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4 Ways Contractors Can Get Federal Relief During COVID-19

By Daniel Wilson

Law360 (April 24, 2020, 9:26 PM EDT) -- Policies allowing federal contractors to claim costs for employees unable to work, accelerating payments for work in progress, and providing billions of dollars in loans for small business are among the most influential federal contracting changes stemming from the COVID-19 crisis.

Alongside an unprecedented coronavirus rescue package, federal agencies have also introduced a slew of new contracting regulations, guidance, class deviations and other changes intended to help ensure essential items and services are quickly produced and get where they need to be — and to help ensure that important parts of the federal supply chain don't go out of business.

At the same time, certain existing contracting laws and regulations such as contract change clauses in the Federal Acquisition Regulation, or FAR, are also becoming more prevalent.

Here, Law360 examines four coronavirus-related contracting policies that federal contractors need to be aware of.

CARES Act Section 3610

Likely the most important new clause for federal contractors in a slew of recent COVID-19 legislation and policy changes is Section 3610 of the Coronavirus Aid, Relief and Economic Security, or CARES, Act.

Under that clause, federal agencies are allowed to reimburse contractors for their costs to keep employees and subcontractors in a “ready state” if they’re currently unable to perform their work, such as if they’re sick or locked out of their usual worksite and unable to telework.

“It’s a wonderful bit of relief for contractors,” Crowell & Moring LLP partner David Robbins said. “That is the nearest-term most important [policy].”

Federal agencies, particularly the U.S. Department of Defense — the most proactive federal agency on implementing Section 3610 — have been quick to recognize that they can be a backstop in a time of crisis, keeping contractors engaged and paid and helping to mitigate related problems, according to Bass Berry & Sims PLC partner Richard Arnholt.

“It’s a recognition that we need to keep liquidity flowing into the government contracts space, and we need to have them ready when that work gets switched back on, we need people to be able to resume

activity immediately in order to get our economy back on the right track,” he said. “Many of these contractors are providing mission-critical support to the government.”

Although Section 3610 is undoubtedly valuable for contractors, there are several important caveats. For example, reimbursement is limited to 40 hours per person, per week, and only at the minimum applicable contracting billing rate.

And if contractors want to receive payroll tax credits for sick leave available under previous coronavirus-related legislation, those credits offset Section 3610 payments. There are also existing rules meant to prevent double-dipping, which means those payments could clash with state and local relief or Paycheck Protection Act loans, described in a section below.

Also, contractors need to be aware that Section 3610 is discretionary and not in use by all agencies, and its implementation isn’t consistent across agencies that are using it, Morrison & Foerster LLP partner Dan Chudd said.

For example, the DOD has said that contractors can claim applicable costs from between Jan. 31, when a related national emergency was first declared, and the end of September.

In contrast, the Office of the Director of National Intelligence has said that any claims from Jan. 31 through to the date of enactment of the CARES Act, March 27, will require contractors to make a request for equitable adjustment.

“That makes it difficult for contractors who may have contracts with both DOD and intelligence agencies to know which guidance applies; contractors need to be aware of that,” Chudd said.

The mechanical implementation of the clause can also vary, with some contracting officers for example using FAR Part 31 advance agreements — typically used to negotiate the reimbursement of unusual costs — or allowing Section 3610-related costs as a contract line item through a contract modification, Holland & Knight LLP government contracts practice co-chair Bob Tompkins noted.

Given the lack of consistent guidance and implementation, it is important for contractors to reach out affirmatively to their contracting officers, to “notify them of the impact and work something out,” Stinson LLP partner Susan Warshaw Ebner said.

Contractual Change Clauses

Although Section 3610 is undoubtedly important to contractors, not every useful avenue for relief related to the coronavirus is new, and contracting officers can continue to lean on their existing authorities.

Among other available avenues, existing Federal Acquisition Regulation provisions and clauses written into contracts themselves can also be helpful for contractors trying to sort out how they complete their work in the midst of uncertainty.

“Section 3610 is a very important provision, but it should not be viewed in isolation,” Tompkins said. “It really needs to be viewed in the context of other potential avenues of relief that contractors have, both under the Federal Acquisition Regulation but also under other relief provisions of the CARES Act and some of the other post-COVID-related legislation.”

The FAR includes sections on excusable delays for contractors, stop work and suspension orders, and related cost recoveries or equitable adjustments, among other relevant clauses.

And agencies may also have their own specific relevant FAR clauses that deal with issues like facility closures, with NASA for example already having an existing “ready state” clause that resembles Section 3610, Tompkins noted.

In some cases, a negotiated agreement — especially if there is already funding available on a contract to give some wiggle room — may be a more straightforward process for both sides than using Section 3610, even if being used toward the same goal of keeping employees paid, Arnhold said.

