

The Novel Coronavirus' Impact on Government Contractors

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by Mark Stempler

Government contractors are a significant sector of the economy grappling with the devastating impact of COVID-19, the novel coronavirus. As state and local governments scale back a myriad of services, some by mandated government orders and others by the force of circumstances, contractors are and will continue to be significantly impacted. In the balance are hundreds of millions of dollars of public projects and revenues, from construction and design projects, to public transportation services, and to providers of all types of goods and services used by government agencies.

Key issues have and will continue to arise from the difficult decisions government agencies face, including: Can the contract be terminated, and under what circumstances? What happens to work in progress? What happens to orders from

goods that may no longer be needed in the immediate future? What costs and expenses will the contractor be entitled to?

First, many government contracts contain termination provisions. The circumstances which allow for termination vary by contract. Generally, government contracts can be terminated for cause, or terminated for convenience. Termination for cause typically refers to a specific material breach of the contract. For instance, a failure of performance, an inability to deliver goods or services timely, or lack of adequate manpower.

Some contracts will describe the types of material breaches which may result in termination for cause. Contract may require a notice provision to alert a contractor it is in breach and allow for a time period in which a contractor can cure the purported breach. If the breach is cured, termination may be prevented.



Mark J. Stempler shareholder with Becker & Poliakoff.

In contrast, a termination for convenience clause generally gives a party the right to terminate the contract without cause, even if the other party does not breach the agreement. Such clauses can be exercised in times of emergency, such as the one we are facing now. Written notice from the agency to the contractor may still be required, as well as a time period to allow the contractor to demobilize or wind-down from the project.

It is important to determine who or what within a govern-

ment agency has the power to terminate a contract. Such decision-making power might be vested in the governing body, like a board of commissioners, or with a purchasing director depending on the monetary threshold. In times of emergency like, this, the power may shift to someone like a county or city administrator. This will depend on what is provided for in a contract, a local code, the agency's rules, or in emergency orders issued by the state or local government agency.

If the contract is terminated, contractors will need to determine what costs and other compensation they are entitled to. Costs incurred in a services contract may run through the date of actual termination following a notice period. Whether a contractor will be entitled to costs such as overhead for a space they were required to lease, or for administrative costs incurred in furloughing or laying off employees, may depend on specific contractual terms. It is critical for contractors to properly document costs now even if the government agency has not taken emergency action. If costs cannot be proven with a reasonable degree of certainty, the contractor may be forced to incur them even for a government-mandated work stoppage.

In Florida, issues like force majeure, impossibility of performance, and frustration of purpose are generally recog-

nized defenses to nonperformance of a contract or render a contract unenforceable. A force majeure clause may excuse a party's performance or obligations under a contractual duty due to circumstances beyond the control of either party. The triggering event often includes an "act of God," which is an unpreventable event caused by forces of nature. Whether a force majeure clause can be triggered by the coronavirus outbreak will depend on the specific language in the contract.

If there is no force majeure clause in the contract, or even if the coronavirus does not constitute a force majeure under the contract, "impossibility of performance" can discharge a party from performing a contractual obligation which cannot be performed due to circumstances. This concept is raised when the facts making performance impossible were not known to the parties at the time the contract was entered, and neither party assumed the risk of impossibility nor could they have acted to prevent the event rendering the performance impossible. For example, it may be impossible to provide certain services to a state college if its campus is shut down.

"Frustration of purpose" is different, and typically refers to a condition surrounding the contracting parties where one of the parties finds that the purposes bargained for, and which purposes were known

to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party.

These concepts are not limitless, however. Courts are reluctant to excuse performance that is not impossible but merely inconvenient or profitless. For instance, just because a government agency may not have the funds readily available to pay for goods or services or does not want them in the time contemplated in a contract, will not automatically prove frustration or impossibility under the law.

Government contractors who experience losses because they cannot meet their obligations due to the coronavirus should also consider relief through insurance coverage. Some insurance policies may cover force majeure or other similar circumstances, and a contractor's specific policy terms should be carefully evaluated.

The coronavirus is having an unprecedented impact on modern society, the economy and governmental functions. Government contractors must know their contractual rights and take steps to prepare for the challenges this viral threat poses.

Mark Stempler is a shareholder with Becker in West Palm Beach practicing government procurement law and construction and civil litigation. Contact him at mstempler@beckerlawyers.com