

# COVID-19 and Contracting: A High-Level Check...

By Tom Ewing

*"You gain strength, courage, and confidence by every experience in which you really stop to look fear in the face. You are able to say to yourself, 'I lived through this horror. I can take the next thing that comes along.'" - Eleanor Roosevelt*

**H**opefully, as the COVID-19 scourge continues, you have been able to stay safely distant, far enough away from the pandemic's full terror.

Finally, there seems to be some light at the end of the tunnel. Possibly, the whole world's social and business interactions – taken for granted just a couple months ago – will soon be on a pathway to recovery. Ready for something really crazy – like starting a meeting with a handshake?

Last month this column veered from its contracting focus to reference new SBA business assistance programs. That diversion continues. After all, COVID remains the 800 lb. gorilla in the room – every room – forcing many questions: how is the pandemic affecting government contracts? Is everything business as usual? Or has COVID-19 so disrupted deadlines and decisions that it will take months, maybe years, to get critical work and projects back on track?

Consider deadline dates, critical in a solicitation notice, even more critical for real-world work. A Coast Guard cutter, for example, may have the rest of its 2020 duty cycle dependent on maintenance needed by May. But if that service contract couldn't be completed, say, in April, what happens to the cutter's mission if it's not made seaworthy in May? Multiply that by a thousand or 10,000, across a landscape of projects from anchors to hospitals to highways to zoos.

On the one hand, future historians will need to answer just how close we came to total chaos. On the other, COVID-19's impact on government contracting has been a topic of speculation since it first raised its spiky little head.

Kayleigh Scalzo is an attorney and partner in the government contracts group in the Washington office of the law firm Covington & Burling LLP. On

March 18, in an article for the Firm's "Inside Government Contracts" blog, Scalzo looked in her crystal ball to ask how COVID-19 might affect the federal contracting system. Some potential concerns:

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- Companies would need to keep an even closer eye on contract documents, double-checking for possible mistakes or errors now that agencies are working at a more frenzied pace.
- Greater use of sole-source procurements, meaning less competition.
- A decreased willingness for agencies to suspend performance on newly-awarded contracts while bid protests (i.e., challenges to the award decision) are pending.
- Possible interruptions or delays for routine processes.

At the end of April, Scalzo was asked to update and comment on her March look-ahead. Her colleague and Covington partner, attorney Mike Wagner, joined the discussion. Their optimistic assessment: that routine procurement activities largely have not slowed. That agencies are still working and that business-as-usual is proceeding. Each emphasized they were not minimizing challenges from new and difficult working conditions. But people are working through unexpected hurdles. In some cases,

Scalzo said, agency staff are likely doing two jobs: normal assignments and new COVID-19 related work.

[Government agency officials and contracting specialists were asked about this set of issues. None responded by deadline.]

Keep in mind, of course, that Scalzo's and Wagner's comments are observations from their workplace experience, and not conclusions based on formal, cross-agency statistics. Still, if you are waiting to hear on a bid or currently reviewing a solicitation notice, these insights are important, and optimistic.

Scalzo and Wagner mentioned attributes that add strength and resiliency to the contract system. Scalzo referenced a "countercyclical" dynamic inherent in government purchasing, i.e., government agencies need to buy stuff, to spend money, during challenging times. COVID is strange and different but as an emergency it's hardly the first. More pointedly for this crisis Wagner noted that the new CARES Act specifically addresses potential problems for businesses and contracts, providing funding to cover the costs of paid leave and keep contractor employees in a ready state, even if COVID-19 interrupts the work required to complete a project.

The flip side of this scheduling and deadline issue, of course, is whether private businesses can meet the terms and conditions set by government contracts. If your work has to be completed by May 15 but you haven't been allowed on a worksite or you haven't been able to establish and document safe work practices or access data systems or your key personnel have left the area, your sleepless nights index could be off the charts.

Gail D. Zirkelbach is a Government Contracts Partner at Crowell & Moring LLP, in Los Angeles. Her advice for businesses trying to stay timely with contracts is to document and maintain records for all required work in case your company is unavoidably thrown off track.

Zirkelbach, too, sees the contracting process staying on course, at least so far. Regarding COVID-19, she commented that “yes, there has been nothing like this in years but in government contracting there are mechanisms to protect against unforeseen circumstances.” She referenced allowances for “excusable delays.” Hence her advice to detail unplanned work or variances. Close documentation will be critical if you need to seek additional funding or otherwise prove contract compliance.

COVID-19 is surely unusual, and its global scale is unprecedented. But emergencies are not new, and while COVID-19 is testing limits everywhere, hopefully its destructive energy will be depleted via existing plans and planning.

Zirkelbach was asked if deadlines in current solicitations might change because of COVID-19, either because contract officers couldn’t get to their regular work or because that work may have been supplanted by COVID-19 requirements. She said, yes, that could happen; actually, such changes are not that unusual. However, deadlines can’t change just for one company, even because of COVID-19. A revision would be for every potential bidder. Keep track of possible contract changes by registering on beta.SAM.gov in order to receive official change notifications.

Finally, with specific reference to COVID-19, Zirkelbach emphasized the need for documentation if a company accepts money pursuant to the CARES Act. She said the government is assembling an auditing team to track every cent. Don’t mess with these guys. **PMM**

*Tom Ewing is a freelance writer specializing in energy, environmental and related regulatory issues.*



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