



October 2, 2009

Mr. Shay Assad  
Director, Defense Procurement and Acquisition Policy  
3060 Defense Pentagon  
Room 3B855  
Washington, D.C. 20301-3060

Subject: DFARS Class Deviation, Continuation of Essential Contractor Services

Dear Mr. Assad:

The Aerospace Industries Association (AIA) is responding to DFARS class deviation 2009-O0010, Continuation of Essential Contractor Services, issued on August 27, 2009. This class deviation adds a new subpart to the DFARS, 237.XX, Continuation of Essential Contractor Services, and authorizes contracting officers to include a new clause, 252.237-70XX, Continuation of Essential Contractor Services (Aug 2009), in solicitations and contracts that are identified by the requiring agency as having essential contractor services which support mission essential functions.

Our member companies have a long and proud history of supporting our customers during crisis situations. We support the intent of this class deviation – to provide for a reasonable assurance of the continuation of essential services provided by contractors during crisis situations such as an influenza pandemic. However, we believe contractors should be entitled to an equitable adjustment to the terms of the contract if costs increase due to the continuation of services during an event that would create an excusable delay.

Paragraph (b) of the clause requires contractors to prepare a plan with provisions for the acquisition of necessary personnel and resources for continuity of operations during a crisis for up to thirty days or until normal operations can be resumed. If the contractor anticipates not being able to perform the contract due to any of the causes enumerated in the excusable delays clause of the contract, paragraph (c) of the clause requires contractors to use best efforts and cooperate with the Government to maintain continuity of operations during a crisis.

Section 237.XX02, Policy, of the new Subpart 237.XX acknowledges that the excusable delay and termination for default clauses “generally relieve contractors from delay and default when a failure to perform arises from causes beyond their control.” These clauses do not provide other relief. The costs of executing the continuity of operations plan required by paragraph (b) of the new clause could be substantial yet contractors would be unable to price the contingent costs into the contract at inception because the extent of any future crises would be unknown. The new clause does not provide the contractor with the right to an equitable adjustment. We are concerned that inclusion of the new clause in a contract could be construed as waiving the contractor's right to an equitable adjustment to contract terms other than schedule when providing its best efforts to maintain continuity of operations during a crisis (schedule adjustment is addressed by the excusable delay and termination for default clauses).

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We recommend that you issue a revised class deviation that incorporates the modifications in the attachment. A revised class deviation would help to ensure the continuation of essential services during crises while recognizing the legitimate right of contractors to obtain equitable adjustments of contract terms for increased costs incurred on behalf of the Government due to causes beyond contractor control, fault, or negligence.

If you have any questions concerning the comments above or in the attachment, please contact me at 703 358-1042. I can be reached by email at [dick.powers@aia-aerospace.org](mailto:dick.powers@aia-aerospace.org).

Sincerely,

  
Richard J. Powers  
Director, Financial Administration

Attachment

**AIA Recommendation**  
**DFARS Class Deviation 2009-O0010, Continuation of Essential Contractor Services**  
**Added text in bold font and [brackets]. Deleted text is struck-through.**

Subpart 237.XX- CONTINUATION OF ESSENTIAL CONTRACTOR SERVICES

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237.XX02 Policy.

Although the excusable delays and termination for default clauses generally relieve contractors from delay and default liability when a failure to perform arises from causes beyond their control, contractors providing services designated as essential contractor services by a DoD component are expected to use their best efforts to continue providing such services, in accordance with the terms and conditions of their contracts even during periods of crisis. **[If providing best efforts increases the cost of, or the time required for, performance of any part of the work under a contract, the contractor is entitled to an equitable adjustment in the contract price and delivery schedule (fixed-price contracts); the estimated cost, delivery or completion schedule, amount of any fixed-fee, and other affected terms (cost-reimbursement contracts); or the ceiling price, hourly rates, delivery schedule, or other affected terms (time and materials or labor hour contracts).]**

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PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.237-70XX, CONTINUATION OF ESSENTIAL CONTRACTOR SERVICES (Aug 2009)

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(c) The Contractor recognizes that the services under this contract are vital to the Government and must be continued without interruption. In the event the Contractor anticipates not being able to perform due to any of the causes **[beyond the control and without the fault or negligence of the Contractor including those causes stated]** ~~enumerated~~ in the excusable delay **[or termination for default]** clause[s] of this contract, the Contractor shall notify the contracting officer or other designated representative as expeditiously as possible and use its best efforts and cooperate with the Government in the Government's efforts to maintain the continuity of operations. **[If providing best efforts increases the cost of, or the time required for, performance of any part of the work under this contract, the contractor is entitled to an equitable adjustment in the contract price and delivery schedule (fixed-price contracts); the estimated cost, delivery or completion schedule, amount of any fixed-fee, and other affected terms (cost-reimbursement contracts); or the ceiling price, hourly rates, delivery schedule, or other affected terms (time-and-materials or labor-hour contracts).]**

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(End of Clause)