

Best Practices for COVID-19 Claims

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Juggling different responsibilities during a global pandemic is difficult—but preparing and filing a COVID-related claim does not have to be. In this article we provide tips and words of caution to help contractors pursue COVID-related government contract claims.

Introduction

The past year has been fraught with unprecedented, unexpected, and—in many cases—unimaginable difficulties. Government contractors—and the government agencies they service—were no exception.¹

Many government contractors are part of the essential workforce required to operate through the pandemic.² Continued performance during COVID-19, while providing financial security, nevertheless creates many practical difficulties (and costs) attendant on ensuring the continued safety and well-being of one's workforce and

supply chain. Far from “business as usual,” companies have been guided by an evolving array of stay-at-home orders,³ shifts to a primarily teleworking environment,⁴ and a host of safety recommendations from the Centers for Disease Control and national, state, and local health organizations. Both industry and the government have faced more than a year of tough choices concerning continued contract performance, delays, and COVID-related cost recovery, and they will no doubt continue to do so through 2021.⁵

Though Congress stepped in with COVID-related stimulus packages designed to offer relief, including, among other measures, authorization⁶ (though no additional funding) for contractors to receive reimbursement for specified paid leave costs, these measures do not cover the full sweep of potential COVID-related costs facing contractors today.⁷ Congress and agencies have signaled the urgent need to assist contractors, but at the same time remind contracting officers of their obligation to protect their programs and the public fisc. This has led to considerable uncertainty as to how COVID-related claims will fare in the days ahead. In an effort to forecast and assist contractors and federal agencies alike, we revisit the fundamentals of the procurement claims process, and view that process through the lens of a global pandemic.

This article discusses best practices for contractors to follow in pursuing COVID-related claims against the government. Specifically, we reiterate the “golden rules” that should guide contractors' pre-claim strategy when submitting procurement-related claims, including those for COVID-related costs. Then, we trace the challenges likely to arise as COVID-related claims trickle through the adjudication process and provide a variety of tips that contractors should follow to maximize their likelihood of obtaining relief.

Although not many cases arising from COVID-related

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claims have actually progressed to the point of providing concrete guidance—either at the U.S. Court of Federal Claims (COFC), the Armed Services Board of Contract Appeals (ASBCA), the Civilian Board of Contract Appeals (CBCA),⁸ or elsewhere—we attempt to draw parallels between the current challenges facing contractors and difficulties that have arisen in similar emergency or other exigent circumstances where COFC and the boards *have* weighed in. And we also suggest which of the various COVID-related guidance or other directives in statutes, in regulations, or from the courts pertaining to procedures would best serve to streamline the claims process for contractors.

Pre-claim Strategies

Agency guidance to federal contractors in response to the COVID-19 pandemic began at a dizzying pace and continues to evolve. Staying abreast of recent guidance and developments, especially from your contracting agencies, is imperative. Many agencies, such as the Department of Defense (DoD), have collected COVID-19 guidance and resources in one location to assist contractors with COVID cost and schedule relief.⁹ Use the guidance to understand your rights and justify your requests, and be prepared to educate your contracting officers about the latitude they have been provided to grant COVID relief. Also, be mindful that reaching a resolution with one contracting officer does not guarantee you will get the same result in another context.

Beyond that, be mindful (and reassured!) that *the same basic principles—what we refer to as the “golden rules”—apply to secure cost and schedule relief even under unique COVID circumstances.*

- **Review the Specific Contract.** Determine all relevant parties' obligations. Note relevant FAR¹⁰ and DFARS¹¹ provisions, including those related to Excusable Delays; Suspension of Work or Stop Work;¹² Changes and Differing Site Conditions;¹³ and terminations clauses.¹⁴
- **Communicate and Coordinate.** Information sharing is vital to good decision making. Make sure your internal stakeholders are coordinating routinely during rapidly changing and evolving events. As early as possible, communicate (in writing) with your contracting officers regarding COVID-19 impacts.
- **Document.** If there was ever a golden rule you should not ignore, this is it. Document your actions regarding COVID-19 and seek customer direction/approval (in writing) of your actions. Remember that a key part of obtaining relief under the Changes clause is demonstrating government

direction to perform work that is outside the existing scope of your contract. Because the pandemic creates unique scenarios that may not have been contemplated at the time of award, seek written direction for how to handle those scenarios to provide justification for future adjustments and claims.

- **Mitigate.** Consider relevant national, state, and local guidance in taking reasonable steps to reduce COVID-19 costs. A pandemic does not entitle a contractor to extreme measures to guarantee safety of employees. Record why the option you selected is both cost-effective and reasonable—the mere act of doing so may prompt consideration of a less-costly but equally safe means to achieve your goal. Remember to seek approval/direction for those decisions and to document (the what, when, where, and why) of your mitigation efforts.
- **Segregate.** You maximize your chance of recovery by segregating your COVID costs, specifically by creating COVID-19 charge numbers/accounts, to enable both you and the government to trace pandemic costs accurately. There may be some occasions where it may be challenging to delineate blended costs; in such cases, develop a system to nevertheless document those costs, such as by documenting and comparing “before and after” costs (pre- and post-COVID) so that a clear picture emerges of the COVID impact.
- **Seek Adjustments.** The general rule is that you should seek adjustments pursuant to contract type, relevant agency guidance, and the regulatory framework under which the cost arises. Because section 3610 of the CARES Act creates a unique cost principle and means of recovery under an attendant DFARS clause, but only covers a defined set of paid leave costs, contractors may need to seek additional adjustments under standard contract clauses to obtain full COVID cost recovery.
- **Submit Claims.** When the government is silent or rejects COVID invoicing or your requests for adjustment, consider filing a claim at that time, which needs to be certified if over \$100,000.

Pursuing Claims: Key Issues

When pursuing claims that arise from COVID-19, contractors and the government will wrestle with the same foundational issues that lie at the core of any other contractual dispute: (a) liability, (b) causation, and (c) damages. Undoubtedly these issues take on a heightened and more pronounced significance in the event of unexpected and exigent circumstances like a global pandemic.¹⁵

Contract type is of paramount importance to COVID cost recovery, given that risk allocation between

contractor and government is effectively selected at the outset of contract award. We continue to see, for example, contractors under fixed-priced contracts, which allocate risk to the contractor, facing greater challenges in recovering for pandemic-related costs where no explicit government direction for performance beyond the original scope of the contract is provided.¹⁶ Beyond contract type, practitioners should be mindful that specific clauses relevant to obtaining schedule and cost relief also vary somewhat between fixed-price supply contracts,¹⁷ cost reimbursement and time and materials contracts,¹⁸ and contracts for commercial items.¹⁹

Claims vs. REAs: The Basics

Before addressing best practices and issues that contractors should be wary of when filing a COVID-related claim, we first define a “claim” and outline the distinction between a claim and a request for an equitable adjustment (REA).

Beginning with REAs, pursuant to the FAR, a contractor may submit a proposal seeking to have the contracting officer adjust the contract based on “changes or other conditions”—either at the written request of the contracting officer or if “the contractor deems an oral or written order to be a change to the contract[.]”²⁰ REAs often arise under the “Changes” clause,²¹ the “Changes and Changed Conditions” clause,²² and the “Differing Site Conditions” clause.²³ Through an REA a contractor can seek either compensation for a variety of direct or indirect costs (in the form of contract adjustment) or an adjustment to the time for completion of the project.²⁴ Each of these kinds of requests will need to be supported by a “detailed breakdown” that demonstrates to the contracting officer why the given REA is warranted.²⁵ Once an REA has been submitted, the contracting officer and contractor should negotiate in an attempt to reach an agreement. If, however, they cannot come to a consensus, the contracting officer may determine the equitable adjustment unilaterally.²⁶

Now turning to claims, pursuant to the Contract Disputes Act of 1978 (CDA),²⁷ a proper “claim” must (1) “relat[e] to a contract” and “be submitted to the contracting officer for a decision,” (2) “be in writing,” or (3) in the case of a government claim against the contractor, be “the subject of a written decision by the contracting officer.”²⁸ As for substance, any CDA claim submitted to a contracting officer must seek, “as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.”²⁹ In other words, a proper CDA claim must tell the contracting officer “exactly how much to pay the claimant in order to resolve the claim via accord and satisfaction.”³⁰

Nevertheless, contractors seeking monetary payment pursuant to the CDA should be aware that they may also be able to recover future costs without defeating the sum certain requirement. This is a particularly important tool

when filing COVID-related claims early on while pandemic costs continue to accrue.

