 2020), <https://www.acq.osd.mil/dpap/pacc/cc/docs/COVID-19/M-20-18.pdf>.

17. DoD Memorandum Determining and Making Commercial Item Procurements to Respond to the Coronavirus Disease 2019 (COVID-19) (Mar. 31, 2020), https://www.acq.osd.mil/dpap/policy/policyvault/Determining_and_Making_Commercial_Item_Procurements_COVID-19_Memo_DPC.pdf.

18. GSA Memorandum Placing Rated Orders Under the Defense Priorities and Allocation System for Novel Coronavirus Disease 2019 (COVID-19) (Mar. 19, 2020), https://www.gsa.gov/cdnstatic/MV-20-05%20w%20Attachments_1.pdf.

19. GSA Guidance Regarding Acquisitions and Contracts for GSA Essential Critical Infrastructure Activities and Novel Coronavirus Disease 2019 (COVID-19) (Mar. 26, 2020), <https://www.gsa.gov/cdnstatic/SPE-2020-08%20ext.pdf>.

20. DoD Class Deviation—Submission of Interim Vouchers Under Classified Contracts (Mar. 27, 2020), <https://www.acq.osd.mil/dpap/policy/policyvault/USA000690-20-DPC.pdf>.

21. DoD Coronavirus Disease 2019 (COVID-19) Emergency Acquisition Flexibilities, https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html#Exemption_and_Waiver_FAR. Applicable emergency flexibilities are identified in FAR 18.203, *Emergency Declaration or Major Disaster Declaration* and DFARS 218.203, *Incidents of national significance, emergency declaration, or major disaster declaration* as they relate to the COVID-19 pandemic. Additionally, FAR Subpart 18.1 and DFARS

Subpart 218.1 provide contracting officers other available acquisition flexibilities when certain conditions are met. See also Memorandum for All GSA Contracting Activities and Heads of Contracting Activity, March 14, 2020, https://www.gsa.gov/cdnstatic/SPE-2020-07_0.pdf.

22. See DoD Memorandum Emergency Acquisition Flexibilities – Disaster of Assistance Activities (Mar. 6, 2020), https://www.acq.osd.mil/dpap/policy/policyvault/Emergency_Acquisition_Procedures_DPC.pdf.

23. <https://www.acq.osd.mil/dpap/policy/policyvault/USA002260-18-DPC.pdf>.

percent of cost to 90 percent for large businesses, and from 90 percent to 95 percent for small businesses.²⁴ The class deviation identified a FAR and DFARS deviation to cover the rate increases.²⁵ DCMA will work on mass modifications to contracts where applicable using DCMA authorities.²⁶

GSA FAR and GSAR class deviation

On 24 March 2020, the General Services Administration (GSA) issued a class deviation, effective immediately, to the FAR and General Services Acquisition Regulation (GSAR),²⁷ which provides flexibility for debarring officials who need to notify contractors of being suspended, proposed for debarment, or debarred.²⁸ FAR 9.406-3 and FAR 9.407-3 require contractors to be notified of a suspension, proposed debarment, or debarment action from GSA's suspension and debarment official (SDO) via certified mail, return receipt requested.²⁹ However, as written, the FAR prohibits any other type of notification such as an electronic means of notification that could be beneficial during the COVID-19 pandemic. This class deviation allows for greater flexibility for SDOs by allowing electronic delivery of notices.

OFCCP limited exemption and waiver from FAR requirements

Given the impact of COVID-19, the U.S. Department of Labor's Office of Federal Contract Compliance Program (OFCCP) granted a limited exemption and waiver on 17 March 2020 from certain FAR requirements for contracts related to COVID-19 relief efforts.³⁰ Pursuant to the OFCCP memo, new federal contracts entered into specifically to provide

coronavirus relief may include a provision exempting the contractor from all affirmative action obligations and other obligations imposed by Executive Order 11246; Section 4212 of the Vietnam Era Veterans Readjustment Assistance Act; and Section 503 of the Rehabilitation Act of 1973. The coronavirus exemption and waiver period is granted from 17 March 2020 to 17 June 2020, subject to extension by OFCCP. These exemptions and waivers do not impact the processing of complaints of discrimination under 41 C.F.R. §§ 60-1.21-1.24, 41 C.F.R. § 60-300.61, and 41 C.F.R. § 60-741.61, nor do they exempt covered contractors from their obligations to comply with other federal, state, and local civil rights laws.

