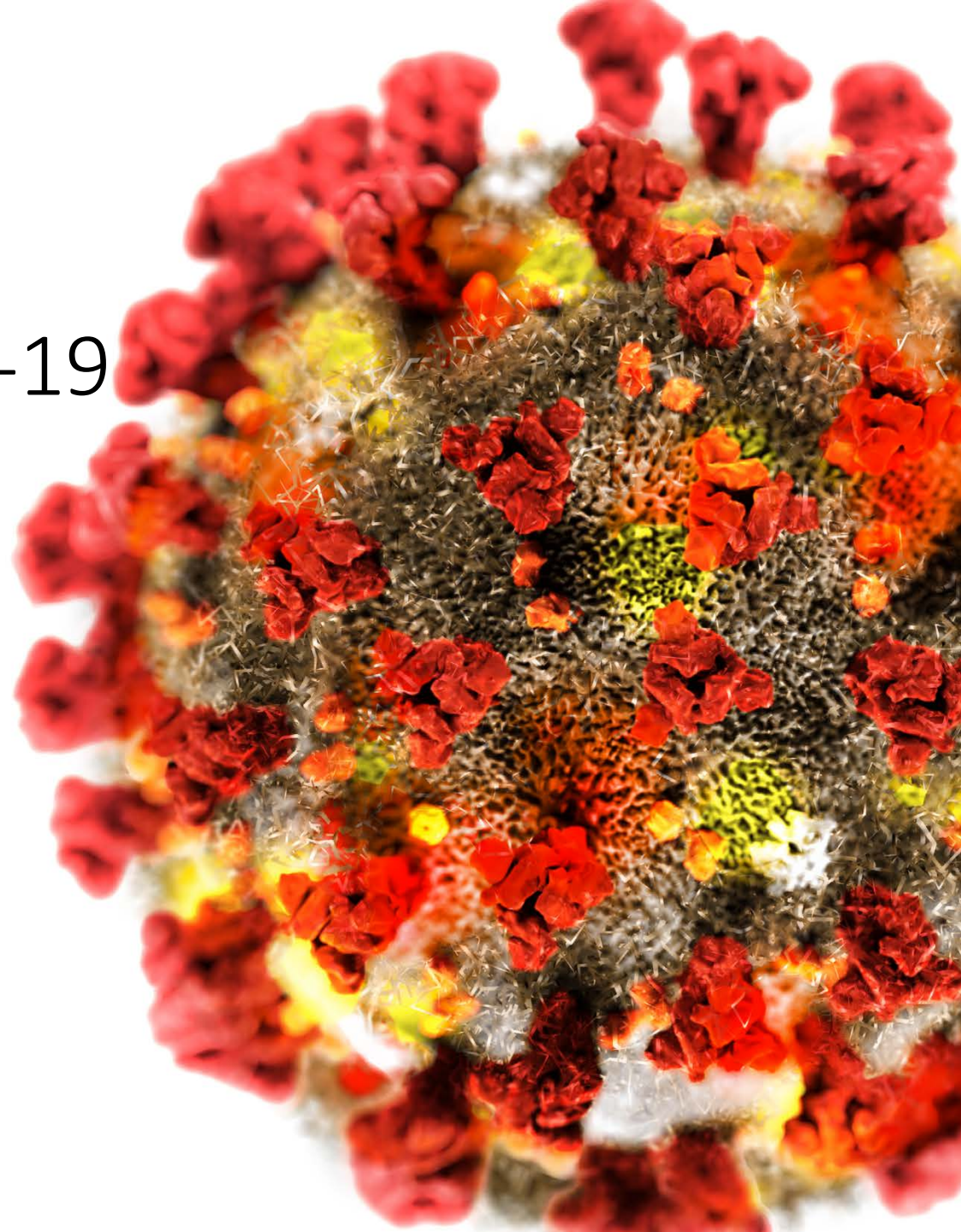


# Government Contracts Legal Developments Driven by COVID-19

Prudent Government Contractors Will  
Examine their Legal Issues and Business  
Opportunities in New and Creative Ways  
in the COVID-19 Era



# Today's Government Contracts Speakers



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# Reconciliation of State “Stay in Place” Orders and Federal “Critical Infrastructure Sector” Obligations



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# State Stay at Home Orders

States	Effective Date	Duration	Adopted DHS Guidance on Essential Critical Infrastructure Workforce	Criminal/Civil Penalties for Violation	Employers Required to Provide Masks to Essential Workers
California	March 19, 2020	Until further notice	Yes	Yes	No, but required under some local orders (Los Angeles)
New York	March 22, 2020	May 15, 2020	No*	Yes	Yes
Texas	April 2, 2020	April 30, 2020	Yes	Yes	No
Virginia	March 30, 2020	June 10, 2020	No*	Yes	No

\*State guidance essentially tracks the DHS guidance.

