



COVID-19 – How To Protect Your Company Against Virus Impacts

On March 22, 2020, Governor Jared Polis issued Executive Order D2020-013 that requires Colorado businesses to reduce in-person operations. Subsequently, the Colorado Department of Public Health & Environment specified which industries are defined as Critical Businesses to include healthcare, critical manufacturing, financial institutions, construction, and defense (including all aerospace).¹ This executive order follows similar directives by other states and a declaration of a national emergency by President Trump on March 13, 2020.² The cities of Denver and Boulder have also issued Shelter-in-Place orders on March 23.³

We are experiencing an unusual moment in modern history with a global reaction to stop the spread of COVID-19. Currently, most of us are home bound, all large events are cancelled or postponed, and many businesses are shut down. The overlapping orders and directions from various governmental authorities creates uncertainty resulting in a fluid and confusing environment.

Additionally, government contractors may already be facing or could soon experience delays in performing their contracts. Such delays could include:

1. Reductions in or cessation of operations of your company or your subcontractors;
2. Inability of or delays by customers in approving inspections, accepting delivery or processing payments; and
3. Illness of employees.

To try and simplify the confusing world, I will break out specific questions to address situations you may face. Depending on your circumstances, you may need to take immediate actions to identify and mitigate delays, notify customers, and start preparing potential claims.

What Exactly Is a Force Majeure or Excusable Delay?

The two phrases are thrown about and used as a sword and shield. First, the phrases are synonymous and provide companies with an excuse in some situations to prevent a customer from terminating a contract for default. I prefer "Excusable Delay" as it more accurately

¹ Colorado Executive Order: https://drive.google.com/file/d/1LQpL1oDurg4Iiasq_d6Cu_v2zM_0IMd3/view; Public Health order: <https://drive.google.com/file/d/1SpX8UhqQC9PODstkbg3AgPrb8k6CTM2k/view>

² <https://www.fema.gov/news-release/2020/03/13/president-donald-j-trump-directs-fema-support-under-emergency-declaration>

³ City of Denver - https://www.denvergov.org/content/dam/denvergov/Portals/771/documents/covid-19/DenverStayAtHomeOrder_DDPHE.pdf; City of Boulder - [https://www-static.bouldercolorado.gov/docs/Emergency_Order_2020-6_Stay_at_Home_\(amended\)-1-202003240849.pdf](https://www-static.bouldercolorado.gov/docs/Emergency_Order_2020-6_Stay_at_Home_(amended)-1-202003240849.pdf).

describes the theory. Second, you will need to provide sufficient evidence to support the defense of Excusable Delay to justify your failure to perform the contract.

In government contracts, the language appears in a variety of clauses depending on the type of contract and whether you are a prime or subcontractor. If you are a subcontractor, you could have a variation of one of the clauses or a full text clause instead.

Clause	Not liable for nonperformance if beyond control and without fault if caused by:	Notice
FAR 52.212-4, Contract Terms and Conditions – Commercial Items	(f) – Acts of God, Acts of the Government in either its sovereign or contractual capacity, epidemics and quarantine restrictions	(f) In writing, as soon as possible after commencement of delay and again when delay ends
FAR 52.213-3, Terms and Conditions – Simplified Acquisitions	(e) – Acts of God, Acts of the Government in either its sovereign or contractual capacity, epidemics and quarantine restrictions	(e) In writing, as soon as possible after commencement of delay and again when delay ends
FAR 52.249-8, Default (Fixed-Price Supply and Service)	(c) - Acts of God, Acts of the Government in either its sovereign or contractual capacity, epidemics and quarantine restrictions. (d) Similar language applies for nonperformance by subcontractor provided Contractor can show that it could not have obtained supplies or services from another subcontractor.	
FAR 52.249-9, Default (Fixed Price Research and Development)	(c) - Acts of God, Acts of the Government in either its sovereign or contractual capacity, epidemics and quarantine restrictions. (d) Similar language applies for nonperformance by subcontractor provided Contractor can show that it could not have obtained supplies or services from another subcontractor.	
FAR 52.249-10, Default (Fixed Price Construction)	(b)(1) Acts of God, Acts of the Government in its sovereign or contractual capacity, Acts of another Contractor in performing the contract (not your own subcontractor), epidemics and quarantine restrictions, Acts of a subcontractor if without fault or control of both you or your subcontractor.	(b)(2) In writing within 10 days from beginning of delay unless extended by Contracting Officer.
FAR 52.249-14 – Excusable Delays	Applies to Cost Reimbursement/Time-and-Materials (a) Acts of God, Acts of the Government in its sovereign or contractual capacity, epidemics and quarantine restrictions (b) Acts of a subcontractor if without fault or control of you or subcontractor unless supplies and services were obtainable from another source, Government directed use of other source, and you failed to comply.	