Certainly there are qualifications that, if added, will undercut the sum certain such as “approximately,”³¹ “at least,”³² “no less than,”³³ and “well over [or] in excess of[.]”³⁴ And contractors filing COVID claims, or any claims, should be sure to avoid such vague terminology. On the other hand, a contractor’s CDA claim seeking future costs would not be deemed “an improper qualification” if, for example, the claim “notif[ies] the Government therein of a potential upward adjustment of the claimed amount.”³⁵ Thus,

a contractor is entitled to submit a claim in a ‘sum certain’ that utilizes forward pricing for future anticipated costs,[] that reserves its right to claim additional amounts in the future for costs to be later incurred as a result of a change,[] or that reserves its right to revisit the claimed ‘sum certain’ amount until the time that a final release is executed.³⁶

Though contractors may seek future costs without defeating the sum certain requirement, it is imperative to segregate actual, accrued costs from those that are based on estimates of future costs and not employ an REA or claim as a negotiation strategy.³⁷ In that way, contractors “unambiguously refer to costs which might be disallowed in the future.”³⁸ Particularly in these uncertain times, contractors submitting COVID-related CDA claims should consider adding language that will leave the door open to future costs, while ensuring that a core “sum certain” grounds their claim.

Claims and REAs are closely related as, oftentimes, a claim will be based on an earlier REA. Notably, though, because the preparation of an REA is ordinarily viewed by the FAR as a matter of contract administration, a contractor can usually recover costs related to preparing an REA.³⁹ Costs related to preparing CDA claims, however, cannot be recovered as such costs are considered to have been incurred as part of the “prosecution of a CDA claim” and are therefore unrecoverable.⁴⁰ On a more basic level, another distinction between claims and REAs is that a contractor’s submission only constitutes a “claim” if certain procedural requirements (that we have highlighted above and further explain below) are met.

Once a proper claim has been submitted to the contracting officer, a Contracting Officer’s Final Decision (COFD) will be rendered.⁴¹ The COFD will be a written decision in which the contracting officer ordinarily either grants or denies (in part or entirely) the contractor’s claim.⁴² The COFD must state the reasons for the decision reached, will inform the contractor of whatever rights it has under the CDA, and will often include specific findings of fact.⁴³ The reason for this is that “[t]he purpose of the CDA’s administrative claim process—including the requirement for a contracting officer’s final decision—[is] . . . ‘to facilitate resolution of contract disputes by negotiation, at the agency level, rather than by litigation.’”⁴⁴ As such, especially when bringing

COVID-related claims, contractors should do whatever possible to resolve any disputes directly with the contracting officer to avoid costly litigation. One practical suggestion that we offer is for contractors to communicate regularly with their contracting officers and to be as forthcoming as possible. Thus, for example, rather than simply submitting a claim, contractors should inform their contracting officers of any intention to submit a claim—which may even include providing to the contracting officer a draft of such claim prior to its formal submission.⁴⁵

Finally, if the COFD *denies* a contractor's claim, the contractor can appeal that decision.⁴⁶ There are two basic tracks for a CDA appeal. One option is to appeal that decision to an agency board within 90 days after receiving the COFD.⁴⁷ Alternatively, a contractor may bring an action directly to COFC—and may do so up to 12 months after receiving the COFD.⁴⁸ Although the boards and COFC possess concurrent jurisdiction over most CDA appeals, depending on the nature of the underlying claim and other considerations—such as the substantial difference between the statute of limitations for each “track”—a contractor may choose one forum over another.⁴⁹ In either event, the tribunal's decision will be final⁵⁰ and is then appealable to the U.S. Court of Appeals for the Federal Circuit within 120 days of the COFC or board decision.⁵¹

Procedural Considerations: Which Claim Procedures Are Particularly Important to Consider When Pursuing COVID-Related Claims?

Each of the enumerated steps in the procurement claims process brings with it certain procedural wrinkles. We now highlight which procedural rules of the claims process contractors should use to their benefit, procedural requirements contractors should be wary of, and other best practices that contractors should consider when pursuing COVID-related claims.

Certification

One of the requirements for a properly submitted CDA claim in excess of \$100,000 is that the claim be certified that it is being made in good faith, that the claim is accurate, and that the certifier is authorized to act on behalf of the contractor.⁵² For claims arising under section 3610 of the CARES Act, there is a seven-part “enhanced certification” that we reference later in this article. But for the standard certification, there are two notable clarifications of this statutory procedural requirement that contractors should utilize to their advantage—particularly when submitting COVID-related claims.

First, the CDA specifically notes that the claim certification “may be executed by an individual authorized to bind the contractor with respect to the claim.”⁵³ This could potentially be difficult in the present teleworking environment in which it may be difficult to track down the “proper” individual who is authorized to certify a CDA

claim. Luckily, courts have interpreted this provision broadly and have found that a contractor's senior personnel,⁵⁴ general counsel,⁵⁵ or even outside counsel⁵⁶ can properly certify a claim—provided that any such individual possesses “general authority over the affairs of the contractor” and is empowered to bind the contractor.⁵⁷ As such, in the current telework environment, contractors should consider taking advantage of the broad array of individuals who can certify a CDA claim and expeditiously submit their claims—rather than waiting to locate the individual who may be the most natural choice when doing so will delay the claims process.

Second, a recent decision from the ASBCA changed more than a decade of precedent concerning the very practical issue of electronic versus handwritten signatures.⁵⁸ Historically, the ASBCA had held that electronic signatures were insufficient to satisfy the CDA's certification requirement.⁵⁹ Recently, however, the ASBCA in *Kamaludin Slyman* reversed course and held that “so long as a mark purporting to act as a signature may be traced back to the individual making it, it counts as a signature for purposes of the CDA, whether it be signed in ink, through a digital signature application, or be a typed name.”⁶⁰ This too is an incredibly useful and welcome development that contractors should utilize in the current telework environment when submitting COVID-related, or any other, CDA claims. Instead of spending valuable time trying to scan or otherwise produce written signatures using “work from home” technology, contractors who are on the ASBCA “track” should take advantage of this rule change and promptly submit a claim with an electronically signed certification.

CDA claim certification should not slow the claims process down. Rather than missing a statutory deadline or neglecting to submit a claim altogether because of delays in preparing a proper certification, when a claim is top of mind for a contractor, submit it without delay—even if that means substituting the usual certifier or relying on an electronic signature at the ASBCA rather than a written one.

Timing Considerations

In a similar vein to the advice concerning certification, despite the exigent circumstances posed by the COVID-19 pandemic, contractors should be sure to submit CDA claims promptly. Although contractors may be tempted to delay in submitting CDA claims in reliance on the lengthy statute of limitations, we suggest that contractors submit their claims expeditiously.

To begin, we note that contractors must submit CDA claims to the contracting officer within the six years after the accrual of such claims.⁶¹ Nevertheless, as a practical matter—and as we encourage throughout this article—contractors should strike the iron while it is hot and make sure to file their claims while the facts and other surrounding circumstances are still fresh and pressing.

In the event that a contractor chooses not to submit its claim right away, we offer two important

considerations that contractors should keep in mind. First, taking a cue from the ASBCA's conclusion that Hurricane Andrew did not impact the CDA statute of limitations, contractors should similarly assume that the ongoing pandemic will not be an excuse for purposes of CDA timeliness.⁶² Additionally, as the Federal Circuit has recently made clear, given that the precise onset of the pandemic—and thus, by extension, the accrual of the likely bases for COVID-related claims—is somewhat uncertain, contractors should be conservative in calculating the six-year deadline for bringing their COVID-related claims under the CDA.⁶³

The takeaway: File claims quickly, or if not, be sure to carefully and conservatively calculate statutory deadlines with regard to the CDA statute of limitations—or any other claim-related deadlines, for that matter. As we further detail below, contractors face enough challenges in pursuing COVID-related claims on the merits; timeliness should not be the reason that a COVID-related claim fails.