# Commonalities and Distinctions

## Commonalities

- References to DHS guidance and “Critical Infrastructure” definitions
- Social distancing
- Limitations on large gatherings
- Permission for individuals to conduct “essential activities”

## Distinctions

- Official process to request “essential” status (Texas)
- Local officials may enforce stricter public health orders (Indiana)
- Some state agencies issue guidance for contractors (Caltrans, NY State DOT)



# DHS Critical Infrastructure Sectors

## Sectors

1. Healthcare/Public Health
2. Law Enforcement and Public Safety
3. Food and Agriculture
4. Energy
5. Water and Wastewater
6. Transportation and Logistics
7. Public Works and Infrastructure Support
8. Communications and IT
9. Government-Based Operations
10. Hazardous Materials
11. Financial Services
12. Chemical
13. Defense Industrial Base
14. Commercial Facilities
15. Residential/Shelter Facilities and Services
16. Hygiene Products and Services

# Defense Production Act, Title I

## Priorities and Allocations (Title I) – 50 U.S.C. §§ 4511 *et seq.*

- Defense Priorities and Allocations System – 15 C.F.R. §§ 700.1 *et seq.*
- Rated Orders:
  - “DO” (Critical to National Defense)
  - “DX” (Highest National Defense Urgency)
  - FAR 52.211–15: “This is a rated order certified for national defense, emergency preparedness, and energy program use, and the Contractor shall follow all the requirements of the Defense Priorities and Allocations System regulation”
- Acceptance and Rejection
  - Mandatory Acceptance
  - Mandatory Rejection
  - Optional Rejection
- Special Priorities Assistance: FORM BIS-999

<b>SOLICITATION, OFFER AND AWARD</b>		1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)		RATING	PAGE OF PAGES
2. CONTRACT NO.	3. SOLICITATION NO.	4. TYPE OF SOLICITATION <input type="checkbox"/> SEALED BID (IFB) <input type="checkbox"/> NEGOTIATED (RFP)	5. DATE ISSUED	6. REQUISITION/PURCHASE NO.	

# Defense Production Act, Title III

## Expansion of Productive Capacity and Supply (Title III) – 50 U.S.C. §§ 4531 *et seq.*

- Incentives to Industry:
  - Loans
  - Purchase commitments
  - Modification or expansion of privately owned facilities
- DOD Announced First Title III Project for COVID-19 on April 11, 2020
- Funding:
  - CARES Act—\$1 Billion
  - FY 2020—\$64 Million
  - More discussion in next module



# Takeaways

## Tensions

- States focused on employees staying home
- Department of Defense concerned with Defense Industrial Base continuity
- Supremacy Clause??

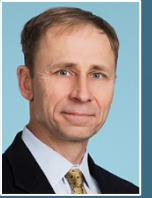
## Ways to Assist Employees

- Advocate for “essential” determination
- Follow OSHA’s safe workplace guidelines
- CARES Act

## DPA Implications

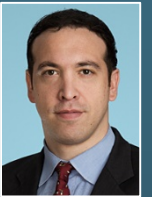
- Identify rated orders
- Be ready to perform

# \$850B in CARES Act Loans for Large, Midsize, and Small Businesses – Eligibility and Repayment Issues



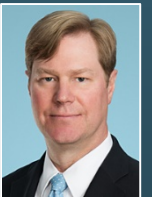
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# CARES Act § 1102 – Paycheck Protection Program

## Temporarily Amends § 7(a) – Business Loans – of the Small Business Act

- Loans available to business concerns, 501(c)(3) nonprofits, tribal organizations
- Eligible if applicant (including *affiliates*) is small under existing SBA rules *or*
  - 500 or fewer employees whose principle place of residence is in US
  - 500 or fewer employees *per location* if in accommodation or food services industries (NAICS Sector 72)
- Affiliation Waivers for:
  - 500 or fewer employees *per company (not location)* if in NAICS Sector 72
  - Franchises on SBA Franchise Directory
  - Faith-based organizations
  - Financed by Small Business Investment Company

