

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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# Defense Department Guidance for Government Contractors on Additional COVID-19-Related Costs

*By Joseph R. Berger, Thomas O. Mason, and Francis E. Purcell, Jr.\**

*The Department of Defense has released significant guidance concerning government contractors' COVID-19-related costs, including potential avenues of relief for expenditures related to personal protective equipment and teleworking that are not covered under the CARES Act, in both cost reimbursement and fixed-price contractual settings. The authors of this article examine the guidance regarding possible relief for these other types of costs.*

The Department of Defense (“DoD”), through its office of Defense Pricing and Contracting (“DPC”), released significant new guidance in July 2020 concerning COVID-19-related impacts and costs for government contractors. The guidance concerns potential avenues of relief, in both cost reimbursement and fixed-price contractual settings, that is separate from the possible recovery for paid leave costs under Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”).

## DOD’S GUIDANCE ON COVID-19 COSTS

DoD’s guidance (“Guidance for Assessment of Other COVID-19 Related Impacts and Costs”)<sup>1</sup> recognizes that to maintain readiness and ensure mission continuity, the government and industry have taken reasonable measures to prevent the spread of COVID-19 and to allow facilities to remain open and productive. These necessary actions in response to COVID-19 have included maximizing the use of telework within mission requirements, using personal protective equipment (“PPE”) and special cleaning regimens to reduce exposure, and realigning shifts to practice social distancing. As stated in the

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<sup>1</sup> July 2, 2020.

guidance, DoD contractors will likely continue to incur delays and costs associated with their response to the COVID-19 pandemic, but as of the date of the guidance, no funds had been appropriated specifically for reimbursement of these costs.

As stated in the guidance, Section 3610 of the CARES Act and DoD's related Defense Federal Acquisition Regulation Supplement Class Deviation provide a means for affected contractors to request reimbursement of costs incurred for paid leave, including sick leave, granted to their employees during the COVID-19 pandemic. Under Section 3610, contracting officers may modify contracts to reimburse up to 40 hours per week of paid leave costs, subject to the availability of funds. DoD has also released updated guidance and a new class deviation implementing Section 3610.

DoD's July 2020 guidance concerns circumstances that may not be addressed by Section 3610, including reimbursement for other types of expenditures related to COVID-19, in both cost and fixed-price contractual settings. The guidance notes that 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 workspaces to accommodate social distancing, and delays in delivering and/or receiving purchased materials."

Further, with respect to reimbursement on cost contracts, the guidance makes clear, "where allowable and allocable, these costs may be recovered on cost-reimbursement and incentive contracts."

In addressing performance delays, the guidance notes that DoD contracts contain clauses to excuse performance delays not due to the contractor's fault or negligence, including Federal Acquisition Regulation ("FAR") 52.249-14, Excusable Delays; FAR 52.212-4, Contract Terms and Conditions—Commercial Contracts; and various termination clauses. Therefore, in the event of delays caused by COVID-19, a contractor may be entitled to relief from delivery requirements. However, as stated in the DoD guidance, "there is no statutory, regulatory, or contractual entitlement to an adjustment to contract price for schedule delays that are attributable to excusable delays."

With respect to fixed-price contracts, the guidance recognizes that, in contrast to performance 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)."

However, DoD also recognizes that the government has discretion to grant relief, even under fixed-price contracts, through contract modifications that reflect its needs and best interests:

Contracting Officers are granted discretion, subject to the availability of funds, to modify contracts (e.g., under FAR 52.243-1, Changes Fixed Price, and its applicable alternatives) 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.

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.

The guidance also cautions that costs that would be associated with certain COVID-19-related government-directed change modifications may exceed current available funding, and in those cases, contracting officers may not direct a change or execute a modification that results in an increase to the contract price unless DoD receives additional appropriations. DoD recommends that modifications be contained in a separate contract line item for auditing purposes.

As stated in the guidance, the COVID-19 pandemic has presented historic and unprecedented challenges for DoD, its mission and its people, and "these challenges require us to use all of our experience and skill to find innovative solutions to both protect Government interests and ensure the continued health of the Defense Industrial Base to support our mission."

All DPC guidance documents and memoranda on COVID-19 for government contractors are available on the DPC website.<sup>2</sup>

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<sup>2</sup> <https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html>.