

COVID-19 Resources

Written by Nick Sanders
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The tendency over here is to just write about COVID-19 stuff, because that's what's on everybody's mind right now. Contractors are concerned about workforce health and safety (as they should be), and also about impacts to their existing contracts. Of course there will be impacts.

There will be direct cost impacts associated with absent employees, or with quarantined employees, or simply because of inefficiencies created by the need to keep social distancing. We've heard it referred to as "employee density." We've also heard about some contractors being directed to reduce their "footprint" at certain governmental installations, also in the name of reducing employee density. If you were a learning curve contractor, you're pretty much going to throw that learning curve right out the window.

There will be indirect cost impacts associated with unanticipated paid time off, or with additional standby/idle time, or with the additional costs associated with facility cleaning/sterilization. Many contractors are giving their employees facemasks to wear—and those facemasks cost money. Whatever indirect rates you thought you were going to run at for 2020, you're pretty much going to throw those rates out the window.

Recovery of the direct and indirect cost impacts associated with COVID-19 will depend on contract type, contract terms and conditions, your customer, and your contracting officer. Recovery will also depend on how well you documented your circumstances and your decisions made in response to those circumstances. As we've posted before, every contractor should be (1) segregating COVID-19 impacts in their accounting system, and (2) documenting everything. Two or three years from now, you're going to be glad you did so.

Auditors are going to push contractors to justify why their decisions—and the resulting costs—were reasonable. FAR 31.201-3 establishes the basis for reasonableness. It states:

(a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. *No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.*

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(b) What is reasonable depends upon a variety of considerations and circumstances, including-

(1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;

(2) Generally accepted sound business practices, arm's-length bargaining, and Federal and State laws and regulations;

(3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and

(4) Any significant deviations from the contractor's established practices.

(Emphasis added.)

Document decisions made with an eye to supporting the reasonableness of those decisions, giving the definition quoted above. Obviously, the COVID-19 pandemic crisis is hardly normal circumstances, so deviations from the contractor's established practices should be expected. However, undocumented deviations that haven't been communicated to customers and contracting officers are going to be suspect.

Further, note that what is reasonable can turn on "the contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large." Use that. Actions taken to address COVID-19-related responsibilities to the government, the employees, and the public at large should be deemed to be reasonable actions, and the resulting costs accepted as being reasonable costs. Document why that is the case!

Also look at the cost principle 31.205-13. We've written about that cost principle before—particularly as it interacts with the cost principle at 31.205-14.

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In [this article](#) , we discuss a couple of contractors who got it wrong.

In [another article](#) , we spent a bit more time comparing the 31.205-13 principle to the 31.205-14 principle.

In essence, the 31.205-13 cost principle states “*Aggregate costs incurred on activities designed to improve working conditions, employer-employee relations, employee morale, and employee performance (less income generated by these activities) are allowable, subject to the limitations contained in this subsection.*”

” But it’s not that straightforward and so you need to read the details for yourself, in case you end up like the contractors we write about.

However, it seems fairly clear to us that costs associated with COVID-19 activities intended to protect employee health and welfare, and to keep employees working on their DPAS-rated government contracts, are (generally speaking) fully allowable under 31.205-13. Further, even if you are a contractor that doesn’t have DPAS-rated contracts, at some point this crisis is going to be over and you will need a workforce ready and available to perform those contracts. Actions taken now to ensure performance can resume will likely be viewed as being both reasonable and allowable.

If you document them.

Before we wrap this up, we wanted to list some important COVID-19-related websites that have important resources. Those resources are already establishing the government’s position on many issues we’ve discussed here. In particular, DOD has issued many guidance documents, and so you need to be aware of them if you are a defense contractor.

So, presented in no particular order:

<https://www.acquisition.gov/coronavirus>

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<https://www.businessdefense.gov/coronavirus/>

<https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html>

<https://www.dentons.com/en/issues-and-opportunities/covid-19-coronavirus-hub>

<https://www.cov.com/en/news-and-insights/insights/2020/03/covid-19-evolving-considerations-for-global-business>

<https://www.insidegovernmentcontracts.com/tag/covid-19/>

<https://www.crowell.com/Practices/Coronavirus-COVID-19-Resource-Center>

[https://www.bdo.com/insights/business-financial-advisory/risk-advisory/novel-coronavirus-\(covid-19\)-impact-and-risk-respo](https://www.bdo.com/insights/business-financial-advisory/risk-advisory/novel-coronavirus-(covid-19)-impact-and-risk-respo)

<https://www.pillsburylaw.com/en/news-and-insights/scenarios-government-contractors-may-face-during-the-covid-19-national-emergency.html>

<https://www.nationaldefensemagazine.org/articles/2020/3/19/contractor-tips-for-covid19-pandemic>

<http://thecgp.org/coronavirus-resources-for-federal-contractors>