

## CLIENT ALERT

### Not So Majeure—GAO Finds Agency Properly Rejected a Bid Classifying All COVID-19-Related Events as an Excusable Cause of Delay

December 13, 2021

In [American Mine Services, LLC, B-420138 \(Dec. 3, 2021\)](#), the Government Accountability Office (“GAO”) denied a protest by American Mine Services (“AMS”), finding that the Army Corps of Engineers (“Corps”) reasonably rejected AMS’ bid because it included a provision stating that COVID-19, as well as other similar pandemics or endemics, would be considered “force majeure” events.

AMS submitted a timely bid in response to the Corps’ invitation for bids (“IFB”) to furnish and install new service gates at the Surry Mountain Dam in New Hampshire. Notably, AMS’ bid included the following “Clarification and Exceptions” provision:

For purposes of this bid, COVID-19 is considered a Force-Majeure Event along with any other similar disease, epidemic, or pandemic event. If any of the aforementioned events occur and affect the project, AMS reserves its rights for additional time.

The Corps subsequently rejected AMS’ bid as nonresponsive because the added provision materially modified the terms of FAR 52.249-10, Default (Fixed-Price Construction). While the FAR clause lists epidemics and quarantine restrictions as possible causes of excusable delay, GAO noted that the language of the provision inserted in the protester’s bid specifically listed “COVID-19” and “any other similar disease, epidemic, or pandemic event.”

In its protest, AMS argued that the Corps’ decision was unreasonable because its “Clarification and Exception” provision only confirmed existing protections offered to bidders under FAR 52.249-10. GAO disagreed, finding that the added provision limited the government’s rights under the Default clause because FAR 52.249-10 only terminates a contractor’s duty to proceed in cases of “unforeseeable causes beyond the control and without the fault or negligence of the Contractor, . . . [including] Epidemics.” GAO reasoned that AMS’ added provision would impose a lower standard than what FAR 52.249-10 requires by rendering the occurrence of disease, pandemic or endemic *per se* unforeseeable causes of delay beyond the control and without the fault or negligence of the contractor. As a result, the added provision would remove the contracting officer’s discretion to determine whether COVID-19 (or similar pandemics or epidemics) are force majeure events that qualify as excusable delays. Further, GAO rejected AMS’ argument that its changes were immaterial such that the contracting officer could waive them. Ultimately, GAO concluded that not all challenges arising from the COVID-19 pandemic are “unforeseeable or beyond mitigation,” and supported the Corps’ position that contractors can consider these risks when determining the total price of their bid, but cannot except themselves from those risks.

This decision foreshadows possible protest issues to come. For example, while E.O. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors is [currently stayed](#), it is possible that contractors’ compliance with the vaccine mandate could serve as grounds for future protests if the executive order is reinstated.

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