Discovery and Other “Merits-Stage” Procedural Issues

Assuming contractors follow the above guidance concerning claim procedures, COVID-related claims should be able to proceed on the merits. And although some claims inevitably will be disposed of at the motion to dismiss stage, others will likely have enough merit to proceed through discovery. We highlight below the likely obstacle contractors will encounter on the merits when pursuing COVID-related claims.

Guidance that was recently provided by the CBCA with regard to discovery during the ongoing pandemic may prove instructive as contractors' COVID-related claims make their way through COFC and the boards.⁶⁴ In *4k Global-ACC Joint Venture, LLC*, the CBCA adjusted the discovery schedule that had been put into place before the onset of the pandemic. The Board noted that it “presume[d] that [COVID-19] will affect DOL's ability, if not 4k Global-ACC's ability, to produce paper copies of documents in the near term and may slow other discovery activities.”⁶⁵ Thus, the CBCA noted that “[r]ather than adopting a specific schedule for the completion of discovery and the establishment of a hearing date at the present time, the Board will await the parties' draft ESI review and production procedures before adopting a more complete discovery schedule[.]”⁶⁶

The CBCA's order in *4k Global-ACC Joint Venture, LLC* underscores an important and helpful consideration that contractors should keep in mind as their COVID-related claims progress on the merits: Tribunals would rather be flexible and adopt useful rules of the game instead of trying to fit a square COVID-shaped peg into a round ordinary discovery hole. Indeed, other tribunals that adjudicate CDA claims have reached similar decisions with regard to setting discovery and trial schedules during the ongoing pandemic—and continue to do so almost a year into the pandemic.⁶⁷

Absent any suggestion to the contrary, contractors

should never *assume* that any procedural rule has changed in light of the pandemic. In fact, we have highlighted procedures that are likely to remain unaffected by the existence of COVID. Nevertheless, assuming the pandemic continues as contractors' COVID-related claims progress, contractors should be proactive in seeking to reach a consensus with the government, and in turn approval from COFC or the boards, concerning sensible and practical adjustments to pre-COVID discovery and trial procedures. We expect that tribunals will continue to favor this flexible approach and contractors should seek to utilize the resulting practical benefits.

Other COVID-Specific Procedural Guidance: Virtual Oral Arguments

One COVID-specific development that could have sizable practical implications, at least for the foreseeable future, is the proliferation of virtual oral arguments. The Federal Circuit, COFC, ASBCA, and CBCA all have adopted some form of mandatory or permissive virtual oral arguments.⁶⁸ This added flexibility—or, for the Federal Circuit and COFC, this requirement—could potentially influence contractors' CDA claim strategy.⁶⁹ Given this new reality, contractors should be sure to think about the procedural rules of their chosen forum and whether the COVID-specific guidance pertaining to in-person proceedings (or lack thereof) can provide some added benefit that would not ordinarily be available in non-COVID times.

Merits Considerations: What Can Contractors Do to Maximize the Likelihood of Recovery on the “Merits” When Pursuing COVID-Related Claims?

Now that we have laid out the ways in which CDA claims procedures may need to be adjusted during this unique period, we next turn to the substance of the COVID-related REAs, claims, or appeals themselves. What follows is a discussion of (a) the presumptive theories of recovery that exist for contractors to pursue COVID-related claims, (b) the likely hurdles that contractors will have to overcome in pursuing such theories, and (c) best practices contractors should adhere to in order to maximize their likelihood of recovery.

Section 3610 of the CARES Act

Section 3610 of the CARES Act⁷⁰ allows agencies to reimburse, at the minimum applicable contract billing rates (not to exceed an average of 40 hours per week), any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of government and contractor personnel, during the public health emergency declared for COVID-19 on January 31, 2020. In simplified terms, section 3610 of the CARES Act offers discretionary authority for contracting officers to use available funds to reimburse contractors and their subcontractors for certain expenses used to keep their

workforces in a “ready state.”⁷¹ Importantly, section 3610 is merely an authorization for reimbursement. At the date of this writing, Congress has still not appropriated funds in support of section 3610. Yet, contracting officers have discretion to use existing program funds to reimburse section 3610 costs.

When Recoverable?

In terms of timing, section 3610 reimbursements are available for covered paid leave costs from March 27, 2020 (the date the CARES Act passed), through a deadline extended to September 30, 2021, under the American Rescue Plan Act of 2021 (passed March 11, 2021).⁷² Contractors seeking reimbursement for paid leave and other COVID costs prior to March 27, 2020, may use standard contract authorities otherwise available. Likewise, because section 3610 covers only specified paid leave costs for those who cannot work remotely and are needed in a ready state, standard contract provisions must also be used to recover all other non-section 3610 COVID-related costs no matter when incurred.

Where Recoverable?

The paid leave reimbursement under section 3610 may be for work that would have been performed at either a government-owned or leased facility or contractor-owned or leased facility approved by the government.

How Recoverable?

Following section 3610's enactment, a number of agencies issued guidance on obtaining reimbursement under this provision. Federal agencies approached recovery under section 3610 differently, in terms of both billing and prerequisites. DoD, for example, after a flood of guidance, months of consideration, and requests for public comment, issued on August 18, 2020, final guidance to assist defense contractors and contracting officers in handling reimbursements under section 3610 of the CARES Act. As part of that guidance, DoD issued Class Deviation 2020-O0021 (Rev. 2),⁷³ which included a new DFARS clause 252.243-7999⁷⁴ for inclusion in contracts with section 3610 reimbursements. At that time, DoD likewise updated a separate cost principle at DFARS 231.205-79, outlined in Class Deviation 2020-O0013 (Rev. 3).⁷⁵

DoD's memoranda accompanying these Class Deviations provide more detailed guidance and offer three distinct procedural methods of obtaining recovery under section 3610: (1) single contracts with reimbursement under \$2 million, (2) multiple contracts that are logically grouped under a single program or contracting activity, and (3) enterprise-wide.⁷⁶ In all cases, the contractor must demonstrate it is an “affected contractor” and the amount of section 3610 reimbursement, if any, will be made only after submission and analysis of each section 3610 reimbursement request. The guidance also specifies that section 3610 reimbursements may be inclusive of both cost-type and fixed-price contracts,⁷⁷ and that the amount of

reimbursement may not include profit or fee and is subject to the availability of funds. Additionally, the contractor must certify, among other representations, that the claim is accurate, made in good faith; that it is not duplicative of any other reimbursement (via loan programs or other requests); and that appropriate subcontractor costs have been included. The breadth of guidance issued from DoD is extensive and has evolved over time. Thus, it is important for practitioners to be mindful of being up to date on the most recent guidance on the Defense Contract and Pricing COVID-19 Resource Center.⁷⁸

If you have a contract with a federal agency other than DoD, and you have costs that arguably fall under section 3610, be sure to investigate whether agency-specific guidance has been issued regarding reimbursement for these costs.

Seeking Costs Under the Changes Clause

Another path (outside of the authorization provided under section 3610) for seeking costs for COVID-related claims pursuant to the CDA would appear to be under the “Changes” clause. There are multiple “Changes” clauses and alternates for various contract types and scenarios.⁷⁹ We discuss the “Changes—Fixed Price” clause at FAR 52.243-1, appearing in fixed-price contracts for supplies and services (optional for research and development),⁸⁰ to illustrate the mechanics of the clause and considerations for contractors.

Under the “Changes” clause, when a contracting officer orders a unilateral change to the general scope of the contract, the contractor is entitled to an equitable adjustment and the contract “shall” be modified to reflect increases (or decreases) in cost and/or schedule associated with that change.⁸¹ Asserting a right to a change must occur within 30 days from the date of receipt of the written change order, although that time limitation is often not enforced if no prejudice would result.⁸² The general rule is that changes are far easier to demonstrate if they have been documented and separately accounted for.

