

## DOD Prepares for Pandemic by Telling Contractors They Better Not Get Sick

Written by Administrator  
Monday, 07 September 2009 00:00

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*"I have an eye infection and I can't see the point of coming into work today."* -- Anonymous Employee

On August 27, 2009 the Department of Defense (DOD) issued [another](#) DFARS Class Deviation--this time in recognition of the "changing environment" and the "increased need for continuity of operations capabilities and plans that enable agencies to continue their essential functions across a broad spectrum of emergencies ... [including] the 2009 H1N1 influenza pandemic." This latest Class Deviation creates solicitation and contract clauses that put contractors on notice that, even in the midst of national emergencies, the DOD expects them to show up for work.

The Class Deviation acknowledges that various contract clauses, including the "excusable delays" and "termination for default" clauses, generally relieve contractors from liability when a failure to perform arises from causes beyond their control. However, the document then states that, regardless of those legal niceties, "contractors providing services designated as essential contractor services by a DOD component are expected to use their best efforts to continue providing such services, in accordance with the terms and conditions of their contracts even during periods of crisis."

The document defines "essential contractor services" as contractor-provided services that support DOD mission critical functions, "such as support of vital systems, including ships owned, leased, or operated in support of military missions or roles at sea; associated support activities, including installation, garrison, and base support services; and similar services provided to foreign military sales [FMS] customers under the Security Assistance Program." The document goes on to say that "Services are essential if the effectiveness of defense systems or operations may be seriously impaired by the interruption of these services." Further, the document defines "mission essential functions" as "those organizational activities that must be performed under all circumstances to achieve DOD component missions or responsibilities."

The new contract clause, "Continuation of Essential Contractor Services" (AUG 2009), notifies contractors that some or all of the services performed under the contract are essential services . It requires the contractor to have a plan to ensure continued performance of the services during a crisis. In its plan, the contractor must identify provisions for "acquisition of necessary personnel and resources ... for continuity of operations up to 30 days, or until normal operations can be resumed." In the event the contractor cannot perform the services, the clause requires Government notification "as expeditiously as possible" and full efforts to cooperate with the Government's efforts to maintain continuity of operations. In crisis situations, the clause permits the Government to use Federal employees of other agencies or "contract support from other contractors or to enter into new contracts for essential contractor services." Finally, the clause must be flowed-down to all subcontracts for essential services.

Well, what is one to make of the foregoing? On one hand, the DOD should be commended for proactively preparing for possible emergencies, such as the H1N1 pandemic. And it is a good idea to require contractors to begin planning and preparation for workforce management and mobilization during times of crisis. On the other hand, contractors will incur costs in developing

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their plans, and will expect to receive reimbursement for such costs from the DOD. Moreover, it is interesting that DOD expects contractors to support foreign governments (who are acquiring services via FMS contracts) in such emergency situations. Finally, it is nice to require "full cooperation" during times of emergency, but it is doubtful how much contractors can actually do to compel employees to come to work, if they choose not to.

And what is the remedy for a contractor who breaches its contract by failing to exercise its best efforts to support essential DOD (or foreign government) services? The obvious remedy would seem to be a termination for default (T4D); however, as the Class Deviation itself notes, contractual T4D clauses generally relieve contractors of their duty to perform when the failure arises from causes beyond their control (e.g., pandemics). Thus, it is unclear if the DOD has any remedy other than to note the lack of performance and ensure that lack is input into the contractor past performance [database](#).

See the class deviation [here](#).