

# COVID-19 as a Cause for Excusable Delay in Federal Contracts

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When working with U.S. government contracts, performance delays or impacts resulting from flu epidemics similar to the coronavirus (COVID-19) have been considered “acts of God” and should provide grounds for entitlement to an excusable delay.

Government contracts contain Federal Acquisition Regulation (FAR) clauses that recognize that fact. Relevant clauses found in most government contracts include the Default clauses for fixed-price contracts (FAR 52.249-8, 52.249-9, and 52.249-10), the Excusable Delay clause (FAR 52.249-14), and the Commercial Items Terms and Conditions clause (FAR 52.212-4). Delays contemplated by these clauses are in the same class as acts of God, such as fires, floods, and unusually severe weather, and are frequently referred to as “force majeure.”

When a contractor’s performance is about to be affected by an act of God, such as an epidemic or pandemic, the first step is to confirm the contract contains Default and Excusable Delay clauses. However, even with the existence of those clauses, a contractor’s work has only begun if it is to be successful in obtaining a time extension based on excusable delay. The contractor must, of course, establish the existence of an epidemic or pandemic. But additional proof is also required. The contractor must additionally establish the epidemic was the real cause of the delay it experienced and delays could not have been avoided if the contractor adopted a different method of addressing (e.g, mitigating) the problem.

The Boards of Contract Appeals have previously dealt with contractors’ assertions of epidemics as grounds for excusable delay. One of the leading cases, *Asa L. Shipman’s Sons, Ltd.*, GPOBCA No. 06-95, 1995 WL 818784 (Aug. 29, 1995), (*Asa*) involved a termination for default when the contractor’s argument was that its delayed performance was excusable because its key employees were incapacitated during a flu epidemic in New York. The board denied the contractor’s appeal. It acknowledged the existence of the alleged flu epidemic but found the contractor had not established it as the cause of the performance delay. The board held that it was insufficient to merely allege there were key employees who could not perform because of the flu, especially when the contract terms and conditions did not require the contractor to identify key employees. The board also determined the contractor failed to establish any other efforts it had made to overcome the illness of the alleged key employees.

In *Ace Electronics Associates, Inc.*, ASBCA No. 11496, 67-2 BCA 6456 (July 18, 1967), a case cited by the board in *Asa L. Shipman’s Sons*, which also addressed a claim for excusable delay arising from the results of an epidemic, the board denied the claim

holding, “It is incumbent upon [the contractor] to establish not only the existence of an excusable cause for delay but also that such cause actually contributed materially to such delay as well as the actual extent of the delay so caused.”

From the cases dealing with a contractor’s attempt to assert the existence of an epidemic or pandemic as grounds for excusable delay, it is apparent that to have a chance of succeeding, the contractor must be able to present evidence of the existence of an epidemic and the epidemic was the cause of the delay it experienced. To do this, it must be able to identify when the impacts occurred, how long they lasted, and the epidemic directly affected the critical path of performance of the work. Finally, a contractor must also establish it made reasonable efforts to attempt to mitigate the adverse effects of the epidemic on its performance but those efforts were ineffective.