A key challenge some contractors may face in seeking COVID-related costs under the Changes clause may be in demonstrating contracting officer direction. A recent decision from the CBCA, although not discussing COVID-19, illustrates this point.

In *Pernix Serka Joint Venture v. Department of State*,⁸³ a contractor suspended work unilaterally to protect its employees in West Africa due to an outbreak of the Ebola virus. Despite being entitled to a schedule extension under an excusable-delays clause, the contractor failed to recover any claimed costs stemming from that decision, as the agency refused to provide that direction or approve the contractor's planned actions. The CBCA denied the contractor's appeal seeking an equitable adjustment for costs of suspending work and maintaining the health and safety of workers.

Pernix JV submitted a claim for increased costs for differing site conditions, disruption of work, and

demobilization and remobilization of personnel, all related to its response to the Ebola epidemic. Pernix JV brought claims under both a cardinal change and constructive change theory, and likewise asserted that the State Department had breached its implied duty to cooperate.⁸⁴ The board found Pernix JV assumed the risk of such unforeseen costs under this firm-fixed-price contract, and even though the contractor's delay was excused, it acted unilaterally in its decision to suspend work and could not demonstrate a change to the contract, nor a breach of the government's implied duty to cooperate.

Because the "Government never changed the description of work it expected from the contractor" and did not give directions to the contractor on how to respond to the outbreak,⁸⁵ the changes caused by the Ebola virus were "interstitial in nature and [thus] . . . not materially alter[ing] the nature of the bargain into which the plaintiff [. . .] entered."⁸⁶

The *Pernix* case highlights the challenges a contractor may face in demonstrating entitlement to a change where its agency customer has refused to provide direction in the face of an outbreak, like COVID-19. Outside of suspending work and evacuating employees, contractors could face substantial costs arising from the COVID-19 outbreak, such as delays in accessing facilities or supplies, staffing shortages, and reduced productivity. Yet, as *Pernix* makes plain, where these risks fall will depend on the type of contract at issue and the degree of government direction or approval of COVID-mitigation costs.

Under the COVID-19 pandemic, the defense industrial base (among other industries) was identified as a Critical Infrastructure Sector by the Department of Homeland Security and required to continue to perform.⁸⁷ At the same time, contractors were directed to "follow guidance from the Centers for Disease Control and Prevention (CDC) as well as State and local government officials regarding strategies to limit disease spread."⁸⁸

Recognizing that "COVID-19 will affect the cost, schedule, and performance of many DoD contracts,"⁸⁹ the DoD (among other agencies) has sanctioned the ability of contracting officers to direct changes or otherwise modify contracts to allow contractors' recovery for COVID-related costs. The DoD states that COs should use "regulatory tools" to address impacts of COVID-19,⁹⁰ including where the contractor may be entitled to an equitable adjustment to contract price using the standard FAR "Changes" clauses (e.g., FAR 52.243-1 [fixed-price contracts] or FAR 52.243-2 [cost-reimbursement contracts]).⁹¹

To enable maximum recovery, contractors should engage their COs with candid, early discussions regarding COVID-19 expected impacts. Doing so will enable a contractor to obtain the direction and/or ratification needed to demonstrate it has not acted unilaterally. Documenting those communications and costs is likewise imperative, given it is the contractor's burden to demonstrate entitlement and injury.

In some circumstances, contractors have prevailed in

obtaining costs due to unforeseen outbreaks under the "Changes" clause. In *Valerie Lewis Janitorial v. Department of Veterans Affairs*,⁹² the CBCA awarded the contractor's costs for enhanced cleaning following a bacterial outbreak because those costs stemmed from a change to the underlying firm-fixed-price contract for janitorial services. The board found the evidence demonstrated that the outbreak (in February 2012, following contract award) resulted in "a significantly heightened concern about controlling infection."⁹³ Further, the evidence showed that the contracting officer instructed Lewis by email to implement the two-step cleaning process with specific directions.⁹⁴

The *Lewis* case is instructive on several measures. First, obtaining contracting officer direction is essential. This may sometimes be more challenging when, as here, a single change (enhanced cleaning due to bacterial outbreak) is entwined with other directions/perceived changes to the scope of the original work effort. Contractors may benefit from strategically narrowing the scope of the directions sought to avoid future complexities. Lewis employed that strategy to obtain a written modification solely on the enhanced cleaning.

Second, when actual costs are not readily available or are difficult to quantify, the *Lewis* case supports the willingness of boards to accept estimates. This is especially true where the government clearly ordered the change, and where conditions may have made tracking costs with precision difficult.⁹⁵ Though board decisions vary in their flexibility regarding estimates, in this case, the board appeared sympathetic to the challenges associated with actually tracking each staff member's additional time spent conducting enhanced cleaning for each room at each location. But don't expect boundless acceptance of estimates. The board rejected Lewis's own estimate (substantially greater than that of the government) because it lacked the same level of quantifiable evidence for support as the VA's, which included a time study of observed, enhanced, two-step cleaning.⁹⁶

The *Lewis* case thus also confirms the need to tie estimates to actual costs and recorded time where possible to support future requests for equitable adjustment and claims. To the extent such segregation is challenging or impracticable (as might be argued in *Lewis*), contractors should seek to record as much evidence as possible (or conduct a sampling) to justify future estimates of costs and seek to obtain CO ratification of those methods where possible.

Note, too that the *Lewis* case involved a contract for cleaning services, making it far easier to demonstrate a change to the costs associated with an enhancement to those cleaning services. More difficult is demonstrating a change when its impact may not directly relate to a change to the performance specification, but instead represents a change to the conditions under which a contractor must perform (i.e., the social distancing, rotating work shifts, and other operational changes, including suspensions of work) that were unforeseen at the time of contracting.

While these changes may affect both costs and schedule, there is less clarity as to whether such costs are as easily recoverable as those identified in *Lewis* (even if schedule relief is assured under an excusable-delays clause).

Termination for Convenience and Stop Work Orders

Another likely basis for REAs or claims brought under the CDA relating to the ongoing pandemic are those premised on the related statutory bases of termination for convenience and stop work orders. Both of these theories will enable contractors who suffered COVID-related setbacks to seek payment pursuant to the CDA.

Essentially, if a contractor can meet the elements of excusable delay, in addition to seeking an extension of time under the CDA, a contractor can also seek compensation for its costs up until that point—as such termination is no longer for default, it has now been converted to one for convenience.⁹⁷ This is a very valuable tool for contractors to use when submitting CDA claims—particularly with regard to COVID-related claims—under applicable circumstances.

Another important way that contractors can recover COVID-related costs is in the event of a stop-work order.⁹⁸ At various points throughout this now yearlong pandemic, contracting officers may have ordered the stoppage of work during contract performance. Depending on the result of that order, contractors may have various mechanisms through which they can recover costs resulting from the stop-work order. Contractors should ensure that they carefully consider into which scenario they fall and, in turn, what costs they will be able to recover.⁹⁹ Common examples of costs that contractors can recover in a stop-work order scenario are idle labor and equipment.¹⁰⁰ Especially during a pandemic and in a largely teleworking environment, contractors should carefully ensure that they maximize their recovery for any part of their workforce or expensive equipment that is rendered idle by a stop-work order.

Excusable Delay

Although largely used to extend performance, rather than recover costs, we would be remiss not to cover the FAR's excusable-delays clause. Epidemics and quarantine restrictions have long provided a potential basis for excused performance.¹⁰¹ This clause should theoretically include any inability to perform as a result of stay-at-home orders and other COVID-related limitations.

Nevertheless, contractors must be cognizant of the equally well-established need to demonstrate that (i) any alleged delay in performance was indeed the direct result of the alleged epidemic or quarantine restriction and (ii) the delay was out of the contractor's control and was not the result of any fault or negligence that could be attributed to the contractor (and any relevant subcontractors).¹⁰² Thus, although a pandemic's impact on contractor performance *can* be deemed an excusable delay,

neither COFC nor the boards have had occasion to apply this provision to the current pandemic. Nevertheless, earlier decisions that grappled with similarly exigent circumstances should guide contractors' structuring of their excusable delay claims.