“Section 3610 is a great safety valve where there isn’t [alternatives] available on a contract,” he said. “[But] if there’s a possibility for a negotiated arrangement that contracting officer can enter into using his or her existing authorities, and they’ve got the money, why are you relying on 3610? It seems unnecessary and overly complicated.”

Section 3610 also won’t protect contractors if an adverse impact on contract performance opens up the risk of termination for default or negative performance ratings, according to Tompkins. But using an excusable delay provision with appropriate notice and documentation for the government might, he said.

Contractual change and adjustment clauses can also be useful to contractors when they’re ready to work but a delay or change comes from the government side, according to Robbins.

“Contracting officers are doing amazing work remotely, but they are and will continue to be just overwhelmed by the massive quantity of these changes requests, amendments, you name it coming through,” he said. “So their inaction can actually create rights to delay and money for contractors, and knowing how to manage that really matters.”

Whatever method contractors use to try to recover their COVID-19-related costs, it is important to ensure that they’re segregating those costs from their other expenses and documenting the reason behind any increased costs, Chudd said.

“That sort of documentation and segregation of costs is going to be imperative whether they’re seeking reimbursements under 3610 or they’re seeking compensation through some other FAR provision,” he said.

Accelerated Progress Payments

The DOD, the largest federal contracting agency, has also recently implemented a number of policies designed to speed up payments to contractors. Although not all are direct responses to COVID-19, they all will have a positive impact on cash flow, which can be vital for keeping those businesses alive and ready to work.

One DOD rule finalized on April 8, for example, allows contractors to tie their progress payments to performance rather than a percentage of costs incurred up to that point, including a provision to allow for claims beyond costs incurred.

The DOD also implemented another rule on the same day intended to ensure small businesses, whether contractors or subcontractors, get paid within 15 days of submitting an invoice, down from 30 days.

And under a March class deviation, the department also increased the amount it will pay contractors under the traditional monthly progress payment model, from 80% of incurred costs to 90% of incurred costs — and 95% for small businesses, up from 90% — with the Civilian Agency Acquisition Council also following suit its own April class deviation.

Ellen Lord, undersecretary of defense for acquisition and sustainment, said in a press conference on April 20 that the new progress payment provisions had been quickly incorporated into hundreds of existing contracts and that they would provide \$3 billion in increased cash flow to the defense industry in the near term.

It's not only the DOD itself that's kicking more cash into the supply chain, either. Its two largest contractors, Lockheed Martin Corp. and the Boeing Co., having made public commitments to enabling accelerated progress payments to quickly flow down to subcontractors and suppliers — a pledge Lord has asked other major defense contractors to make as well.

While it might take an invoicing cycle or two for the new progress payment requirements to be applied and kick in for some contractors, both Tompkins and Ebner said at least some contractors were starting to see accelerated progress payments kick in already.

"I think that's been very successful," Ebner said. "I know of contractors who have gotten those accelerated progress payments. They've increased the progress payment amount that small businesses could seek ... that's a significant deal. Getting cash to contractors for things that they're doing in a fast way is the best way to keep them mobilized and able to work."

The Paycheck Protection Program

Although not specifically set aside for contractors, the Paycheck Protection Program implemented by the CARES Act is another avenue smaller federal contractors and subcontractors can use to try to keep cash flow going during the pandemic.

The program offers low-interest loans of up to \$10 million to businesses with fewer than 500 employees to continue paying employees during the pandemic, and the loans are forgivable if at least 75% of those funds are used to meet certain payroll requirements.

"The PPP program is hugely important," Arnholt said. "There's a lot of negative press right now about some larger publicly-traded companies that got money, but I think the important thing to remember is that 1.66 million companies received money under that program. Out of that, 1.6 million companies received less than \$1 million, and the average loan was around \$250,000."

The program's massive popularity meant that an initial \$349 billion set aside for loans ran out in less than two weeks, and it was renewed on Friday with an extra \$310 billion, which should hopefully "help a lot more small businesses across the country, including in the government contracts sector," Arnholt said.

Given the rush to get funding before the initial tranche ran out, as well as confusion over eligibility requirements and requirements changing over time, some businesses may have applied for PPP funds while ineligible, for example when they already had adequate access to liquidity elsewhere.

But that's not necessarily a problem as long as they quickly return the loaned money, Robbins said, pointing to recent Treasury guidance on the program.

"It seems like the answer builds in this nice loophole saying, you know what, everything was rushed, and you made a certification in good faith if you applied before this guidance and repay in full by May 7," he said. "It's basically building in a very quick no harm, no foul, give the money back [provision]."

--Additional reporting by Al Barbarino. Editing by Emily Kokoll and Alanna Weissman.

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