# CARES Act § 1102 – Paycheck Protection Program

## Maximum Loan Amount:

- 2.5 X annualized average monthly payroll cost up to \$10 Million

## Uses:

- 75% – Payroll costs
- 25% – Lease, mortgage interest and utilities

**Terms:** Two-year repayment period (deferred for 6 months); 1% interest rate

**Availability:** Until June 30, 2020 or funds are exhausted

# CARES Act § 1106 – PPP Loan Forgiveness

## Maximum Loan Forgiveness

- Based on loan amounts used during eight-week period after loan origination

## Forgiveness Amount Reduced For Cuts in FTEs or Salaries/Wages

- FTE-based forgiveness reduction = percentage reduction in FTEs
- Salary-based forgiveness reduction = percentage reduction of total salary/wages of more than 25% for employees making less than \$100,000 in 2019

## Mitigation

- FTE and salary/wage reductions between 2/15/2020 and 4/26/2020 disregarded if restored by 6/30/2020

# Summary of the Loans for Larger Companies in Title IV

## Title IV Appropriations

- \$46 Billion directed to loans for the aviation industry and businesses “critical to maintaining national security”
- \$454 Billion for a program providing financing to banks and other lenders that provide loans to businesses, nonprofits, and state and local government – including specifically a program or facility for “mid-sized” businesses with between 500 and 10,000 employees
- For the \$46 Billion portion, those businesses must, among other things, be “expected to incur covered losses such that continued operations of the business are jeopardized”
- For the \$454 Billion portion, a borrower will certify that “the uncertainty of economic conditions as of the date of the application by the borrower makes necessary the loan request to support the ongoing operations of the recipient”



# Summary of the Loans for Larger Companies in Title IV

## Strings Attached

- Treasury shall not make a loan or loan guarantee using the \$46 Billion portion of appropriated funds *unless*: (1) in the case of a public company, the Treasury receives “a warrant or equity interest in the eligible business” or (2) in the case of an applicant that is not a public company, the Treasury receives either “a warrant or equity interest in the eligible business” or “a senior debt instrument”
- Various conditions under both categories of appropriations, for example:
  - Compensation freeze for highly paid executives
  - Funds must be used to maintain at least 90% of workforce at full comp until Sept. 30
  - Recipient must restore 90% of workforce that existed on Feb. 1
  - No payment of dividends or repurchase equity

# Summary of the Loans for Larger Companies in Title IV

## Main Street New Loans

- Unsecured term loan originated on or after April 8, 2020; that the loan has the following features:
  - Four-year maturity
  - Amortization of principal and interest deferred for one year
  - Adjustable rate of SOFR + 250-400 basis points
  - Minimum loan size of \$1 Million
  - Maximum loan size that is the lesser of (i) \$25 Million or (ii) an amount that, when added to the Eligible Borrower's existing outstanding and committed but undrawn debt, does not exceed four times the Eligible Borrower's 2019 earnings before interest, taxes, depreciation, and amortization ("EBITDA")
  - Prepayment permitted without penalty

# Summary of the Loans for Larger Companies in Title IV

## Main Street Expanded Loans

- Term loan originated before April 8, 2020, provided that the upsized tranche of the loan has the following features:
  - Four-year maturity
  - Amortization of principal and interest deferred for one year
  - Adjustable rate of SOFR + 250-400 basis points
  - Minimum loan size of \$1 Million
  - Maximum loan size that is the lesser of (i) \$150 Million, (ii) 30% of the Eligible Borrower's existing outstanding and committed but undrawn bank debt, or (iii) an amount that, when added to the Eligible Borrower's existing outstanding and committed but undrawn debt, does not exceed six times the Eligible Borrower's 2019 earnings before interest, taxes, depreciation, and amortization ("EBITDA")
  - Prepayment permitted without penalty

# Strategies to Resolve Performance – Related Cost Growth and Schedule Enlargement



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# Establishing Legal Basis for Schedule Enlargement and Cost Growth

## Standard FAR Clauses included in many contracts:

- FAR 52.249-14, Excusable Delay (Cost-Reimbursement, Time & Materials and Labor Hour Contracts)
- FAR 52.249-8, Default (Fixed-Price Supply and Service)
- FAR 52.212-4, Contract Terms and Conditions—Commercial Items
- FAR 52.249-9, Fixed-Price Research and Development & FAR 52.249-10, Fixed-Price Construction
- FAR 52.242-14, Suspension of Work & FAR 52.242-15, Stop-Work Order
- FAR 52.243-1, Changes-1 (Fixed-Price), -2 (Cost-Reimbursement), and -3 (T&M or Labor Hours)

## Distinctions

- Schedule Enlargement vs. Cost Growth plus BOTH??