Generally speaking, it is clear that claims brought pursuant to the CDA and premised on a theory that a public health concern like COVID-19 delayed performance are cognizable. For example, in *Fluor Intercontinental, Inc.*,¹⁰³ the CBCA held that the "significant turmoil" that unforeseeably arose during the contractor's performance in constructing an embassy in Haiti—and that resulted in the urged evacuation of all American personnel—constituted excusable delay.¹⁰⁴ Specifically, the CBCA noted—citing a Court of Claims decision—that "[b]ecause neither this contractor nor the contracting officer would be aware of all of the bases underlying the change in status at the embassy and the scope and duration of any particular perceived threats, it was commercially impracticable to perform critical path work."¹⁰⁵ The ASBCA recognized this same argument and granted one contractor's request for extended performance where performance was delayed due to employees' need to recover from typhoid injections.¹⁰⁶

The takeaway, then, is that excusable delay presents a viable claim for contractors facing similar circumstances to the present COVID-19 pandemic. Notably, though, in most circumstances, a successful excusable delay claim will only entitle a contractor to extend the time in which it may complete performance.¹⁰⁷ So, although the government will be unable to terminate for default¹⁰⁸ or recover actual or liquidated damages based on the delay,¹⁰⁹ the contractor will nevertheless be unable to recover any additional costs caused by the underlying reason for the delay. There have been a few instances in which contractors *have* been able to recover some costs based on an excusable delay theory, but in most such cases there was some other component of the claim that provided the contractor with the "hook" to seek costs.¹¹⁰ Outside of these outliers, the overwhelming weight of authority suggests that costs are simply unavailable when claiming excusable delay alone. Therefore, contractors should not rely on CDA claims premised on excusable delay as a cost-recovery technique.

Even if a contractor's last line of defense in the present COVID context is to seek additional time based on a theory of excusable delay, courts and the boards have made clear that not all such claims will succeed—irrespective of the exigency of the present circumstances. In fact, there is a well-established body of case law in which REAs or claims premised upon excusable delay have been denied in circumstances similar to the present global pandemic.¹¹¹ Tracking the FAR and the factors enumerated by the courts, we suggest two areas that contractors should focus on in trying to strengthen claims premised on an excusable-delays theory.

First, contractors should ensure they are carrying their burden of proof—that is, to prove that the given occurrence (here, COVID) actually caused the delay. This sounds elementary, but viable CDA claims in circumstances like COVID have failed simply because the contractor did not meet its burden of proof.¹¹²

For example, the Government Printing Office Board of Contract Appeals (GPOBCA) in *Asa L. Shipman's Sons, Ltd.* confronted a situation similar to the present-day contractors' presumptive COVID-related excusable delay claims.¹¹³ There, a contractor sought relief claiming that its failure to perform was based on a flu epidemic in New York City that occurred at the time set for contract performance.¹¹⁴ Ultimately, the GPOBCA denied the contractor's claim but helpfully provided a road map for future contractors to follow in asserting excusable delay. Namely, the GPOBCA pointed to the fact that the contractor did not provide evidence as to "(a) the precise duration of the epidemic; (b) what personnel . . . were affected by the flu and the periods during which they were absent because of the disease; (c) whether such absences in fact caused the delay in performance and if so the extent of such delay; and (d) what efforts were made during such absences by the use of overtime or other measures to keep the work going."¹¹⁵

Contractors seeking to pursue an excusable-delays claim should be sure not to take anything about the current pandemic as a given. Thus, when preparing a COVID-related REA, claim, or appeal, contractors should be sure to explain *with specificity* how and why the pandemic has impacted performance. And such contentions should be supported by concrete examples of such impact with regard to particular personnel and at specific times. Furthermore, as the GPOBCA suggested in *Asa L. Shipman's Sons*, contractors should be sure to describe what measures were taken to mitigate the impact of COVID on contract performance. That, in turn, provides a perfect segue into the second factor contractors must consider when pursuing excusable-delays claims.

Second, contractors do well by demonstrating that the given occurrence (here, COVID-19) was unforeseeable and that appropriate mitigation occurred. When the pandemic began, no one could have possibly foreseen that anything like this could happen. Yet, since March of 2020, we have been awash in news of the pandemic, raising questions about the foreseeability of COVID impact since then. Contractors' best recourse to defeat the suggestion that COVID impacts are foreseeable is to argue that the pandemic has been far from predictable (even for the experts), and little could we know that new strains of the virus, even more transmittable, would arise. Regardless, the foreseeability of COVID impacts could be a disputed issue, alongside the second part of this inquiry, namely, whether contractors appropriately mitigated COVID's impact under the circumstances. Again, a number of decisions addressing non-COVID scenarios are instructive.

Generally, courts and the boards have held that circumstances that are foreseeable cannot be the basis for an excusable delay claim.¹¹⁶ This would include things like ordinary inclement weather, which contractors should expect and for which contractors are expected to have in place ways to mitigate the impact of such on performance.¹¹⁷ Notably, contract type may play at least some role in dictating a contractor's likelihood of success in pursuing a COVID-related claim.

With regard to claiming excusable delay when performing fixed-price construction contracts, the FAR specifically states that "[t]he delay in completing the work arises from *unforeseeable causes* beyond the control and without the fault or negligence of the Contractor."¹¹⁸ Conversely, the FAR makes no mention of the unforeseeability requirement when describing the elements of excusable delay concerning the performance of fixed-price supply and services contracts,¹¹⁹ fixed-price research and development contracts,¹²⁰ or contracts for cost reimbursement and time and materials contracts.¹²¹ The omission of the unforeseeability language from these FAR provisions may suggest that contractors need not prove that COVID-19 was unforeseeable when pursuing excusable-delays claims related to the aforementioned contract types. Nevertheless, the courts and boards seem to have sometimes interposed this requirement even when applying FAR provisions and when discussing contract types that do not explicitly use unforeseeability language.¹²² As such, contractors should be sure to establish the unforeseeability of circumstances upon which their excusable delay claims are premised.

To properly establish unforeseeability, even for the kinds of occurrences that are deemed unforeseeable generally, the GPOBCA in *Asa L. Shipman's Sons* emphasized that contractors must demonstrate why the occurrence was unforeseeable and that the contractor took every reasonable precaution to minimize the delay's effect. Thus, for example, in *Jennie-O Foods, Inc. v. United States*, the Court of Claims upheld the Department of Agriculture Board of Contract Appeals (AGBCA) decision denying the contractor's claim that its performance should be excused due to a supplier's turkey epidemic.¹²³ The court explained, although the turkey epidemic could have constituted excusable delay, because the contractor did not demonstrate that it would have been impractical to obtain turkeys from another source, the contractor failed to show that it did "enough to obtain an adequate supply of healthy turkeys to meet its contractual obligations."¹²⁴

Accordingly, even in a COVID environment, contractors who may seek recourse down the road based on an excusable delay theory should ensure that they have taken every reasonable step to minimize the pandemic's impact on performance. Taking a cue from *Jennie-O Foods*, before attempting to extend the time for performance based on COVID-related effects, contractors should first see if there is some reasonable step they can

take to provide substitute performance. And as we learn more about the pandemic and its impact, this calculus should mature as well.

Conclusion

Ultimately, we believe that this pandemic will generate numerous REAs, claims, and appeals brought pursuant to the CDA for years to come. If contractors consider the questions posed and follow the enumerated best practices, they will be far better-positioned to ensure they obtain the relief they seek. And in the midst of juggling so many things during a difficult global pandemic, by adhering to these guidelines, contractors can ensure that preparing, submitting, and litigating COVID-related claims is one less thing that has to be difficult. 

Endnotes

1. See, e.g., *How the Coronavirus Pandemic Is Impacting Contractors*, BLOOMBERG GOV'T, <https://about.bgov.com/how-the-coronavirus-pandemic-is-impacting-contractors/> (last visited Jan. 29, 2021) [hereinafter BLOOMBERG GOV'T].