Information sharing

The federal government has begun to compile resources and provide landing pages for various announcements and guidance issued by numerous federal government agencies. Both the GSA and DoD have websites dedicated to compiling relevant resources related to COVID-19.³¹ Moreover, the government has created platforms for the acquisition workforce to use (e.g., templates, best practices) to facilitate rapid sharing of information related to COVID-19³² and to provide operational contract support information related to COVID-19.³³

DCMA has also established an inbox specifically for emails regarding DIB companies' changes in operational status.³⁴ This will allow the DCMA to capture any specific company/site operational DIB impacts that can be rolled up for reporting purposes. DoD has also set up a mailbox for inquiries on COVID-19 related issues.³⁵

Military component memoranda

Air Force memorandum on creative contracting

On 26 March 2020, the Department of the Air Force (Air Force) issued a memorandum regarding creative contracting techniques for maintaining the financial health of the DIB.³⁶ The memorandum emphasizes the need to get value for every taxpayer dollar, while balancing long-term DIB needs, such as increasing liquidity of critical suppliers and ensuring programs are not put at risk. The memorandum provides some additional clarity on the Air Force's guidance on creative contracting techniques based on industry feedback:

- Where the circumstances warrant, continue to consider raising progress payments up to 95 percent for small businesses and 90 percent for large businesses, and request permission to exceed these thresholds when needed. DCMA has already begun mass modifications to DoD contracts, raising progress payments to 90 percent, so coordination with DCMA actions will be important.
- Where the circumstances warrant, continue to consider reducing withholds down to 5 percent and request permission for below 5 percent on mandatory withholds when needed.

DoD guidance, including that of the Air Force, has requested creative use of UCAs to accelerate contract awards in negotiation to increase cash flow. Where UCAs are required or beneficial, the Air Force has directed an increase in obligations and allowed expenditures up to 95 percent. The Air Force has ultimately directed all program managers and COs to accelerate the award of new programs, where justified and in accordance with statute, policies, and regulations, and to maximize the use of UCAs (also where justified) to purchase critical items smarter and faster.

Air Force COVID-19 acquisition task force

On 25 March 2020, the Air Force issued a memorandum establishing the Air Force Acquisition COVID-19 Task Force (DAF ACT) across the acquisition enterprise (i) to execute all requirements

24. DoD Class Deviation—Progress Payment Rates, DARS Tracking Number: 2020-O0010 (Mar. 20, 2020), <https://media.defense.gov/2020/Mar/22/2002268032/-1/-1/1/DEVIATION-ON-PROGRESS-PAYMENTS-MEMO.PDF>.

25. FAR 52.232-16, Progress Payments (DEVIATION 2020-O0010) & Alternate II (MAR 2020). (DEVIATION 2020-O0010); 252.232-7004, DoD Progress Payment Rates (DEVIATION 2020-O0010).

26. Partnering with the U.S. Defense Industrial Base to Combat COVID-19, Statement of Lt. Col. Mike Andrews (Mar. 22, 2020), <https://www.defense.gov/Newsroom/Releases/Release/Article/2121122/partnering-with-the-us-defense-industrial-base-to-combat-covid-19/>.

27. The areas of the FAR and GSAR that are being amended by this class deviation are: FAR 9.406-3(c) and (e); FAR 9.407-3(c) and (d); and GSAR 509.406-3(d)(ii) and (d)(iii).

28. GSA FAR and GSAR Class Deviation - Flexibilities for Debarring Official Notification to Contractors (Mar. 24, 2020), https://www.gsa.gov/cdnstatic/CD-2020-04_0.pdf.

29. GSAR 509.406-3(d)(ii) and 509.406-3(d)(iii) are silent on the notification means to contractors being suspended, proposed for debarment, or debarred.

30. OFCCP Exemption and Waiver Contracts for Coronavirus Relief Efforts (Mar. 17, 2020), <https://www.dol.gov/sites/dolgov/files/OFCCP/National-Interest-Exemption-Memo-Coronavirus-Relief-Efforts.pdf>.

