

DOD Issues More Guidance on COVID-19 Expenses

Written by Nick Sanders
Wednesday, 08 July 2020 00:00

On July 6, 2020, the Dept. of Defense [issued](#) more guidance on treatment of COVID-19 related expenses incurred by its contractors. We have noted several prior pieces of DOD guidance on the subject; however, more [recentl](#)
[y](#) we have been critical of the lack of clear guidance to DOD contracting officers. This latest piece of guidance does nothing to change our mind about the failings of DOD guidance.

Our fundamental problem with the current guidance memo (link above) is that it really doesn't say much of anything that a contracting officer might find useful.

Sure, it addresses non-labor COVID-19 expenses, which is new and certainly of potential interest to many DOD contractors. Recalling that the CARES Act (especially Section 3610) and related guidance focused on contractor's "stand-bye" labor costs, one might reasonably argue that guidance on non-labor costs was needed. Our problem is the memo doesn't really add anything to the conversation that wasn't already in the FAR.

Here's a quick recap of the memo, quoting selectively:

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DoD Contractors may have already incurred, and will likely continue to incur, delays and costs associated with their response to the COVID-19 pandemic. *However, to date, no funds have been appropriated specifically for reimbursement of these costs.*

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DFARS Class Deviation 2020-O0013 – CARES Act Section 3610 Implementation, effective April 8, 2020, provides a means for affected contractors to request reimbursement of costs incurred for paid leave granted to their employees during the COVID-19 pandemic. Subject to the availability of funds, a contracting officer may modify contracts or other agreements to reimburse up to 40 hours per week of paid leave costs.

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So far, that's just a recap of history. There's absolutely nothing new there. Let's continue:

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Contractors may face further unplanned costs due to COVID-19, such as those related to providing PPE to employees, additional cleaning of work areas, changes to work spaces to accommodate social distancing, and delays in delivering and/or receiving purchased materials. Where allowable and allocable, these costs may be recovered on cost-reimbursement and incentive contracts.

Yes. The FAR does permit contractors to be reimbursed for costs that are allowable and allocable to their flexibly priced contracts. Those costs don't need to be COVID-19 related costs either; they can be any costs that are allowable and allocable. Why DOD felt the need to restate what was already true as if it were new policy guidance escapes us.

But let's move on.

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DoD contracts contain clauses to excuse performance delays not due to the contractor's fault or negligence ... In the event of delays caused by COVID-19, the contractor may be entitled to relief from contract delivery requirements. However, there is no statutory, regulatory, or contractual entitlement to an adjustment to contract price for schedule delays that are attributable to excusable delays. Unlike contractors performing under cost-type contracts, contractors under fixed-price contracts generally must bear the risk of cost increases, including those due to COVID-19 (e.g., costs associated with PPE, social distancing, and supplier delays and inefficiencies).

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Contracting Officers are granted discretion, subject to the availability of funds, to modify contracts ... to reflect changes to the Government's needs as a result of COVID-19. Any resulting changes in contract price must be substantiated by the contractor and determined by the contracting officer to be required to perform the contract as modified, and must be driven exclusively by the change(s) directed by the Government.

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Hold on. Let's stop right there. What did the memo just say? Did it say contracting officers can modify FFP contracts for the cost impact of COVID-19 related expenses?

No. No, it didn't. Read again.

The memo says that contracting officers are granted discretion to modify contracts *to reflect changes to the government's needs*

. It has nothing to do with the contractor's needs. In fact the memo reinforces that notion with the statement that the changes "must be driven exclusively by the change(s) directed by the Government." Exclusively.

So what does that mean? It means the memo is granting authority to contracting officers to make changes to FFP contracts under the changes clause, should the government's needs have changed. You know what? That's authority that was already given to contracting officers when they received their certificates of appointment. There is absolutely nothing new there.

The memo seems to hint that contracting officers are being given authority to make changes to FFP contract prices as the result of COVID-19. (Nudge, nudge. Wink, wink.) For example, it states "the costs that would be associated with such COVID-19 related, Government-directed change modifications may be above and beyond current available funding." However, that weak hint is contradicted throughout the memo, including the following:

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In making such modifications, Contracting Officers must be mindful that they are stewards of the public funds. They must only execute contract actions that result in fair and reasonable prices for the supplies or services provided and are determined to be in the best interests of the Government.

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The costs that would be associated with such COVID-19 related, Government-directed change modifications may be above and beyond current available funding. *In such cases, Contracting Officers may not direct a change or execute a modification that results in an*

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increase to the contract price until and unless the Department receives additional appropriations.

Based on the express language of the memo, we strongly recommend that contractors not expect any changes to their FFP contract prices as the result of non-labor COVID-19 related costs. Their stand-by labor costs, of course, may be reimbursed (even under T&M or FFP contracts) pursuant to the CARES Act Section 3610; but even that price impact is subject to contracting officer discretion and the availability of funds.

And as we've already noted, contracting officers have received little if any guidance regarding the exercise of their discretion.

This memo continues that trend.