

## COVID-19: IMPACTS TO YOUR PROFITS

### Notice Requirements and Business Risk Insurance

*YOU NEED TO PROTECT YOUR RIGHTS, TODAY!*

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With the recent global spread of COVID-19, the construction world has changed, along with the rules it operates by. Now more than ever, Contractors must be aware of these changes and how their businesses are (or will be) impacted.

**Fact:** The many contractual impacts of the Coronavirus situation are evolving by the day, and will certainly come to light in the weeks and months to come. With respect to this unprecedented situation, **do you understand the importance of the word “NOTICE” with regard to your business?** If you truly do, then this article will not help you. *If you don't*, then you should read on **very** carefully.

It is critically important that Contractors put the Government/Owner/Prime Contractor **ON NOTICE** – **NOW** – as your business and performance are being impacted, and you are going to be looking for recovery in the near future.

Clearly, COVID-19 is an uncontrollable event, or *Force Majeure*, and every contract does (or should) contain an “uncontrollable event” clause. The myriad of ripple effects from this event will include Changes, Suspension of Work, Stop Work, Delays, and Disruption. Each of these cited Federal Acquisition Regulation (FAR) clauses, coupled with AIA documents or your unique contract, all contain clauses with a corresponding “NOTICE” provision.

If you are a Government Contractor who intends to seek an Equitable Adjustment for adverse impacts from this situation, you **must** put the Government/Owner on **NOTICE** of same. While the principle of “**Constructive Notice**” almost always applies, the more assured method to preserve your rights to a future adjustment is to provide timely written **NOTICE** to facilitate your Request for Equitable Adjustment (REA) and/or Change to your contract at a future date.

Of critical significance, it is important to note that **all of the above-mentioned impacts can be captured under your Changes Clause** (FAR 52.243 for example), ***if prepared and addressed correctly.***

Contractually, the benefit of submitting your forthcoming REA under the Changes Clause is simple but impactful, specifically in regards to how it impacts your **PROFIT**.

Importantly the Suspension of Work and Stop Work Clauses **do not allow** for recovery of profit. However, the Changes Clause not only allows for recovery of due profit on a contractor claim, it also makes an Equitable Adjustment **mandatory**.

In fact, the regulation states verbatim:

“If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer ***shall*** **make an equitable adjustment in the contract price**, the delivery schedule, or both, and shall modify the contract.” - FAR 52.243-1(b) [Changes-Fixed-Price] [Emphasis provided]

However, if the Contractor fails to combine the NOTICE requirement with a direct reference to the Changes Clause, they most assuredly jeopardize their ability to **recover profit**.

To summarize, **if you don't submit correctly now, you can all but guarantee that loss!**

It is critical that every Contractor understand that, during this crucial time, Contractors across the United States and around the world are “putting out fires” just to keep their businesses thriving, or even just afloat. Putting the Government/Owner

**ON NOTICE NOW** will preserve your right to recover cost and time impacts *later* when the dust has settled, and give you the time you need to adequately prepare a comprehensive and impactful REA package.

In fact, these exact types of cost recoveries are Excell's "bread and butter" – it is what we specialize in. In addition to the above, a hidden resource is probably sitting in your dusty filing cabinet, i.e. **Business Risk Insurance**. Have you looked into it? Because it may very well play a very large role in the success of your business through these trying times!

## **BUSINESS RISK INSURANCE**

Ask yourself: Have I combed through my insurance policies to ascertain ALL coverage that may be available to me? If not, this could be a critical oversight that is often overlooked. One frequently forgotten type of coverage is "Business Risk Insurance", which most assuredly could help replace lost income and pay for extra expenses when a business is affected by a covered event or impact. This type of coverage, (sometimes called business income coverage or addressed by another title) is typically part of a business owners insurance policy.

Clearly, covered perils typically include theft, fire, wind, falling objects or lightning, but natural disasters and other **uncontrollable events, such as a pandemic, MAY indeed also be covered.**

***Be sure to read your business insurance policy documents so you know which perils your insurer helps cover. Excell strongly advises you to read your policy to know what is covered and what is not. If in doubt, ask a professional because the risk of missing this coverage could be critical.***

Indeed, business interruption coverage may help reimburse you in many ways, including recovery for lost income, extra expenses incurred in relocation, lost rent, increased costs of IT equipment to work from home, and many other areas too *numerous to discuss here.*

## **CONCLUSION**

***The experts at Excell Consulting have helped clients successfully navigate these types of waters many times before. We understand that everyone has questions at this uncertain time, so feel free to give us a call to help take the pressure off.***

And of course, should any government contractor continue to experience issues with their impacted contracts, or if they may have any questions concerning the proper course of action with regards to their specific situations, the professional consultants at **Excell** are available to assist, so reach out today. And remember, simple consultation calls to **Excell** are always **FREE!**

### **EXCELL CONSULTING "HERE TODAY FOR YOUR TOMORROW"**

*Author's note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – John G. Balch, CEO, MA, CPCM*