

Coronavirus Fallout Leaves Gov't Contractors Scrambling

By Dorothy Atkins

Law360 (March 24, 2020, 9:03 PM EDT) -- Government contractors are scrambling to respond to recent policy changes aimed at combating the coronavirus outbreak, and one of the biggest challenges has been trying to decipher conflicting messages about whether their businesses are considered "essential."

Attorneys who represent government contractors told Law360 Tuesday that the rapidly changing legal landscape has prompted their clients to seek counsel on wide-ranging issues, raising questions about employment liability, cybersecurity, product liability and indemnification rights.

At the top of the list is whether their clients' businesses are considered "essential," which would allow them to remain open despite state orders requiring brick-and-mortar shops to shutter and forcing workers to stay home.

The U.S. Department of Defense issued guidance late last week indicating that government contractors in the so-called Defense Industrial Base, or DIB, are "essential critical infrastructure" and should remain open. However, the agency encouraged contractors to work remotely if possible.

But that's not so easy for many government contractors, particularly those who work on classified projects, said J. Alex Ward, co-chair of Morrison & Foerster LLP's government contracts and public procurement practice.

"Some things you just can't do remotely," he said. "If you're assembling a fighter jet, you can't do that from home."

Ward said some of the questions that his clients have raised over the past two weeks are in response to the stay-home orders that he says local governments issued without thinking through their ramifications on certain industries like defense.

"You can't just shut down the defense, even in these uncertain times — especially in these uncertain times," he said.

To complicate matters even more, some states have implemented their own definitions of "essential," creating potential conflicts with federal guidance and confusion over what businesses can stay open, according to Covington & Burling LLP special counsel Samantha L. Clark.

Although none of the attorneys Law360 spoke to say their clients have been forced to close, the possibility of enforcement has been enough to prompt McCarter & English LLP partner Daniel J. Kelly to advise his clients to have employees carry letters with them while traveling to and from work. The letters state the nature of the work that the employees are performing and describe why it is essential under the local rules, Kelly said. It also provides their counsel's contact information in case the workers are questioned by law enforcement, he said.

Kelly added that the firm is advising businesses to have a similar letter on hand in case state officials contact them with questions about their operations. He also emphasized that it's important for government contractors to track costs associated with having employees work remotely so they can try to be reimbursed.

Reed Smith LLP partner Holly A. Roth pointed out that these changes have a greater effect on small government contractors, who might not be able to easily transition to telecommuting than larger businesses. Roth said there are also concerns among small businesses that the changes will lead to the government awarding more contracts to large businesses in the future.

Even if businesses are allowed to remain open, those employers could face liability issues if workers are exposed to COVID-19 on the job, and Roth noted that the government is already asking that some contractors report if they have employees with COVID-19.

Meanwhile, the president's invocation of the Defense Production Act of 1950 — a Korean War-era law that allows to ramp up private production of medical equipment — last week and the Federal Emergency Management Agency's recent push to use it has raised concerns among government contractors about protections afforded under the law.

Frederic Levy, partner and co-chair of Covington's government contracts practice group, said clients who are interested in making medical products are concerned they could be held liable if products they provide quickly under the DPA turn out to be ineffective or problematic.

He also noted that some clients have sought to know more about their rights to refuse rated contracts under a provision of the DPA, which requires private companies to prioritize the fulfillment of the government's contract above others.

For example, Levy said, one subcontractor received a rated order from a prime contractor who demanded nearly all of its inventory regarding a product that didn't on its face appear related to the COVID-19 response. Although Levy declined to specify the product at issue, he said it was in the telecommunications realm.

For businesses whose workers can telecommute, there are also cybersecurity concerns, which Defense Secretary Mark Esper highlighted during a televised event Tuesday. Esper said employers should be "doubly cautious" about cyberattacks and phishing attempts as more businesses go remote.

As government contractors are trying to navigate these rapidly changing legal landscape, businesses are also concerned about how the stimulus package being debated on Capitol Hill will impact them, Roth said.

"I think for the small businesses their concerns are about this stimulus package and how it will affect them — whether they will qualify and how soon they will be able to get it," she said. "Almost everybody, large and small, thinks the uncertainties about this are horrendous."

--Editing by Brian Baresch.

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