

# Coronavirus and its Implications for Government Contractors

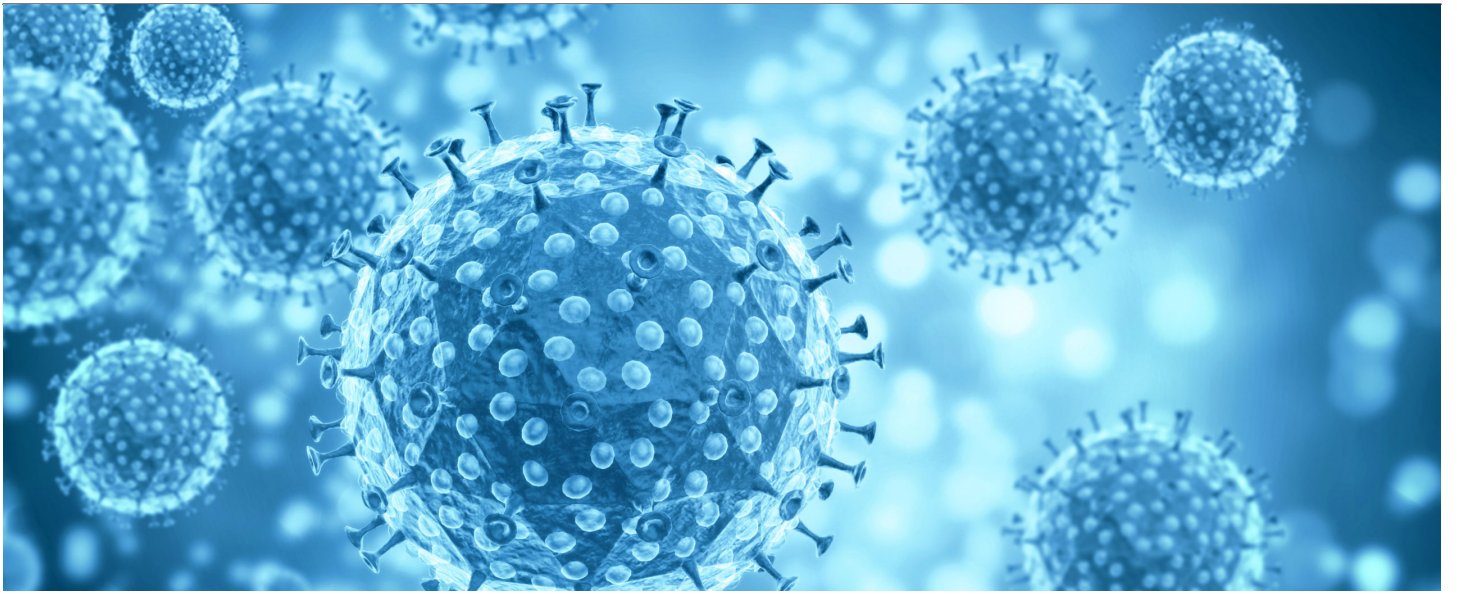
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Coronavirus (COVID-19) is spreading throughout the globe at an accelerating pace, with the Center for Disease Control (“CDC”) warning of an imminent outbreak in the United States. The disease has already impacted the global economy. Fears of a coronavirus outbreak caused the largest one-week decline in the U.S. stock market since the 2008 financial crisis. The spread of coronavirus creates unique challenges for companies doing business with the government. Government contractors should anticipate the following issues:



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## Interruptions to Performance

Coronavirus may create difficulty for contractors to perform. The disease has created significant interruptions in global supply chains, and may soon decrease the availability of employees in the U.S. In addition to the risk to financial performance, the inability to perform on contractual obligations may cause reputational harm to government contractors, making it difficult for companies to do business with the government in the future.

One potential source of relief is a *force majeure* clause. Common in commercial contracts, a *force majeure* clause allows a party to suspend or terminate performance of a contractual duty due to extreme circumstances beyond the control of either party. Coronavirus, as a global pandemic, may trigger *force majeure* clauses to the extent unforeseen interruptions to a contractor's business prevent it from performing its contractual duties. Contractors should review their contracts with the government to see whether they contain force majeure clauses and what level of flexibility they provide.

Federal regulations for government contractors, particularly the Federal Acquisition Regulation ("FAR"), contain their own provisions for excusable delay. For example, FAR 52.249-14 requires the following clause in government contracts:

(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, **(5) epidemics, (6) quarantine restrictions**, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. Default includes failure to make progress in the work so as to endanger performance.

48 C.F.R. § 52.249-14.

Government contractors might also seek relief through the common law doctrines of impracticability and impossibility. For example, even if Coronavirus does not constitute a *force majeure* under the terms of a contract, a government contractor may seek relief by showing that Coronavirus made it impossible for it to perform its contractual obligations. For example, New York courts look to whether impossibility of performance is the result of destruction of the subject matter of the contract or the means of performance. See *Sher v. Allstate Ins. Co.*, 947 F. Supp. 2d 370 (S.D.N.Y. 2013). If the subject matter of the contract or the means of performance are not destroyed, the defense of impossibility is inapplicable. See *Warner v. Kaplan*, 71 A.D. 3d 1, 5 (1<sup>st</sup> Dept. 2009).

California courts, on the other hand, evaluate the applicability of these defenses by analyzing whether performance "is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary." Cal. Civ. Code § 1511(2); *Squillante v. California Lands, Inc.*, 5 Cal. App. 2d 89 (4<sup>th</sup> Dist. 1935) (heat conditions prevented production of normal crop of produce and defeated growers' efforts to provide quantities for which they contracted.). Certain types of contracts may also be governed by the Uniform Commercial Code ("U.C.C."), which provides an excuse where performance has been made "impracticable" by the occurrence of an event "the nonoccurrence of which was a basic assumption on which the contract was made." Whether these doctrines apply will depend on the terms of a particular contract.

Finally, government contractors experiencing loss due to their inability to meet contractual obligations should consider insurance coverage as a form of relief. Some insurance policies may cover *force majeure* circumstances, and a contractor's specific policy terms should therefore be carefully evaluated.

## The Defense Production Act ("DPA")

While coronavirus has caused interruptions to the supply side of commercial businesses, it has also created shifts in demand. Consumers have rushed to purchase medical and home supplies—causing shortages and price increases—and the rush may continue as the virus continues to spread. The Defense Production Act ("DPA"), codified at 50 U.S.C. § 4501 *et seq.*, and its implementing regulations, the Defense Priorities and Allocation System (DPAS), codified at 15 C.F.R. § 700 *et seq.*, give the U.S. government the authority to "jump the line" and force contractors to prioritize sales of goods to the government before selling to consumers or other private purchasers.

Businesses selling high-demand medical supplies that have increased in demand from the coronavirus may be affected by the DPA. Health and Human Services Secretary Alex Azar recently suggested that the administration may use the authority of the DPA to force contractors to prioritize government purchases of personal protective equipment, including gloves and masks. See Matthew Choi, *Alex Azar: War powers on the table to increase medical supplies*, Politico (March 1, 2020). If the powers of the DPA are invoked when an order is submitted to a contractor, it must accept the order if it normally sells the ordered goods or service and can satisfy the terms of the order. Government contractors should prepare to respond to orders under the DPA by reviewing procedures for prioritizing such orders with their employees.

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