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Balancing Efficiency and the Public Interest: A Comparative Analysis of Force Majeure Defaults in Government Contracting

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Balancing Efficiency and the Public Interest

A COMPARATIVE ANALYSIS OF FORCE MAJEURE DEFAULTS IN GOVERNMENT CONTRACTING

INTRODUCTION

In March 2020, the COVID-19 pandemic made its way into the United States, prompting then US President Donald Trump to declare a national state of emergency.[1] The COVID-19 pandemic has disrupted contracts across the country, including government contracts,[2] leading many contracting parties to take a closer look at their contracts and the provisions that bind them.[3] Particularly, US courts in 2021 saw an increase in case filings relating to COVID-19 and force majeure provisions.[4]

With the high stakes of federal contract performance and the risks associated with contract nonperformance, the Federal Acquisition Regulation (FAR), the regulatory scheme governing federal contracts, its force majeure-like rule,[5] and its effect on government contracts are being looked at closer than ever.[6] In taking a critical look at both the risk allocation under the FAR's

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1 *President Trump Declares State of Emergency for COVID-19*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 25, 2020), https://www.ncsl.org/ncsl-in-dc/publications-and-resources/president-trump-declares-state-of-emergency-for-covid-19.aspx [https://perma.cc/W26U-ETPZ].

2 *See* Scott Maucione, *Defense Department Working on Policy to Pay Back Contractors Faster for Work Stopped by COVID*, FED. NEWS NETWORK (Aug. 14, 2020), https://federalnewsnetwork.com/dod-reporters-notebook-jared-serbu/2020/08/defense-department-working-on-policy-to-pay-back-contractors-faster-for-work-stopped-by-covid/ [https://perma.cc/LRY9-8LGA].

3 *See* Melis Acuner et al., *COVID-19 Update: The Impact of COVID-19 on Financial Contracts*, NAT'L L. REV. (Apr. 20, 2020), https://www.natlawreview.com/article/covid-19-update-impact-covid-19-financial-contracts [https://perma.cc/49XD-4XZK].

4 Ray F. Middleman, *Litigation Trends Involving Force Majeure Clauses and Coronavirus 2020*, ECKERT SEAMANS (Apr. 27, 2020), https://www.eckertseamans.com/legal-updates/litigation-trends-involving-force-majeure-clauses-and-coronavirus-2020 [https://perma.cc/AWZ7-Y6AM].

5 *See* 48 C.F.R. § 52.249-14.

6 *See Navigating the COVID-19 Challenge—Delays, Changes and Cost Recovery Under Federal Contracts*, MCGUIRE WOODS (March 26, 2020), https://www.mcguirewoods.com/client-resources/Alerts/2020/3/navigating-the-covid-19-challenge-delays-changes-and-cost-recovery-under-federal-contracts [https://perma.cc/UL4Z-4N68].

excusable delay provision and the approach taken in other common law jurisdictions, it is clear that the United States can bolster its own regulatory scheme by incorporating language from other regulations.[7]

Risk allocation accomplished through contractual provisions is essential to not only business-to-business contracts, but also to contracts between private parties and the state. The US federal government, along with its agencies, is the largest buyer of good and services across the globe.[8] Privatization—where the federal government purchases goods or services from another party—has become increasingly popular in the past few decades, with the aim of making such acquisitions more efficient.[9]

The US government has been armed with the ability to purchase from the public sector since its inception.[10] Article I, Section 8 of the US Constitution gives the federal government the power to "pay the Debts and provide for the common Defense and general Welfare of the United States."[11] Section 9 goes on to establish the "power of the purse," allowing the federal government to appropriate federal funds.[12] From 1779 to 1947, there was no consolidated rulebook for federal acquisition until the Armed Services Procurement Regulations (ASPR) were adopted in 1948.[13] The Office of Federal Procurement Policy Act Amendments of 1979 authorized the issuance of "policy directives . . . for the purpose of promoting the development and implementation of the uniform procurement system."[14] The resulting FAR went into effect on

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[7] Such as one of Canada's force majeure-like provisions in the Standard Acquisitions Clauses and Conditions Manual. *See Section 3-General Conditions: General Conditions–Higher Complexity–Goods: 2030 11 (2014-09-25) Excusable Delay*, *in* STANDARD ACQUISITION CLAUSES AND CONDITIONS MANUAL (Pub. Works & Gov't Servs. Can. 2021) [hereinafter SACC MANUAL] (last visited Apr. 3, 2022), https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual.