# Agencies Response to COVID-19 Performance Disruptions

## Department of Defense

- Under Secretary of Defense, Acquisition & Sustainment Memorandum Re: *Defense Industrial Base Essential Critical Infrastructure Workforce*
- Defense Contract Management Agency (Western Region) Memorandum Re: *COVID-19 Mission Impact Status Reporting*
- Under Secretary of Defense, A&S, Defense Pricing & Contracting Memorandum Re: *Managing Defense Contracts Impacts of the Novel Coronavirus*
- Under Secretary of Defense, A&S, DPC Memorandum Re: *Class Deviation – CARES Act Section 3610 Implementation*

## Office of Management and Budget & General Services Administration

- Deputy Director for Management Re: *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)*
- Office of Acquisition Policy Re: *Emergency Acquisition Flexibilities for Novel Coronavirus Disease*



# Schedule Relief

## Critical Path Delay

- Understanding cause of the delay, *e.g.*, CO directed, employee-related, supplier related, state-mandated?
- Assessment of potential impact on performance schedule
- Engagement with CO regarding cause of delay and potential schedule impact
- Documentation of cause of delay
- Avoid exposure to liquidated damages tied to contractual deadlines

# Cost Recovery

## Cost Category

- Understanding cause of the cost growth, *e.g.*, CO directed, PPE-mandates, idle-labor, supplier caused cost increases, etc.
- Assessment of potential cost growth by cost category
- Engagement with CO per the DoD/GSA/OMB memorandums regarding REAs
- Documentation of cost growth by cost category

# Takeaway Strategies for Obtaining Schedule Enlargement and/or Cost Recovery

## Early Involvement

- Carefully memorialize schedule impacts and cost growth by contract contemporaneously, and by WBS if possible
- Calculate potential going forward impacts carefully

## CO Engagement

- Reach out to your COs ASAP!
- Present actual costs and ETCs; BUT be creative as this is uncharted territory
- Leverage relationship(s) with senior Agency officials to get all contracts similarly treated

# Contract Formation Opportunities and Cost Reimbursement Strategies



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# Contract Formation Issues

## DoD Commercial Item Determination

- R&D or procurement of COVID-19 vaccinations or medications
- Temporary booths, test stations or hospitals for COVID-19 surges
- Emergency medical supplies
- Facility-related services for shutdown or maintenance

## DoD Delegation of OTA Approval Authority

## Department of Labor Affirmative Action Waiver

- Only for contracts to provide coronavirus relief
- Agencies may insert waiver clause in contracts
- Exemption until June 17

# Contract Formation Issues

## FAR 18 – Emergency Acquisitions – Compendium of 27 existing acquisition tools

- Use of FSS, MACs and IDIQs
- Priorities and allocations
- Sole source vehicles
- Waiver of acquisition restrictions
- Extraordinary contractual actions

## Bid Protests



# Cost Reimbursement Strategies

- TINA/CAS Waivers for COVID-19 Procurements
  - TINA: “exceptional cases” FAR 15.403-1(c)(4)
  - CAS: “exceptional circumstances exist” FAR 30.201-5(b)(2)
- Identify Recoverable Costs Arising from COVID-19

Cost Category	Potential Recovery Source
Labor/Paid Leave/Idle Workers”	Section 3610, PPP, REA
Facility Costs	PPP, REA
Purchase/Lease Equipment to Maintain performance – i.e. laptops	REA
Idle Equipment	REA
Performance shifted to subsequent time period with increased labor, other costs	REA
Increased Staffing	REA
Unabsorbed Overhead	REA
Training	REA

\*DOD Guidance also allows child-care, care for others.

# Cost Reimbursement Strategies

- Create Accounts to Segregate Costs
  - “Any Reasonable Method” (DFARS 231.205-79(b)(2), CARES ACT Section 3610)
- Create and Maintain Adequate Supporting Records
  - Identify and explain why claimed hours could not be worked
- Class Deviation: Progress Payments Increase
  - 95% for small businesses
  - 90% for large businesses

# Cost Reimbursement Strategies

- Understanding relationship and risk of:
  - COVID-19 loan forgiveness
  - Section 3610 modification
  - Subsequent claims
- Dangers of duplicate charging: PPP
  - Cost-reimbursement contract labor charging
  - PPP Loan Forgiveness – No longer a cost to the contractor
  - Commercial Contracts – No issue?

# COVID-19 (Coronavirus)

*If you have questions about how the 2019 Novel Coronavirus impacts you or your business, please contact us.*

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