

As a contracting leader for a large prime contractor, how are you communicating with your suppliers during this pandemic? What tools are you using to ensure that suppliers are still able to deliver?

Russell Blaine: The worst thing that you could do would be to sit and remain passive. There's a need for constant engagement. It's communication, it's education, it's interpretation, these are all things that are absolutely essential if you want to ensure that your supply chain is going to maintain operations.

It's working with them to understand the terms and conditions that have been flowed down. It's getting their assurance that they truly comprehend it, and that it just hasn't merely been signed and accepted without understanding. It's helping them to understand what needs to be tracked, what costs need to be segregated, what activities need to be justified. It's providing them with the simplest of tools, if possible: You know, templates, checklists. Ensuring that they're able to log on to automated systems where you've been capturing data that you may have with them. All of that type of stuff is absolutely essential.

But it's also just leading by example. Demonstrating to them that we take our commitment seriously, and diplomatically working with everybody to ensure that they understand the severity of this and the importance we put into it.

...[In terms of communication], you're dealing with varying levels of sophistication in the buyer you work with, in terms of how plugged in they are to Department of Defense or large federal contracts...Some small businesses that require assurance. "What does this mean? How do I interpret this?" So we've got to... make sure that they absolutely understand what the expectations are, on us, as a prime, as on them as subcontractors. They're absolutely vital to our success.

On 20 March the OMB released M-20-18, that had several instructions for dealing with contract performance. What do you consider the most important aspects of that OMB direction?

Robert Burton: [First, the memo] encourages the use of contracting flexibilities that are now available to our community in light of the fact the president has declared [that the] war against the virus [is a] national emergency ...[and]...has exercised that authority under the Stafford Act (Stafford Disaster Relief and Emergency Assistance Act), contracting personnel in the government can go right to *FAR* section 18.202, which gives all of these emergency flexibilities that are now available because of the Stafford Act application.

...For example, these flexibilities increase the threshold for micropurchases, for simplified acquisition, for procedures for commercial item purchases. There are all sorts of things in there that will really assist the acquisition workforce. Now people complain about our acquisition system all the time, in commentaries and so forth about how slow everything is, and how we have a very inflexible system, and maybe some of those criticisms are warranted. But in this emergency situation, a lot of those criticisms really are unfounded, because the flexibility is there.

[Second, the memo] urges agencies to allow contractor employees to telework. Finally OMB has weighed in and said, "Hey, look contractor employees need to telework just like government

people, even though there may not be a provision in the contract that allows for teleworking.” [The memo] even suggests that maybe you need to modify the contract...to specifically allow for telework, or allow for flexibility on the delivery schedule, that simply is not there in the contract.

Can you provide some background on the Defense Production Act and what it means for the contracting community?

Robert Burton: President Trump on March 18 issued an executive order invoking the Defense Production Act authority for HHS, to prioritize acquisition of protective equipment and ventilators and other medical equipment as determined by HHS. So...we’re really looking at the authority now that has been delegated to the secretary of HHS.

What the heck is it? It basically requires businesses—not necessarily government contractors; they could be commercial businesses that don’t even have government contracts...to prioritize and accept orders for materials and services necessary to respond to the pandemic. And the orders must be accepted. Unless you have a really good reason not to accept them. You’ve got to accept it within a very short time frame. It really gives HHS enormous ability to incentivize the domestic industrial base to expand production and supply of critical material. And they can do things like provide loans. They can have quantity purchase commitments. The government has the ability to actually install equipment into a private industrial facility if they wanted to.

The requirements also must be flowed down to subcontractors, so this is definitely a flowdown situation. HHS’s focus right now is purchasing protective equipment and ventilators under the Defense Production Act authority invoked by the president. But this may be extended. So we’re watching here to see will it be extended to face masks, vaccines, and it’s not just product. It can also be construction. So there could be a potential for renovation or construction of health facilities, for example... I wouldn’t be surprised if the Defense Production Act authority is extended, and I believe the secretary of HHS has the authority now to actually extend it to other items without going through the president.

I think one thing our contractor friends should understand is that the failure to comply with any order coming from the government under the Defense Production Act could actually lead to civil and criminal penalties—for willful violations. You’d have to show a willful violation. But it would be willful just to say, “Hey, I’m not doing this.”

So this is a rare aspect to our contracting rules and regulations. It gives enormous power to the secretary of HHS. And of course, President Trump could extend this to other agencies as well in a matter of time.

Does the COVID-19 pandemic justify an excusable delay? What actions should contractors take to communicate the delay?

Robert Burton: Most government contracts include *FAR* clauses that excuse a contractor’s failure to perform if there is no fault or negligence by the contractor. And the *FAR* specifically

recognizes epidemics and quarantine restrictions as legitimate bases for excused performance delays, or non-performance.

...We are recommending that contractors immediately notify the cognizant contracting officer, explaining the facts surrounding the delay and requesting an extension of the delay schedule or period of performance. And if a contracting officer rejects such a request, contractors should really file a claim to protect and preserve the excusable delay as a defense down the line against any possible termination for default.

We haven't necessarily seen anything of that nature yet, but I mean, contractors really do have to be wary that they need to articulate the reasons for the excusable delay very quickly to the contracting officer.

What rights to contractors have under a stop work order?

Robert Burton: ...[Other contractors have received] suspension and stop-work orders...and contractors that get one of these orders have certain rights and obligations. So, we are recommending, for a contractor response to a suspension or stop-work order, to promptly comply with the order. Make sure you comply with the government's order, and immediately issue suspension or stop-work notices to your subcontractors and direct the subcontractors to issue similar notices to lower-tier subcontractors...this communication is absolutely critical.

And then the contractors need to make reasonable efforts to mitigate the cost of the work stoppage and maintain a record of the costs incurred to comply with the suspension or stop-work order. And bottom line, all of this is in order to seek an equitable adjustment for any resulting cost or schedule impacts resulting from the government's directions.

...It's really important to note that we have had some clients that have not received a formal stop-work order or suspension order from the government. But the contracting officer has taken certain actions, such as prohibiting the contractor to access the government work site. Which, in most cases, makes performance of the contract almost impossible. Or government personnel are simply unavailable, because they're all teleworking and for some reason, they actually need to be physically present in order for the contractor to perform. And so, it makes performance equally difficult.

In these situations, a contractor should immediately notify the contracting officer of the impact of the government restrictions on contract work performance and follow the same steps I just outlined when faced with a formal stop-work order. These informal directions from a contracting officer are what we're seeing and they're much more prevalent than any formal or stop-work order. But these informal directions from the contracting officers really have to be treated almost as if it was a formal stop-work or suspension order in order to protect the company.

What if my company or one of my contractors will not be able to perform at all as a result of the pandemic?

Robert Burton: I go back to the [OMB Memo M-20-18] that talks about this type of situation, where the prime contractor may simply have no alternatives, because their source of supply has completely dried up because of quarantines abroad [or] in the United States. But clearly, it may be that the prime contractor has no choice and simply can't perform.

In these dire situations, OMB is recommending a termination for convenience—not default—and encouraging that the government agency re-procure from another contractor that may not be as negatively impacted by the pandemic. And what was so great too, in the OMB memo, was there was encouragement to the contracting officers not to give the contractor a negative performance rating because of the fact that performance was delayed or impossible because of quarantines abroad. And this is becoming a real issue for companies that really rely on foreign sources of supply. They may need to also terminate their subcontract, right? They may need to terminate their subcontract and try to re-procure and put another subcontract in place.