[8] *See, e.g.*, Exec. Order No. 13,627, 3 C.F.R. (2012) (characterizing the federal government as "the largest single purchaser of goods and services in the world").

[9] *See* Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 717–19, 733 (2010).

[10] *See* Christopher R. Yukins, *The U.S. Federal Procurement System: An Introduction*, 2017 UPPHANDLINGSRÄTTSLIG TIDSKRIFT 69, 70–71 (2017) ("Important patterns in modern federal procurement can be traced back to the Revolutionary War . . . . The new United States inherited this traditional contracting system from Europe . . .").

[11] U.S. CONST. art. I, § 8, cl. 1.

[12] *Id.* § 9, cl. 7; *see* Kate Stith, *Appropriations Clause*, NAT'L CONST. CTR., https://bit.ly/3G6hpRt [https://perma.cc/A36U-P5K5].

[13] *See U.S. Defense Procurement*, GEO. WASH. UNIV. JACOB BURNS L. LIBR., https://law.gwu.libguides.com/c.php?g=330645&p=2219710 [https://perma.cc/Q2PA-KS3L] ("Issued under the Armed Services Procurement Act, the ASPR established defense procurement regulations and was in effect from 1948 to 1978.").

[14] KATE M. MANUEL ET AL., CONG. RSCH. SERV. R42826, THE FEDERAL ACQUISITION REGULATION (FAR): ANSWERS TO FREQUENTLY ASKED QUESTIONS 10 (2015), https://sgp.fas.org/crs/misc/R42826.pdf [https://perma.cc/Q5EH-JHPY].

October 1, 1984, codifying the policies for acquisition for almost all executive agencies.[15] Accordingly, the FAR governs contracts accounting for billions of dollars of federal agency spending, exerting incredible influence on the US federal procurement regime.[16]

Government contracts are notoriously complex, often spanning thousands of pages and reading like a foreign language to those unfamiliar with contractual jargon.[17] The FAR itself spans thousands of pages from cover to cover.[18] Many of the provisions within government contracts serve to allocate risk between the government agency and federal contractors.[19] Pricing and termination clauses are the two main contractual provisions that help to define risk allocation between parties.[20] The excusable delay provision is one of these provisions.[21]

Recognizing the unique risks that the government must balance as a sovereign entity, the FAR equips the government with the unilateral right to terminate a contract for default if a contractor fails to perform or, for some contracts, simply for convenience in the government's "best interest."[22] However, a contractor's nonperformance will not always lead to a default termination for delays outside of its control.[23]

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[15] *See id.* at 11; *id.* at 3 (stating that the FAR does not apply to legislative or judicial branch agencies and "does not necessarily apply to all executive branch agencies," such as the Federal Aviation Administration); *see also* Federal Acquisition Regulation ("FAR"), 48 C.F.R. §§ 1–53.300.

[16] *See Federal Procurement Spending Up $120 Billion Since 2015*, GA. TECH CONTRACTING EDUC. ACAD. (June 4, 2020), https://contractingacademy.gatech.edu/2020/06/04/federal-procurement-spending-up-120-billion-since-2015/ [https://perma.cc/R326-AF2G] ("The Government Accountability Office found agencies spent $584 billion on procurement last year . . . . The Defense Department accounted for $381 billion while civilian agencies spent $205 billion.").

[17] *See Federal Government Contract Overview*, FINDLAW (Feb. 2, 2018), https://corporate.findlaw.com/law-library/federal-government-contract-overview.html [https://perma.cc/A7HH-GR4Q] (providing examples of the numerous complex requirements that may be included in a government contract and noting that "[t]hese requirements necessitate the development of relatively complex, government contract-unique . . . systems").

[18] Richard D. Lieberman, *Is the Entire Federal Acquisition Regulation (FAR) Incorporated in Your Government Contract?*, PUB. CONTRACTING INST. (Oct. 5, 2017), https://bit.ly/3PyhJfZ [https://perma.cc/9AUP-2HUD] (noting the FAR consists of thirty-seven chapters, with Chapter 1, applicable to all agencies, comprising over two thousand pages).

[19] Ralph C. Nash, Jr., *Risk Allocation in Government Contracts*, 34 GEO. WASH. L. REV. 693, 694 (1966).

[20] *Id.* This note will discuss termination provisions only—specifically the excusable delay provision—while acknowledging that other provisions, such as pricing provisions, can affect the risk allocation of a specific contract.

[21] 48 C.F.R. § 52.249-14.