31. GSA Coronavirus Acquisition-Related Information and Resources, <https://www.acquisition.gov/coronavirus>; Defense Pricing and Contracting COVID-19, <https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html>.

32. See <https://community.max.gov/x/dUCafg>.

33. See <https://intelshare.intelink.gov/sites/ocs/COVID-19>.

34. Email dcma.lee.hq.mbx.covid19-industry-inquiry-inbox@mail.mil.

35. Email osd.pentagon.ousd-a-s.mbx.covid-19-industry@mail.mil.

36. Creative Contracting Techniques for Maintaining Financial Health of DIB (Mar. 26, 2020), <https://www.acq.osd.mil/dpap/pacc/cc/docs/COVID-19/USAF%20-%20Creative%20Contracting%20Techniques%20for%20Maintaining%20Financial%20Health%20of%20DIB,%20dated%20March%2026,%202020.pdf>.





from the Office of the Under Secretary of Defense for Acquisition and Sustainment Joint Acquisition Task Force, and (ii) to collect and consolidate funding requests needed to recover programs from COVID-19 impacts.³⁷ In an effort to increase the speed and agility of the Air Force acquisition system, the DAF ACT contains the following four lines of effort:

- Relief for external assistance requirements;
- Resilience for DIB efforts;
- Recovery for consolidating funding requests that minimize program impacts; and
- Rapidly managing large-scale small business contracts across all lines of efforts.

Stressing the need for speed, agility, and innovation to address COVID-19, the Air Force has indicated that it is exercising all authorities within its power to get the mission done fast, such as increasing cash flow for max liquidity. Thus, when the task force receives requests, it will assign them to virtual program teams and award contracts faster than ever before to ensure military readiness remains unquestioned.

Air Force mission essential activities

On 21 March 2020, the Air Force issued a memorandum to supplement the guidance provided in Ellen Lord's 20 March 2020 memo on the continuation of mission essential contractor activities on installation support contracts.³⁸ The 21 March memorandum directs COs to seek direction from wing commanders or their civilian equivalent regarding

which installation support contracts are determined to be mission-essential.³⁹ If contractor performance for a mission essential contract is impacted by a local shelter-in-place order, the wing commander or civilian equivalent is directed to use a template appended to the memorandum to provide a mission essential determination letter to the contractor to present to local authorities.

Regarding services contracts, the Air Force directs COs to review continuation of essential contractor services regulations found at DFARS 237.7602 for the purpose of determining whether they should modify active contracts for inclusion of FAR clause 52.237-3, continuity of services or DFARS clause 252.237-7023, continuation of essential contractor services. The Air Force provided a list of active Air Force contracts containing the essential services clause. If the appropriate clause(s) are not included in the contract, the Air Force directs COs to work with contractors to modify their contracts, as necessary.

As indicated in the memorandum, COs must also address performance issues, which arise during COVID-19 pandemic. As a reminder, the Air Force identified that the following clauses may be implicated during the COVID-19 pandemic:

- FAR 52.212-4, Contract terms and conditions - commercial items
- FAR 52.242-14, Suspension of work
- FAR 52.242-15, Stop-work order

- FAR 52.242-17, Government delay of work
- FAR 52.249-8, Default (fixed-price supply and service)
- FAR 52.249-9, Default (fixed-price research and development) g. FAR 52.249-10, Default (fixed-price construction)
- FAR 52.249-14, Excusable delays

The memorandum reiterates the same direction given by many throughout the government, that continuous communication between customers, requirements owners, contractors and local leaders is critical to ensuring current and future national security during this time of crisis.

Air Force mission essential activities during COVID-19

On 17 March 2020, the Air Force issued a memorandum addressing mission essential activities during COVID-19.⁴⁰ The memo notes that many Air Force industry partners are facing the dilemma of local shelter-in-place orders impacting their ability to meet the terms of their contracts. As many contractors are seeking to continue mission essential activities, the memo reiterates DHS's consideration of the DIB as part of the nation's critical infrastructure. The Air Force notes that depending upon the particular facts and circumstances, activities performed on Air Force and Space Force contracts may be considered mission essential and necessary for continuation as part of our nation's critical infrastructure.

