Associated General Contractors
Stephen E. Sandherr, CEO
2300 Wilson Boulevard Suite 300
Arlington, VA 22201-3308

Dear Mr. Sandherr,


USACE values all industry feedback, and I am particularly appreciative of your concerns with this emerging issue. USACE believes that each of our local contracting officers has been given the tools they need to address any contractual issues arising from COVID-19. USACE will follow the guidance provided by the Offices of the Secretary of Defense (OSD) and the Department of the Army regarding potential Novel Coronavirus contract impacts. We will continue to rely upon public health and OSD official actions to guide access to projects which will be communicated on a contract by contract basis as conditions might require.

For your reference, attached is the guidance we received. Once again, thank you for your interest and concern on this topic. Since the situation remains dynamic, we will remain fully engaged in Federal and OSD guidance and ensure that our contracting and construction offices stay apprised of the latest information.

Christine T. Altendorf, P.E.
Chief, Engineering and Construction
MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Deputy Assistant Secretary of the Army (Procurement) (DASA(P))
Response to the Coronavirus Disease (COVID-19)

Reference: Memorandum, Acting Principal Director, Defense Pricing and Contracting,
10 March 2020, subject: Planning for Potential Novel Coronavirus Contract Impacts

1. ODASA(P) recognizes the concerns related to the COVID-19 disease and its
potential impact throughout the Army Contracting Enterprise. The global spread
concerning the COVID-19 virus is rapidly evolving and may put many federal
contractors at risk of missing contractual deadlines. The increased number of COVID-19
cases may impact a contractor’s ability to perform in a timely manner and consequently
endanger the U.S. Army mission.

2. As stated in the reference, communication between the Government and contractors
is essential for workforce safety and mission continuity. Contracting Officers must
assess each situation on a case-by-case basis. It is not the contracting officer’s
responsibility to determine whether the excuse of COVID-19 should apply or not.

3. Contractors should recognize that their contracts may contain clauses that would
excuse performance delays including: Federal Acquisition Regulation (FAR) 52.249-14
(i.e., cost reimbursement and time and material contracts), FAR 52.249-8 (i.e., fixed
price supply and service contracts), and FAR 52.212-4 (i.e., commercial contracts).
Each of the aforementioned clauses share a special thread – a contractor should not be
in default because of a failure to perform the contract if the failure arises beyond the
control and without the fault or negligence of the contractor.

4. "Epidemics" and "quarantine restrictions" are also examples of causes beyond a
contractor’s control (FAR 52.249-14(a); FAR 52.249-8(c) and (d); FAR 52.249-9(c) and
(d); and FAR 52.212-4(f)). These exceptions appear to consider circumstances such as
the spread of the COVID-19 virus, which has been declared a public health emergency
by U.S. authorities and subsequently resulted in global quarantine restrictions. If the
failure to perform is caused by the default of a subcontractor and the cause of the
default is beyond the control of both the contractor and subcontractor, contractors may
be excused from liability for excess costs under FAR 52.249-14, FAR 52.249-8 and
FAR 52.249-9. However, it may not apply under non-commercial contracts if the
subcontracted supplies or services were obtainable from other sources in sufficient time
for the Contractor to meet the required delivery schedule (FAR 52.249-14(b); FAR
52.249-8(d); FAR 52.249-9(d)).
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Contractors also may not be entitled to relief if the contracting officer ordered the
contractor to purchase the supplies from another source, and the contractor
unreasonably failed to comply with that order (FAR 52.249-14). The commercial item
clause does not address excess costs specifically but it does add a notice obligation.

5. The provisions mentioned above do not entitle the contractor to compensation. Non-
compensable delays are delays for which the contractor is entitled to a time extension,
but there is no entitlement to any additional monetary compensation. The federal
government and contractor has no control over the non-compensable delay. Therefore,
both parties assume their individual additional costs. The contractor absorbs its delay
costs for being out on the project longer, and the federal government absorbs its costs
by granting a time extension to the contractor and extending the contract.

6. To approve excusable delay provisions, contracting officers should carefully consider
the circumstances of each case and ensure the contractor took reasonable steps to
perform and provided notice as required.

7. In addition to the excusable delay provisions, the standard FAR changes clauses
(e.g., FAR 52.243-1 or FAR 52.243-2) provide options for obtaining an equitable
adjustment for increased work.

8. Heads of Contracting Activities and Senior Contracting Officials must keep the
DASA(P) advised of significant COVID-19 related impacts to Army contracts and
contract operations.

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Encl
Stuart A. Hazlett
Deputy Assistant Secretary
of the Army (Procurement)
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Response to the Coronavirus Disease (COVID-19)

DISTRIBUTION:
HEADS OF CONTRACTING ACTIVITIES:
   U.S. ARMY MATERIEL COMMAND
   U.S. ARMY MEDICAL COMMAND
   U.S. ARMY CORPS OF ENGINEERS
   NATIONAL GUARD BUREAU
   RAPID CAPABILITIES AND CRITICAL TECHNOLOGIES OFFICE