Generally, contractors will be able to avail themselves of one or more of the situations listed above should you or a subcontractor not be able to perform due to the COVID-19 pandemic or a quarantine restriction but it is *NOT* automatic. First, it only applies if your customer threatens to, issues a cure notice, or terminates the contract for default. Second, you must follow the notification requirements to be able to use the defense. Third, and hardest, you will need to prove that the COVID-19 situation was the cause of your delay and was outside the control and without fault of you or your subcontractor. Fourth, you will need to show that supplies or services could not be obtained elsewhere. For personal services contracts, this means that you could not find an alternative individual to perform the work.

Finally, the excusable delay will enable you to obtain an extension of the schedule and to prevent a termination for default but will not entitle you to a recovery of additional costs (except possibly in cost-reimbursement or time-and-material contracts).

What Do I Do If my State Orders a Shutdown or Quarantine?

Including Colorado, many states⁴ have issued some form of a mandatory shutdown and forced companies to close their doors unless they can establish a telework environment. Contractors may be understandably concerned with their ability to comply with state Shelter-in-Place orders and still meet federal government contractual obligations. Depending on your industry and contractual obligations, you may be able to rely upon various governmental policies to justify continued performance of a government contract.

On March 19, 2020, the Cybersecurity and Infrastructure Security Agency issued a memorandum identifying essential critical industries: healthcare, law enforcement, public safety, first responders, food and agriculture, energy, water and wastewater, transportation and logistics, public works, communications and information technology, critical manufacturing, hazardous materials, financial services, chemical and, of course, the Defense Industrial Base.⁵ The Department of Defense issued a supplemental memorandum on March 20 that identified the specific products and services deemed essential within the Department of Defense: aerospace, mechanical and software engineers, manufacturing/production workers, IT support, security staff, security personnel, intelligence support, aircraft and weapon system mechanics and maintainers, suppliers of medical supplies and pharmaceuticals, and critical transportation.⁶ The state orders contain exceptions that align with the listed services.

You may have already been designated as a “mission essential” service if your contract includes Defense Federal Acquisition Regulation Supplement (DFARS) 252.237-7023, Continuation of Essential Contractor Services, or any other equivalent clause. If so you should review any applicable Mission Essential Contractor Services Plans and ensure you can still comply in this changed environment.

To the extent possible, you can set up a telework environment for your employees.⁷ All telecommuting will still need to comply with cybersecurity requirements in your contracts.⁸

Can I Get Reimbursed from the Government?

Whether you will be reimbursed by the Government will depend on the terms of the contract.

⁴ California (<https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>); Delaware (<https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Fourth-Modification-to-State-of-Emergency-03222020.pdf>); Indiana (https://www.in.gov/gov/files/Executive_Order_20-08_Stay_at_Home.pdf); Michigan (<https://www.michigan.gov/coronavirus/0,9753,7-406-98158-522625--,00.html>); New York (<https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order>); Ohio (https://content.govdelivery.com/attachments/OHOOD/2020/03/22/file_attachments/1407840/Stay%20Home%20Order.pdf)

⁵ Cybersecurity and Infrastructure Security Agency (CISA) Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, dated March 19, 2020, available at <https://media.defense.gov/2020/Mar/22/2002268024/-1/-1/1/DEFENSE-INDUSTRIAL-BASE-ESSENTIAL-CRITICAL-INFRASTRUCTURE-WORKFORCE-MEMO.PDF>

⁶ Department of Defense (DoD) Memorandum on Defense Industrial Base Essential Critical Infrastructure Workforce, dated March 20, 2020 <https://media.defense.gov/2020/Mar/22/2002268024/-1/-1/1/DEFENSE-INDUSTRIAL-BASE-ESSENTIAL-CRITICAL-INFRASTRUCTURE-WORKFORCE-MEMO.PDF>

⁷ FAR 7.108 prohibits agencies from discouraging telecommuting in the performance of government contracts unless government requirements would be adversely impacted.