2. See, e.g., Memorandum from Ellen M. Lord, Under Sec'y of Def., Defense Industrial Base Essential Critical Infrastructure Workforce (Mar. 20, 2020), https://www.acq.osd.mil/dpap/pacc/cc/docs/COVID-19/Defense_Industrial_Base_Essential_Critical_Infrastructure_Workforce.pdf [hereinafter DIB Memorandum].

3. See, e.g., Gov't of D.C., Stay at Home Order, Mayor's Order 2020-054 (Mar. 30, 2020), <https://mayor.dc.gov/release/mayor-bowser-issues-stay-home-order>; State of Md. Exec. Dep't, Order of the Governor of the State of Maryland, No. 20-03-30-01 (Mar. 30, 2020), <https://governor.maryland.gov/wp-content/uploads/2020/03/Gatherings-FOURTH-AMENDED-3.30.20.pdf>; Commw. of Va. Off. of Governor, *Temporary Stay at Home Order Due to Novel Coronavirus (Covid-19)*, EO-55 (Mar. 30, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf).

4. Memorandum from Russell T. Vought, Acting Director, Off. of Mgmt. & Budget, Updated Guidance for the National Capital Region on Telework Flexibilities in Response to Coronavirus (Mar. 15, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/03/M20-15-Telework-Guidance-OMB.pdf>.

5. See BLOOMBERG GOV'T, *supra* note 1.

6. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020). Section 3610 provides authorization but no independent funding for certain paid leave costs.

7. Congress enacted tax credits under Division G of the Families First Coronavirus Response Act (Pub. L. No. 116-127, 134 Stat. 178 (2020)); and small business loans, paycheck protection programs, and certain paid leave costs under the CARES Act, with section 3610 (paid leave costs) extended through March 31, 2021, by section 1002 of the Consolidated Appropriations Act, 2021 (Pub. L. No. 116-260).

8. We will refer to both the ASBCA and the CBCA, collectively, as "the boards."

9. See, for example, Defense Pricing and Contracting's COVID-19 guidance and resource information at *Defense Pricing and Contracting COVID-19 Resource Center*, DEP'T OF DEF., <https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html> (last visited Feb. 2, 2021) [hereinafter DPC COVID-10 Resources], which lists DPC Memorandums, Class Deviations, Frequently Asked Questions, USD(A&S) and USD(C) Memorandums, Military Component Memorandums, and OMB Resources.

10. Chapter 1 of title 48 of the Code of Federal Regulations is

known as the Federal Acquisition Regulation (FAR). Throughout, we cite to the FAR followed by the subsection number in lieu of citing to title 48.

11. The Defense Federal Acquisition Regulation Supplement (DFARS) is chapter 2 of the FAR supplement. Hereinafter, we cite to the relevant regulations using DFARS followed by the subsection number.

12. FAR 52.242-14 (Suspension of Work); FAR 52.242-15 (Stop Work Order).

13. FAR 52.243-1 through 52.243-4; FAR 52.212-4(c) (commercial contract).

14. E.g., FAR 49.201.

15. See, e.g., *Hong Kong Islands Line Am. S.A. v. Distrib. Servs. Ltd.*, 795 F. Supp. 983, 989 (C.D. Cal. 1991) (discussing liability, causation, and damages with regard to strikes and riots that impacted performing parties' ability to ship cargo under the contract), *aff'd*, 963 F.2d 378 (9th Cir. 1992).

16. See, e.g., *Pernix Serka Joint Venture v. Dep't of State*, CBCA No. 5683, 2020 WL 1970843 (Apr. 22, 2020), slip op. available at [https://www.cbca.gov/files/decisions/2020/SOMERS_04-22-20_5683__PERNIX_SERKA_JOINT_VENTURE%20\(Decision\).pdf](https://www.cbca.gov/files/decisions/2020/SOMERS_04-22-20_5683__PERNIX_SERKA_JOINT_VENTURE%20(Decision).pdf).

17. FAR 52.249-8(c).

18. FAR 52.249-14.

19. FAR 52.212-4(f).

20. Gen. Serv. Acquisition Manual (GSAM) 552.243-71(b) (Equitable Adjustments).

21. FAR 52.243-4.

22. FAR 52.243-5.

23. FAR 52.236-2.

24. GSAM 552.243-71(d), (e).

25. *Id.*

26. *Id.* at (n).

27. 41 U.S.C. § 7101 et seq.

28. *Id.* § 7103(a). This piece focuses on (a)(1)–(2)—contractor claims against the government—rather than government claims against the contractor. Nevertheless, it is worth highlighting that the government—in asserting COVID-related claims against contractors—will want to follow all of the best practices that we enumerate and will have to overcome all of the same hurdles that we discuss below.

29. FAR 2.101; see FAR 33.201.

30. *Johnson Lasky Kindelin Architects, Inc. v. United States*, No. 19-1419C, 2020 WL 7649972, at *17 (Fed. Cl. Dec. 23, 2020).

31. *J. P. Donovan Constr., Inc.*, ASBCA No. 55335, 10-2 B.C.A. ¶ 34,509, at 170,171, *aff'd*, 469 F. App'x 903 (Fed. Cir. 2012); *Van Elk, Ltd.*, ASBCA No. 45311, 93-3 B.C.A. ¶ 125,995, at 129,237 (Apr. 20, 1993).

32. *Precision Standard, Inc.*, ASBCA No. 55865, 11-1 B.C.A. ¶ 34,669, at 170,788 (Jan. 20, 2011).

33. *Sandoval Plumbing Repair, Inc.*, ASBCA No. 54640, 05-2 B.C.A. ¶ 33,072, at 163,933 (Sept. 14, 2005).

34. *Eaton Cont. Servs., Inc.*, ASBCA No. 52888 et al., 02-2 B.C.A. ¶ 32,023, at 158,267–69 (Oct. 9, 2002).

35. *Comput. Scis. Corp.*, ASBCA No. 27275, 83-1 B.C.A. ¶ 16,452, at 81,843 (Mar. 23, 1983).

36. *Crane & Co., Inc.*, 16-1 B.C.A. (CCH) ¶ 36,539 (Nov. 8, 2016) (citing *Comput. Scis. Corp.*, 83-1 B.C.A. ¶ 16,452, at 81,843; *Ball Aerospace & Techs. Corp.*, ASBCA No. 57558, 11-2 B.C.A. ¶ 34,804, at 171,276 (July 20, 2011); and *Zafer Tahhuh Insaat ve Ticaret A.S.*, ASBCA No. 56770, 12-1 B.C.A. ¶ 34,951, at 171,831 (Sept. 14, 2011)).

37. The *Daewoo* case is instructive. See *Daewoo Engineering and Construction Co. Ltd. v. United States*, 557 F.3d 1332 (2009). In *Daewoo*, the U.S. Court of Appeals for the Federal Circuit upheld a trial court's assessment of over \$50 million in penalties against a contractor for having submitted a fraudulent REA. The contractor submitted an REA for both actual and future costs (a price adjustment), based on increased costs stemming from site complications.

The government counterclaimed for damages under the Contract Dispute Act, the False Claims Act, and a special plea in fraud and sought forfeiture of Daewoo's claims under 28 U.S.C. § 2514.

The Federal Circuit held that, although the contractor's legal theories were sound, the cost calculation was fraudulent because, among other reasons, it was a baseless negotiation ploy that assumed that the government was responsible for each day of additional performance beyond the original contract period without even considering whether there was any contractor-caused delay or delay for which the government was not responsible. *Daewoo*, 557 F.3d at 1338. Further, Daewoo's claim preparation witnesses inconsistently referred to and interchanged actual, future, estimated, calculated, and planned costs. *Id.*

38. *Ball Aerospace & Techs.*, 11-2 B.C.A. ¶ 34,804, at 171,276.

39. See *Northrop Grumman Sys. Corp. Space Sys. Div.*, ASBCA No. 54774, 10-2 B.C.A. (CCH) ¶ 34,517 (July 22, 2010) (discussing FAR 31.205-47).

40. *Id.* (citing FAR 31.205-47).

41. 41 U.S.C. § 7103(d).

42. *Id.* § 7103(e).