Wherever state, county, or city shelter-in-place orders allow essential or otherwise necessary activities to continue, the Air Force authorizes program officers to identify and attest to programmatic activities they consider to be mission essential to the Air Force. Contractors should find these attestations helpful when engaging with local officials to gain exemption from shelter-in-place orders for their personnel while following all recommended protective measures.

Navy use of COVID-19 language within Navy contracts

On 26 March 2020, the Department of the Navy (Navy) issued a memorandum identifying the various FAR clauses that should address any performance circumstances that could arise from COVID-19.⁴¹ Specifically, the memorandum lists the following FAR clauses, which serve as a conduit through which any adjustments to a contract should be measured: FAR 52.249-14, excusable delays, FAR 52.249-8, default (fixed-price supply and Service), FAR 52.249-9, Default (fixed-price research and development), FAR 52.213-4, terms and conditions-simplified acquisition (other than commercial items), and FAR 52.212-4, contract terms and conditions-commercial items. According to the memorandum, COs are not authorized to craft or include any special clauses or terms to address COVID-19 and should rely on the standard clauses.

Navy direction on REAs and UCAs

On 20 March 2020, the assistant secretary of the Navy issued an intent and direction regarding withholds and retentions during COVID-19. In order

37. Air Force Memorandum on Acquisition Task Force on COVID-19 (Mar. 25, 2020), <https://www.acq.osd.mil/dpap/pacc/cc/docs/COVID-19/USAF%20-%20AF%20-%20Acquisition%20Task%20Force%20on%20COVID-19,%20dated%20March%2025,%202020.pdf>.

38. Air Force Memorandum Mission Essential Activities during COVID-19 (Mar. 21, 2020), <https://www.acq.osd.mil/dpap/pacc/cc/docs/COVID-19/>

USAF%20-%20Mission%20Essential%20Activities%20during%20COVID-19,%20dated%20March%2021,%202020.pdf.

39. In accordance with DFARS 237.7602(a), it is the Wing Commander or civilian equivalent of the requiring activity who determines if a service is mission essential.

40. Department of the Air Force Mission Essential Activities during COVID-19 (Mar. 17, 2020), https://www.acq.osd.mil/dpap/pacc/cc/docs/COVID-19/Essential_Activities_during_COVID-19.pdf.

41. Navy Memorandum Use of COVID-19 Language within DON Contracts (Mar. 26, 2020), <https://www.acq.osd.mil/dpap/pacc/cc/docs/COVID-19/USN%20-%20Use%20of%20COVID-19%20Language%20within%20DON%20Contracts,%20dated%20March%2026,%202020.pdf>.

to ensure that underlying suppliers remain solvent and available to support the Navy, the Navy issued a direction to remove barriers to maximize efficient execution of existing contracts and the award of pending or future contracts. Specifically, the direction suggests that the Navy pay all settled requests for equitable adjustment (REAs) immediately or resolve all remaining REAs as quickly as possible. Moreover, the direction encourages the acceleration of negotiations and award for future work including the use of UCAs.

Navy systems command guidance

The Naval Sea Systems Command,⁴² Naval Air Systems Command,⁴³ and Naval Supply Systems Command⁴⁴ all issued their own specific guidance related to COVID-19. The guidance provides instructions to contractors on implementing certain protective measures, while also encouraging contractors to complete mission essential and emergency tasks. Contractors are directed to communicate with the appropriate contracting offices and notify them of any impediments that could interfere with timely performance.

Army memorandum promoting resiliency of the DIB

On 24 March 2020, the deputy assistant secretary of the Army (Army) issued a memorandum to the DIB to promote resiliency during the COVID-19 pandemic.⁴⁵ The memorandum addresses the known challenges associated with local shelter-in-place requirements and ensures the DIB that the Army is working with DoD, state, and local officials for clear guidance. The memorandum also directs program executive offices and COs to assess the impacts of the shelter-in-place orders and to proactively and transparently resolve or mitigate any impacts. Thus, the Army directs DIB contractors to maintain clear communications with program and contracting offices regarding any challenges. The memorandum

also indicates that Army program executive officers and contracting activities will remain in contact with contractors regarding any impact on their ability to work caused by health and safety guidelines and will work with contractors to modify contract terms where appropriate.