⁸ FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems; DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting

Generally, the rules are: (i) cost-reimbursement and time-and-material contracts have a possibility of recovering costs; and (ii) fixed-price contracts have a low probability of recovering costs. The rationale is simple in that sellers bear the risk of increased costs in fixed-price contracts and buyers bear the risk in cost-reimbursement and T&M contracts.

You may be wondering why a contractor should be liable when the reason for the increased costs is due to actions by the U.S. Government (e.g., quarantine restrictions). Under the *Sovereign Acts* doctrine, the Government is not liable as a party to the contract for acts performed by the Government in its sovereign capacity. This means that directions issued by the Government in response to COVID-19 are not considered to be a change to the contract.⁹

As usual with government contracting, there are exceptions to the general rule such as government delays, unavailability of personnel, and stop or suspension of work. Government personnel are facing the same issues that we are with shutdowns, quarantine restrictions and telecommuting constraints.

If your ability to perform depends on government approvals, acceptance or inspections that are delayed or not performed, then you may have the ability to recover costs pursuant to FAR 52.242-17 or as a constructive change under a Changes clause.¹⁰ If this should happen, you must notify the Contracting Officer in writing and submit a written claim as soon as possible.

Alternatively, the Government could issue a suspension or stop work order pursuant to FAR 52.242-14 or FAR 52.242-15. If you receive such an order, you must comply with the order to include stopping work and mitigating costs. Key steps include notifying your subcontractors and submitting written notice to the Contracting Officer.

If the Government delays processing payments, then you most probably can recover interest pursuant to the Prompt Payment Act. Any interest owed will be automatically calculated and paid by the Government. If the Government fails to pay the interest within 10 days of payment of the invoice, you could be entitled to an additional penalty provided your contract includes FAR 52.232-25, Prompt Payment, and you comply with the requirements.

In no situation should you ever stop work solely because of non-payment by the Government or disagreement with the Government.

What is the Defense Production Act and Should I Care?

The Defense Production Act of 1950 authorizes the President to require the priority performance of contracts and orders necessary or appropriate to promote the national defense over other contracts or orders; to allocate materials, services, and facilities as necessary or appropriate to promote the national defense; and to require the allocation of, or the priority performance under contracts or orders relating to, supplies of materials, equipment, and services in order to assure domestic energy supplies for national defense needs.¹¹

⁹ If you want to understand the *Sovereign Acts* doctrine, I'd be happy to set up a virtual chat.

¹⁰ There are multiple different Changes clauses that could be on your contract; e.g., FAR 52.243-1 through 52.243-4, and FAR 52.212-4

¹¹ 15 CFR §700.1

If your contract or subcontract includes FAR 52.211-15, Defense Priority and Allocation Requirements, and is designated as a rated order¹², then you will have to prioritize these contracts over all other contracts and may have to perform regardless of a state order. You may also be able to rely upon the status of a rated order to justify your product or service as “mission essential”.

Ok, So What Do I Need to Do?