43. *Id.*

44. *Johnson Lasky Kindelin Architects, Inc. v. United States*, No. 19-1419C, 2020 WL 7649972, at *17 (Fed. Cl. Dec. 23, 2020) (quoting *N. Star Alaska Hous. Corp. v. United States*, 76 Fed. Cl. 158, 184 (2007)).

45. *Phoenix Data Sols. LLC*, ASBCA No. 60207, 18-1 B.C.A. (CCH) ¶ 37,164 (Oct. 2, 2018) (noting that the "CDA's claims process [] encourages the exchange of information between the contracting officer and the contractor[]").

46. 41 U.S.C. § 7104(a).

47. *Id.* As highlighted above, the primary boards that adjudicate such appeals are the ASBCA and the CBCA. However, there are a variety of other agency boards—such as the Postal Service Board of Contract Appeals—that also possess jurisdiction to hear CDA appeals. See *id.* § 7105(e)(1)(C), (D).

48. *Id.* § 7104(b). Although we have characterized both of these "tracks" as appeals, we note that technically COFC review is *de novo*. *Id.* ("[I]n lieu of appealing the decision of a contracting officer under section 7103 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims[]"). We nevertheless refer to both as appeals to contrast a board or COFC action from a "claim" submitted to a contracting officer.

49. For example, given the ASBCA's experience and deep proficiency in resolving claims that are unique to the military branches, defense contractors will often choose to pursue their CDA appeals before the ASBCA. On the other hand, COFC cases are ordinarily resolved more expeditiously. See *Contract Disputes Act Forum Selection*, WARD & BERRY, PLLC, <https://www.wardberry.com/gov-con/contract-disputes-act-forum-selection/> (last visited Jan. 30, 2021).

50. See *Bonneville Assocs. v. United States*, 43 F.3d 649, 653 (Fed. Cir. 1994).

51. 41 U.S.C. § 7107(a)(1).

52. *Id.* § 7103(b)(1).

53. *Id.* § 7103(b)(2).

54. *E.g.*, *Donald M. Drake Co. v. United States*, 12 Cl. Ct. 518, 520 (1987).

55. *Johnson Controls World Servs., Inc. v. Garrett*, 987 F.2d 738, 739 (Fed. Cir. 1993).

56. *Flying Horse v. United States*, 49 Fed. Cl. 419, 428 (2001).

57. See *Kiewit/Tulsa-Hous. v. United States*, 981 F.2d 531, 533 (Fed. Cir. 1992); see also FAR 33.207(c)(2)(ii).

58. *Kamaludin Slyman CSC*, ASBCA No. 62006, 20-1 B.C.A. (CCH) ¶ 37,694 (Sept. 25, 2020).

59. *NileCo Gen. Contracting LLC*, ASBCA No. 60912, 17-1 B.C.A. ¶ 36,862 (Sept. 27, 2017); *ABS Dev. Corp.*, ASBCA No. 60022 et al., 16-1 B.C.A. ¶ 36,564 (Nov. 17, 2016); *Tokyo Co.*,

ASBCA No. 59059, 14-1 B.C.A. ¶ 35,590 (Apr. 23, 2014); *Tekno-craft Inc.*, ASBCA No. 55438, 08-1 B.C.A. ¶ 33,846 (Apr. 3, 2008).

60. 20-1 B.C.A. (CCH) ¶ 37,694.

61. 41 U.S.C. § 7103(a)(4)(A).

62. *Dynatech Bldg. Sys. Corp.*, ASBCA No. 47462, 95-1 B.C.A. (CCH) ¶ 27,325 (Nov. 21, 1994) ("We note initially that if Dynatech's ability to file a termination for convenience claim was truly hampered by Hurricane Andrew, then it could have requested an extension from the contracting officer. Dynatech failed to take this step and has, thus, suffered from its own inaction.").

63. See *Elec. Boat Corp. v. Sec'y of Navy*, 958 F.3d 1372 (Fed. Cir. 2020).

64. *4k Glob.-Acc Joint Venture, LLC*, CBCA No. 6683, 20-1 B.C.A. (CCH) ¶ 37,568 (Apr. 3, 2020).

65. *Id.*

66. *Id.*

67. See, e.g., *City of Wilmington, Del. v. United States*, Fed. Cl. 16-1691, ECF No. 89 (Dec. 2, 2020) (further continuing trial to Apr. 2021) & ECF No. 82 (Sept. 2, 2020) (adjusting ordinary trial and pre-trial procedures based on the pandemic); *Frank Penna et al. v. United States*, Fed. Cl. No. 16-1545, ECF No. 96 (Apr. 14, 2020) (continuing trial indefinitely due to ongoing COVID-19 pandemic).

68. See U.S. Ct. of App. for the Fed. Cir., Order, *Conducting Oral Arguments* (May 18, 2020), <http://www.cafc.uscourts.gov/sites/default/files/rules-of-practice/Administrative-Orders/AdministrativeOrder-2020-02-05182020.pdf>; U.S. Ct. of Fed. Cl., *General Order* (June 5, 2020), https://www.uscfc.uscourts.gov/sites/default/files/general_order_in_person_proceedings_20200605.pdf; Armed Servs. Bd. of Cont. App., *General Guidance for Proceedings Conducted Using Video-Conferencing* (Aug. 28, 2020), <https://www.asbca.mil/Rules/forms/GENERAL%20GUIDANCE%20FOR%20CONDUCTING%20VIRTUAL%20PROCEEDINGS%20-%20208.28.2020.pdf>; Civilian Bd. of Cont. App., *Virtual Proceeding Protocol Executive Summary*, <https://www.cbca.gov/howto/ExecSummaryCBCAVirtualProceedingProtocol.pdf> (last visited Jan. 31, 2021).

69. Whereas during non-COVID times a party may choose to go to COFC due to its national jurisdiction, a virtual experience permits these forums to at least feel more "national." Furthermore, virtual hearings could reduce costs and resources needed to orchestrate in-person hearings, perhaps persuading more contractors to continue to pursue claims rather than negotiate a settlement. In such cases, the complexity and length of the matter may be a factor, with no certainty of when virtual hearings may shift back to in person.

70. *Coronavirus Aid, Relief, and Economic Security (CARES) Act*, Pub. L. No. 116-136, 134 Stat. 281 (2020).

71. Section 3610 of the CARES Act states:

Notwithstanding any other provision of law, and subject to the availability of appropriations, funds made available to an agency by this Act or any other Act may be used by such agency to modify the terms and conditions of a contract, or other agreement, without consideration, to reimburse at the minimum applicable contract billing rates not to exceed an average of 40 hours per week any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, but in no event beyond September 30, 2020. Such authority shall apply only to a contractor whose employees or subcontractors cannot perform work on a site that has been approved by the Federal Government, including a federally-owned or leased facility or site, due to facility closures or other restrictions, and who cannot telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for COVID-19: 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.

72. Section 1002 of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (Dec. 27, 2020), extended the date through which paid leave may be taken to be eligible for reimbursement under section 3610 of the CARES Act. Section 4015 of the American Rescue Plan Act of 2021, Pub. Law No. 117-2 (Mar. 11, 2021), amends CARES Act section 3610 by striking “September 30, 2020” and inserting “September 30, 2021.”

73. Memorandum from Off. of Under Sec’y of Def., Class Deviation—Section 3610 Reimbursement Requests, <https://www.acq.osd.mil/dpap/policy/policyvault/USA000097-21-DPC.pdf> (last visited Feb. 2, 2021).

74. DFARS 252.243-7999: Section 3610 Reimbursement (DEVIATION 2020-O0021) is to be used when modifying contracts, task orders, or delivery orders, including those using part 12 procedures for the acquisition of commercial items, to provide for the reimbursement of paid leave to an “affected contractor” pursuant to Class Deviation 2020-O0021.

75. Memorandum from Off. of Under Sec’y of Def., Class Deviation—CARES Act Section 3610 Implementation, <https://www.acq.osd.mil/dpap/policy/policyvault/USA000098-21-DPC.pdf> (last visited Feb. 2, 2021).