[22] *See* Douglas P. Hibshman, *Federal Contractors' Guide to Coronavirus Contract Impacts*, FOX ROTHSCHILD LLP (Mar. 24, 2020), https://bit.ly/3Pzfh8R [https://perma.cc/N5VM-HTCG]; 48 C.F.R. § 52.249-1 ("The Contracting Officer . . . may terminate this contract . . . when it is in the Government's interest.").

[23] Nicholas Solosky, *COVID-19 and Government Contracting Best Practices: Part 1—Excusable Delay Claims*, JD SUPRA (Apr. 1, 2020), https://www.jdsupra.com/legalnews/covid-19-and-government-contracting-75822/ [https://perma.cc/2ZDE-YRMV].

The FAR's excusable delay provision serves as the default force majeure-like provision for most federal acquisition contracts[24] and states that the contractor will not be in default for nonperformance of the contract if the cause of the nonperformance is both "beyond the control" of the contractor "and without the fault or negligence of the [c]ontractor."[25] The provision also provides a nonexhaustive list of possible causes that could be deemed beyond the control of the contractor, including: "(1) acts of God or of the public enemy, (2) acts of the Government . . . (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather."[26] Further, the provision states that if the contractor's failure to perform is a result of a "failure of a subcontractor," the contractor will be held in default of the contract unless the cause of the nonperformance was beyond the control and without the fault or negligence of *both* the contractor and subcontractor.[27]

The standard excusable delay provision also allows contractors to obtain schedule relief only through a time extension, not recovery for costs, if the contractor can meet the requirements under the provision.[28] This also keeps the government from terminating the contract for default or from asserting a breach of contract claim.[29] However, "there are no automatic FAR remedies," regardless of the severity of the event that causes a delay.[30] The provision imposes stringent requirements on contractors[31] for awarding a time extension.

The excusable delay provision places the risk and cost of nonperformance on contractors in the event that the

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[24] *See* STEVEN W. FELDMAN, GOVERNMENT CONTRACT GUIDEBOOK §26:6 (4th ed.), Westlaw (database updated Dec. 2021) (noting that excusable delay clauses are included in almost "all cost-reimbursement prime contracts"); *see also* 48 C.F.R. § 52.249-8(c) (the equivalent default provision for fixed-price contracts).

[25] 48 C.F.R. § 52.249-14(a).

[26] *Id.*

[27] *Id.* § 52.249-14(b). Section (b) goes on to state "unless (1) The subcontracted supplies or service were obtainable from other sources; (2) The Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and (3) The Contractor failed to reasonably comply with this order." *Id.*

[28] *See COVID-19: Preparing for Its Effects on Government Contracts*, COVINGTON & BURLING LLP 1, 4 (2020), https://www.cov.com/-/media/files/corporate/publications/2020/04/covid-19-preparing-for-its-effects-on-government-contracts-takeaways.pdf [https://perma.cc/Z2MW-5XQX].

[29] *See id.*

[30] *See* Nicholas T. Solosky, *COVID-19 and Government Contracting Best Practices: Part 2—Recovering Extra Costs*, FOX ROTHSCHILD LLP (Apr. 1, 2020), https://governmentcontracts.foxrothschild.com/2020/04/articles/general-federal-government-contracts-news-updates/covid-19-and-government-contracting-best-practices-part-2-recovering-extra-costs/ [https://perma.cc/VP7Z-YBKJ].

[31] *See infra* Part II.

requirements of the provision are not met.[32] While the FAR is drafted to favor the US government in regard to contract risk allocation, there are modifications that can be made to the acquisition process, both within and outside of the FAR, to displace some of the burdens on contractors while also continuing to protect the federal government from unnecessary risk. In contrast to the FAR, the language of Canada's excusable delay provision, referred to herein as "SACC 11," allows contractors to help mold the provision and provide for greater cooperation and coordination between contractors and the government agency up front.[33] Modifying the FAR's excusable delay provision by taking pieces of Canada's provision will allow contractors to better assess their possible future risks *ex ante*, build the cost of any such risks into their contracts, and save both parties from the costs of potential future litigation.

Part I of this note looks at force majeure provisions historically and how these provisions allocate risk under general contracts and contracts to which the federal government is a party. Part II outlines the different requirements for federal contractors to receive a time extension under FAR § 52.249-14 and how courts have interpreted such requirements. Part III looks at federal acquisition contracts in Canada and its standard excusable delay provision. Part IV looks deeper into the risk allocation tradeoffs of the US and Canadian regulations. Finally, Part V proposes a streamlined version of the FAR, addresses the tradeoffs of these proposed modifications, and considers how such a version of the FAR would affect future federal contractors in the United States.

