

COFFEE TALK:

JAMIS & Capital Edge discuss COVID-19's Regulatory Compliance, Financial, and Performance Impacts on Government Contractors



Part 1 - COVID-19 – Financial Impacts under Existing Government Contracts

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Our mission at JAMIS is to help our customers solve many of their complex and dynamic business performance and regulatory compliance challenges with our modern business management software JAMIS Prime ERP, which is specifically designed for the unique needs of government contractors.

Today's Presenter



Craig Stetson, Partner, CPA, CGMA, MBA
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Craig Stetson has over 25 years of direct experience in government contract accounting, pricing, subcontract management, regulatory and federal contract compliance, business system implementation, and internal control oversight. His industry experience includes aerospace and defense, manufacturing, construction, architecture and engineering, information and communications, higher education, and not-for-profits.

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Agenda

- Overview – COVID-19 and Government Contracts
- Existing Contracts
 - Schedule Delays, Cost Impacts, Disruptions
 - Pertinent Clauses – Entitlement and Potential Remedies
 - Recent Government Memos, Guidance and Directives
 - Contractor Diligence and Risk Mitigation
- Summary and Takeaway

As a result of the Coronavirus (COVID-19) pandemic, Government Contractors are struggling to maintain business as usual. Multiple memos, deviations, and directions have been issued to support these businesses, as well as various resources to help contractors through this difficult time.

CARES Act - ~\$2.2T, signed March 27, 2020

\$340B – State and Local Governments

\$154B – Public Health (CDC, VA, FDA, others)

\$10.5B – DoD (Defense Health Program, Defense Industrial Base, TRICARE)

Pertinent Clauses

- Compensable Delays
 - Government Ordered Suspensions
 - FAR 52.242-14 (Suspension of Work)
 - FAR 52.242-15 (Stop-Work Order)
 - FAR 52.242-17 (Government Delay of Work)
 - Constructive Suspension, Stop-Work, Delay
- Excusable Delays
 - Default Terminations
 - FAR 52.249-8 (Default (Fixed-Price Supply and Service))
 - FAR 52.249-10 (Default (Fixed-Price Construction))
 - DFARS 252.217-7009(b)
 - Commercial Contracts
 - FAR 52.212-4 (see FAR 52.212-4(f) listing “epidemics” and “quarantine restrictions” as possible excuses for delays)

Pertinent Clauses

- Changes
 - FAR 52.243-1 (Changes-Fixed-Price)
 - FAR 52.243-2 (Changes-Cost-Reimbursement)
 - FAR 52.243-3 (Changes-Time-and-Materials or Labor-Hours)
- CARES Act
 - Section 3610 (Federal Contractor Authority)
 - May require modification to existing contract(s)
 - May require assertion of a request for equitable adjustment

Planning for Potential Novel Coronavirus Contract Impacts

- DPAP memo; issued March 10, 2020
- Highlights
 - COs “strongly encouraged to engage with their Government program managers and requirements owners to determine what, if any, measures should be taken to ensure the welfare and safety of the total force, while ensuring mission continuity”
 - COs are the authority in the event contract performance is affected
 - Communication between the government and contractors is critical and COs need to be transparent when making decisions affecting contract performance or contractor personnel

(Intent and Direction) Withholds and Retentions During Covid-19

- Navy memo; issued March 20, 2020
- Highlights
 - Defense Industrial Base and Nation's Critical Infrastructure need to remain solvent and available to support the Navy
 - My intent ".....remove barriers to maximize efficient execution of existing contracts and award of our pending / future contracts"
 - Notes specific activities for the Navy's action; key among them:
 - payment of existing REAs and settlement of pending
 - reduction to maximum extent retentions and withholds
 - accelerated award of contracts and maximum obligation of funds under UCAs (see April 3, 2020 DPAP memo)

Progress Payment Rates

- DPAP class deviation; issued March 20, 2020, effective immediately
- Highlights
 - Progress payment rates at DFARS 232.501-1 are increased to 90 percent for large business concerns and 95 percent for small business concerns
 - Attachment included with text changes to applicable regulatory requirements
- Applies to DoD contracts

Managing Defense Contracts Impacts of the Novel Coronavirus

- DPAP memo; issued March 30, 2020
- Highlights
 - “We must work hand in hand to recover from this pandemic and maintain mission readiness. The effects of COVID-19 will affect the cost, schedule, and performance of many DoD contracts.”
 - Various FAR clauses may provide relief to address cost or schedule challenges or impossibilities of performance
 - REAs addressed on a case-by-case basis, considering other emergency relief that may be available
 - Section 3610 (CARES Act) may allow reimbursement of contractor labor costs to maintain a ready state; however, credits may apply and reduce reimbursements