76. For a more detailed discussion of DoD’s procedural requirements for pursuit of section 3610 COVID costs, see David B. Robbins et al., *DoD Issues Final Guidance Implementing Section 3610 of the CARES Act*, COVID-19 CORONAVIRUS RESOURCES (Aug. 19, 2020), https://jenner.com/system/assets/publications/20262/original/DoD_Issues_Final_Guidance_ATTORNEY_ADVERTISING.pdf?1597877270.

77. DoD’s Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act, dated April 9, 2020, though pre-dating the most recent guidance, provides insight on the mechanics of recovery by contract type, including fixed-price contracts, cost reimbursement contracts, time and materials or labor hours contracts, and contracts with a mixture of fixed price and cost type line items. Memorandum from Off. of Under Sec’y of Def., Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act, https://www.acq.osd.mil/dpap/policy/policyvault/Implementation_Guidance_CARES_3610_DPC.pdf (last visited Feb. 2, 2021).

78. DPC COVID-19 Resources, *supra* note 9.

79. See FAR 43.205; see, e.g., FAR 52.243-1 (“Changes—Fixed-Price” clause); FAR 52.243-2 (“Changes—Cost-Reimbursement” clause); FAR 52.243-3 (“Changes—Time-and-Materials or Labor-Hours” clause); FAR 52.243-4 (“Changes” clause) (fixed-price construction and dismantling, demolition, or removal of improvements contracts exceeding the simplified acquisition threshold).

80. FAR 43.205(a).

81. FAR 52.243-1(a)–(b) & alts. I–V.

82. FAR 52.243-1(c).

83. CBCA No. 5683, 2020 WL 1970843 (Apr. 22, 2020), slip op. available at [https://www.cbca.gov/files/decisions/2020/SOMERS_04-22-20_5683_PERNIX_SERKA_JOINT_VENTURE%20\(Decision\).pdf](https://www.cbca.gov/files/decisions/2020/SOMERS_04-22-20_5683_PERNIX_SERKA_JOINT_VENTURE%20(Decision).pdf).

84. *Id.*, slip op. at 8.

85. *Id.*, slip op. at 9.

86. *Id.*, slip op. at 10 (quoting *Aragona Constr. Co. v. United States*, 165 Ct. Cl. 382, 391 (1964)).

87. Memorandum from Kim Herrington, Acting Principal Dir., Defense Pricing & Contracting, Off. of Under Sec’y of Def. (Acquisition & Sustainment), Defense Industrial Base Contract Considerations (Mar. 20, 2020), https://www.acq.osd.mil/dpap/policy/policyvault/Defense_Industrial_Base_Contract_Considerations_DPC.pdf.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. CBCA No. 4026, 2020 WL 2507940 (May 5, 2020), 62 GC ¶ 164, slip op. available at [https://www.cbca.gov/files/decisions/2020/KULLBERG_05-05-2020_4026__VALERIE_LEWIS_JANITORIAL%20\(Decision\).pdf](https://www.cbca.gov/files/decisions/2020/KULLBERG_05-05-2020_4026__VALERIE_LEWIS_JANITORIAL%20(Decision).pdf).

93. *Id.*, slip op. at 31.

94. *Id.*

95. *Id.*, slip op. at 32.

96. *Id.*, slip op. at 31.

97. *Engineered Maint. Servs., Inc. v. United States*, 55 Fed. Cl. 637 (2003) (citing FAR 49.201 and quoting *Morganti Nat’l, Inc. v. United States*, 49 Fed. Cl. 110, 129 (2001), for the proposition that “termination for default may be converted to a termination for convenience where the contractor can establish that “[t]he delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the [c]ontractor”), *aff’d*, 89 F. App’x 267 (Fed. Cir. 2004).

98. FAR 52.242-15.

99. Compare FAR 52.242-15(b) (discussing canceled stop-orders where contractor resumes performance), with FAR 52.242-15(c) (discussing where the government terminates for convenience the work covered by the stop-order) and FAR 52.242-15(d) (discussing where the work covered by the stop-order is terminated for default).

100. See, e.g., *Melka Marine, Inc. v. United States*, 38 Fed. Cl. 545, 547 (1997).

101. See FAR 52.249-8(c)–(d), 52.249-14, 52.212-4.

102. See *Bromion, Inc. v. United States*, 411 F.2d 1020, 1023–24 (Ct. Cl. 1969).

103. 13 B.C.A. (CCH) ¶ 35,334 (May 24, 2013).

104. *Id.*

105. *Id.* (citing *Int’l Elec. Corp. v. United States*, 646 F.2d 496, 510 (Ct. Cl. 1981)).

106. *Big State Garment Co., ASBCA No. 337*, 4 CCF ¶ 60,946 (Mar. 31, 1950).

107. See David W. James, *Concurrency and Apportioning Liability and Damages in Public Contract Adjudications*, 20 PUB. CONT. L.J. 490, 496 (1991) (citing *Turnkey Enter., Inc. v. United States*, 220 Ct. Cl. 179, 597 F.2d 750 (1979)).

108. See *Donald R. Herb, GSBCA No. 6864*, 84-1 B.C.A. (CCH) ¶ 17,085 (Jan. 23, 1984).

109. *Morris Mech. Enters., Inc. v. United States*, 554 F. Supp. 433, 441–42 (Ct. Cl. 1982).

110. See, e.g., *BES Constr., LLC, ASBCA No. 60608*, 19-1 B.C.A. ¶ 37,455 (Oct. 23, 2019) (discussing contractor’s excusable delay claim seeking additional delay costs allegedly incurred because the government’s actions affected activities on the critical path).

111. See, e.g., *Crawford Dev. & Mfg. Co., ASBCA No. 17565*, 74-2 B.C.A. ¶ 10,660 (May 28, 1974) (denying excusable delay claim because contractor failed to show community outbreak of flu-induced illness resulted in absence of a sufficient number of employees to cause delay); see also *Gen. Injectables & Vaccines, Inc. v. Gates*, 527 F.3d 1375 (Fed. Cir. 2008) (applying FAR 52.249-8(c) and concluding that subcontractor’s unexcused default terminating its contract to supply influenza vaccine following a ban on import and distribution of the contaminated vaccine did not excuse the prime contractor’s nonperformance under the excusable-delays clause).

112. *Ace Elec. Assocs., Inc., ASBCA No. 11781*, 67-2 B.C.A. ¶ 6,456 (July 18, 1967) (holding that “[i]llness occasioned by the onset of a flu epidemic is in general an excusable delay[,] [b]ut the contractor must[] show[] that performance was in fact delayed by reason of such epidemic”).

113. *GPOBCA No. 06-95*, 1995 WL 818784 (Aug. 29, 1995).

114. *Id.*

115. *Id.* (citing *Ace Elec. Assocs.*, 67-2 B.C.A. ¶ 6,456).

116. E.g., *Great W. Util. Corp., ENGBCA No. 4933*, 85-2 B.C.A. (CCH) ¶ 18,021 (Apr. 4, 1985); *Specialty Assembling & Packing Co. v. United States*, 355 F.2d 554, 572 (Ct. Cl. 1966).

117. Cf. McCormick Sales, Inc., ASBCA No. 2081, 1955 WL 8827 (Feb. 16, 1955) (discussing COFD concerning inclement weather and denying claim for excusable delay).

118. FAR 52.249-10(b)(1).

119. FAR 52.249-8.

120. FAR 52.249-9.

121. FAR 52.249-14.

122. See, e.g., *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 314 (1999) (“If an event is considered to be foreseeable at the time of contracting and the contractor enters into the contract without making provisions to protect itself, the event may be held not to be beyond its control because it assumed the risk.”), *aff’d*, 250 F.3d 762 (Fed. Cir. 2000); *Asheville Jet Charter & Mgmt., Inc. v. Dep’t of Interior*, CBCA No. 4079, 16-1 B.C.A. ¶ 36,373 (Aug. 24, 2017) (citing *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 123 (1943), in support of applying an unforeseeability requirement to a commercial items contract).

123. 580 F.2d 400, 408 (Ct. Cl. 1978).

124. *Id.*