1. First and foremost, **read your contracts**
 - a. Identify which of the above clauses or equivalent requirements are included in each contract
 - b. Identify which contracts are rated orders under DPAS
 - c. Identify any clauses designating performance as mission essential
2. **Read subcontracts** for equivalent clauses and requirements
 - a. Survey your suppliers to request
 - i. Updates on their current and anticipated ability to perform
 - ii. Prompt notification of changes
 - b. Remind them of obligations under contract terms, especially if rated orders
 - c. If delays are anticipated, request their solutions to mitigate impacts
3. **Read state and local Shelter-in-Place orders**
 - a. Read the DHS memorandum and assess if you provide “Essential Services” and are exempt
 - b. Check if your agency has issued supplemental guidance
 - c. Assess requirements for specific state guidance
 - d. If uncertain, coordinate with your contracting officers and program managers
 - e. Unless prohibited in your contract, you can telework. If prohibited, coordinate with your contracting officer to obtain permission.
4. **If You Can’t Perform:**
 - a. Provide required notices of schedule impacts under the Excusable Delay clauses as noted above.
 - b. Even if notice is not explicitly required, provide a written notice anyway that specifies the delay, the cause of the delay, the impact of delay and any mitigation solution.
 - c. Help your clients help you by submitting adequate documentation and justification so they don’t have to ask for additional information.
5. **Communicate with your customers and suppliers** to provide information and updates as applicable and respond to requests.
6. **Segregate and track all schedule delays and increased costs**

¹² Check block 1 of the SF 33 award document. Ratings include DX or DO; e.g DX-A1.

7. **Document Everything!** Unfortunately, you won't know today what the outcome will be in the future. Should you need to defend a decision, you'll need documentation prepared contemporaneously. For example:
- a. If your customer tries to default you, you'll need to be able to justify the number of days delayed, description of how performance was adversely impacted, what additional steps were taken, and cause of delay is not attributable to fault of you or your subcontractor.
 - b. You should also capture copies of any company policies implemented in response to COVID-19 that may have effected performance; e.g., teleworking, reductions in hours, and furlough.
 - c. Even if your customer doesn't terminate you for default, it could provide a neutral or negative past performance rating. The documentation could also help you to respond.

Is There Anything Else to Watch For?

There are many other aspects of company operations that are being impacted by COVID-19 and government activities.

- Acquisition Process Changes are happening frequently to meet demand and help small businesses.
 - DoD authorized an increase in Progress Payment rates to 90% for large businesses and 95% for small businesses. This is intended to help cash flow. If you have a contract with progress payments, request inclusion of the deviation clause. <https://www.acq.osd.mil/dpap/policy/policyvault/USA000642-20-DPC.pdf>
 - DoD authorized an increase in the threshold for sole source awards to 8(a) contractors from \$22M to \$100M to expedite contract awards. This was to implement the 2020 NDAA and not unique to the COVID-19 situation but it also helps the government procure supplies and services quicker. If you are an 8(a) company that provides mission essential services and products, reach out to the SBA and contracting officers. <https://www.acq.osd.mil/dpap/policy/policyvault/USA000495-20-DPC.pdf>
- Employment Requirements such as sick leave, wage rates, etc. I recommend you consult a Human Resource expert. I have included a paper from the Law Offices of Cynthia Wellbrock.
- If you need financing, consult with the Small Business Development Center for help - <https://www.coloradosbdc.org/covid/>.
- Indemnification for companies supporting virus detection, treatment and other medical support may be eligible for indemnification under the Public Readiness and Emergency Preparedness Act ("PREP Act") of 2005, codified at 42 U.S.C. § 247d-6d. <https://www.phe.gov/Preparedness/legal/prepact/Pages/default.aspx>

Contact me with questions at (303) 697-8914 or karri@palmetierlaw.com. I can set up video conferencing through Teams if you want a face-to face.

Please Stay Healthy and Safe to Protect Yourself, Your Team and Your Families

Karri

COVID-19 RESOURCES:

Federal

White House: <https://www.coronavirus.gov/>

CDC: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Small Business Administration: <https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources>

Department of Labor: <https://www.dol.gov/agencies/whd/fmla/pandemic>

Colorado

Colorado Governor's page: <https://covid19.colorado.gov/>;

Colorado Executive Orders: <https://www.colorado.gov/governor/2020-executive-orders>

Colorado SBDC: www.coloradosbdc.org/covid

Colorado PTAC: www.coloradoptac.org

Manufacturer's Edge: <https://www.manufacturersedge.com/covid-19-updates-and-resources-for-manufacturers/>

Misc

NDIA Resources: <https://www.ndia.org/meetings-and-events/coronavirus>

PilieroMazza: <https://www.pilieromazza.com/covid19-client-resource-center>