Army memorandum addressing impact to contract performance

On 12 March 2020, the Army issued a memorandum addressing their response to COVID-19.⁴⁶ Through its memorandum, the Army stresses the importance of communication between the federal government and contractors, as it is essential for workforce safety and mission continuity. It asks for COs to assess each situation on a case-by-case basis, while understanding that it is not the CO's responsibility to determine whether the COVID-19 outbreak excuses performance or not.

The memorandum notes that contractors should recognize that their contracts may contain clauses that would excuse performance delays including: FAR 52.249-14 (i.e., cost reimbursement and time and material contracts), FAR 52.249-8 (i.e., fixed price supply and service contracts), and FAR 52.212-4 (i.e., commercial contracts). Each of the aforementioned clauses share a special thread—a contractor should not be in default because of a failure to perform the contract if the failure arises due to causes beyond the control and without the fault or negligence of the contractor.

The memorandum also notes that “epidemics” and “quarantine restrictions” are examples of causes beyond a contractor’s control (FAR 52.249-14(a); FAR 52.249-8(c) and (d); FAR 52.249-9(c) and (d); and FAR 52.212-4(f)). The Army confirms that these exceptions appear to include circumstances such as the spread of the COVID-19 virus, which has been declared a public health emergency by U.S. authorities and subsequently resulted in global quarantine

restrictions. Thus, the Army notes that if a failure to perform is caused by the default of a subcontractor and the cause of the default is beyond the control of both the contractor and subcontractor, contractors may be excused from liability for excess costs under FAR 52.249-14, FAR 52.249-8 and FAR 52.249-9.

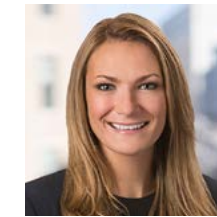
However, the Army recognizes that the relief may not apply under non-commercial contracts if the subcontracted supplies or services were obtainable from other sources in sufficient time for the

contractor to meet the required delivery schedule (FAR 52.249-14(b); FAR 52.249-8(d); FAR 52.249-9(d)) or if the CO ordered the contractor to purchase the supplies from another source, and the contractor unreasonably failed to comply with that order (FAR 52.249-14). As noted in the memorandum, in addition to the excusable delay provisions, the standard FAR changes clauses (e.g., FAR 52.243-1 or FAR 52.243-2) provide options for obtaining an equitable adjustment for increased work.



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42. NAVSEA COVID-19 Guidance for Industry (Mar. 20, 2020), <https://tinyurl.com/qmtozw7>.

43. NAVAIR Coronavirus Guide for Industry (Mar. 12, 2020), <https://tinyurl.com/qr8skc5>.

44. NAVSUP Coronavirus Guidance for Industry (Mar. 2020), <https://tinyurl.com/rzrwv4j>.

45. Army Memorandum Promoting Resiliency of the DIB during COVID-19 Pandemic (to industry) (Mar. 24 2020), [https://www.acq.osd.mil/dpap/pacc/cc/docs/COVID-19/USA-Promoting%20Resiliency%20of%20the%20DIB%20during%20COVID-19%20Pandemic%20\(to%20industry\)%20Mar%2024%202020.pdf](https://www.acq.osd.mil/dpap/pacc/cc/docs/COVID-19/USA-Promoting%20Resiliency%20of%20the%20DIB%20during%20COVID-19%20Pandemic%20(to%20industry)%20Mar%2024%202020.pdf).

46. Deputy Assistant Secretary of the Army (Procurement) (DASA(P)) Response to the Coronavirus Disease (COVID-19) (Mar. 12, 2020), [https://www.acq.osd.mil/dpap/pacc/cc/docs/COVID-19/DASA\(P\)_Memo_COVID-19_Army_Contracting.pdf](https://www.acq.osd.mil/dpap/pacc/cc/docs/COVID-19/DASA(P)_Memo_COVID-19_Army_Contracting.pdf).

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