Submission of Interim Vouchers Under Classified Contracts

- DPAP memo; issued April 3, 2020 (Rev. 1, supersedes March 27, 2020 deviation), effective immediately
- Highlights
 - COs “.....shall direct contractors to submit interim vouchers under classified contracts, using an appropriate method, directly to the payment office listed in the contract”
 - Interim vouchers considered provisionally approved by the DCAA

Section 3610 Credits

“.....Provided, That the maximum reimbursement authorized by this section shall be reduced by the amount of credit a contractor is allowed pursuant to division G of Public Law 116–127 and any applicable credits a contractor is allowed under this Act.”

- Public Law 116-127 (Families First Act), division G: various tax credits available as reduction to tax liability related to paid sick, vacation or family leave
- CARES Act, e.g., Paycheck Protection Program (PPP), effective April 2, 2020. Loans under the PPP are limited to small businesses and may ultimately be forgiven (CARES Act, Section 1106)

Section 3610

- DPAP class deviation; issued April 8, 2020, effective immediately; CARES Act Section 3610 Implementation Framework
- DPAP memo; issued April 9, 2020; Implementation Guidance for Section 3610
- DPAP Frequently Asked Questions; issued April 17, 2020; Implementation Guidance for CARES Act Section 3610
- DPAP Frequently Asked Questions (updated and revised); issued April 24, 2020
- OMB memo; issued April 17, 2020; Preserving the Resilience of the Federal Contracting Base in the Fight Against the Coronavirus Disease 2019 (COVID-19)

Contractor Diligence and Risk Mitigation

- Five key actions government contractors should be aware of to assist with mitigation efforts associated with potential financial and compliance risks arising from the current COVID-19 environment:
 - Program Management and Oversight
 - Documentation
 - Discrete Cost Accumulation and Change Order Accounting
 - Communication and Notice
 - Supply Chain Management

Program Management and Oversight

- Contractors should scrutinize contractual performance to identify discrete events that may have adverse financial implications, including
 - Existing or anticipated supply chain disruptions
 - Delays in or impossibility of performance
 - Access to facilities
 - Access to government personnel
 - Shelter-in-place directives
 - Personnel impacts resulting from idle time or furlough initiatives
 - Directed or constructive changes in scope of work

Documentation

- Contractors will need to prepare or gather and maintain applicable **written documentation** to support the delay, disruption and other unanticipated changes realized during contractual performance. As detailed as possible, including
 - Specific reasons and dates of discrete events
 - Attempts to mitigate or resolve adverse impacts
 - Communication with program management personnel
 - Communication with the government or prime contractor
 - Notification to the government; preservation of applicable contractual rights

Discrete Cost Accumulation and Change Order Accounting

- Contractors will need to ***discretely capture*** unanticipated and increased costs and time incurred related to unforeseen or out-of-scope events potentially arising from COVID-19
 - Establish separate charge numbers with appropriate explanation
 - Communicate with applicable employees the importance of accurate time and expense capture and monitor discipline
 - Create and retain adequate accounting records to segregate and support claimed costs within a reasonable basis

Communication and Notice

- Contractors are strongly encouraged to communicate with customers, government or otherwise, ***as early as possible and periodically*** when known or anticipated contractual performance or delivery challenges arise
- Document applicable communication, including
 - Emails
 - Letters or memos
 - Meeting minutes
 - Telephone discussion logs
 - Presentations

Supply Chain Management

- Contractors should ***actively coordinate with subcontractors***, vendors, suppliers, etc., to identify potential supply chain delivery issues that may affect prime contractors' ability to meet contractual performance requirements, including
 - Description and explanation of performance issues
 - Mitigation plans
 - Corrective action plans and applicable cost or schedule impacts
 - Contractual requirements and remedies incorporated in subcontractor / vendor / supplier arrangements

Summary and Takeaway

- Understanding of Contract Terms and Conditions, Rights, and Obligations and Government Authority
- Awareness of Government Directions and Guidance
- Early and Frequent Government Communication
- Adequate Accounting and Pricing Practices
- Written Documentation
- Transparency

QUESTIONS?

JOIN US FOR PART 2 NEXT TUESDAY!

PART 2 - Tuesday May 5th at 11am Eastern:

CARES Act, Section 3610 - What Contractors Need to Know

PART 3 - Tuesday May 12th at 11am Eastern:

COVID-19 – Prospective Government Contracts, Things to Consider



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