I. BACKGROUND OF FORCE MAJEURE PROVISIONS

Force majeure has its historical roots in the Roman legal doctrines "*pacta sunt servanda* ('agreements must be kept') and *rebus sic stantibus* ('things standing thus')."[34] Together, "[these doctrines] support the notion that contracts must be honored provided the circumstances remain the *same*."[35] "Force majeure"

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[32] *See* Aron C. Beezley & Sarah Sutton Osborne, *A Gov't Contractor's Guide to Excusable, Compensable Delays*, LAW360 (Apr. 7, 2020, 4:57 PM), https://www.law360.com/articles/1261175/a-gov-t-contractor-s-guide-to-excusable-compensable-delay [https://perma.cc/YC57-ZVKG] (discussing how an epidemic such as COVID-19 "does not create an excusable delay per se" but that contractors must prove that the epidemic both occurred and caused the delay in performance).

[33] *See 2030 11 (2014-09-25) Excusable Delay*, *supra* note 7.

[34] Jocelyn L. Knoll & Shannon K. Bjorklund, *Force Majeure and Climate Change: What Is the New Normal?*, 8 AM. COLL. CONSTR. L.J. 1, 4 (2014).

[35] *See id.* (emphasis added).

is a phrase of French origin, meaning a "superior or insuperable force . . . that cannot be reasonably anticipated or controlled."[36] Under a contract's force majeure provision, a party can be excused from performing with the stipulation that the event was unforeseen and "beyond the control of [both] part[ies]."[37] While force majeure events are colloquially known as "acts of God," acts of people have also been viewed as force majeure events.[38] Force majeure provisions are interpreted differently in civil law and common law jurisdictions. Further, as discussed below, these provisions serve to allocate the risk between parties to a contract in various ways depending on the nature of the contract.

A. Force Majeure Provisions in Civil Law Jurisdictions

Originating in Roman legal doctrines,[39] force majeure clauses generally only exist on their own and are incorporated into statutes in civil law countries.[40] In civil law countries, while jurisdictions may differ with respect to the possible triggering events, the interpretation of requirements, or the relief granted, the concept of force majeure automatically applies to the analysis of nonperformance of a party even if the contract does not expressly contain a force majeure clause.[41] The Quebec Civil Code is among the most detailed and one of the only truly defined force majeure provisions even among civil law jurisdictions.[42] The force majeure provision states that "[a] person may free himself from his liability . . . by proving that the injury results from superior

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[36] *Force Majeure*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/force%20majeure [https://perma.cc/RU39-XF78].

[37] *See* Knoll & Bjorklund, *supra* note 34, at 3–4.

[38] *See* Beth W. Petronio et al., *COVID-19: Applicability of Force Majeure Clauses in the United States*, K&L GATES LLP (Mar. 18, 2020), https://www.klgates.com/COVID-19-Applicability-of-Force-Majeure-Clauses-in-the-US-03-18-2020 [https://perma.cc/YPQ7-GW83] ("Following the terrorist attacks on September 11, 2001, many companies began to include 'acts of terrorism' as a force majeure trigger.").

[39] *See* Knoll & Bjorklund, *supra* note 34, at 4. One of the main distinctions between civil law and common law countries is that judicial decisions are binding in common law systems whereas only legislation is considered binding in civil law systems. *See Key Features of Common Law or Civil Law Systems*, WORLD BANK (May 25, 2021), https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law [https://perma.cc/M44M-DQUY]. Further, there is less freedom of contract in civil law systems as compared to common law systems. *See id.*

[40] *See* Andrew C. Smith et al., *Tour de Force: Force Majeure in Civil Law Jurisdictions—A Superior Force Majeure Doctrine?*, PILLSBURY LLP (Dec. 2, 2020), https://www.pillsburylaw.com/en/news-and-insights/force-majeure-civil-versus-common-law.html [https://perma.cc/8LKQ-VQF5].

[41] Michael Polkinghorne & Charles B. Rosenberg, *Paris Energy Series No. 9: Expecting the Unexpected: The* Force Majeure *Clause*, WHITE & CASE LLP 1–2 (Feb. 2015), https://www.jdsupra.com/legalnews/paris-energy-series-no-9-expecting-the-25888/ [https://perma.cc/C76P-WSCF].

[42] *Id.* at 2.

force . . . . Superior force is an unforeseeable and irresistible event, including external causes . . . ."[43] Quebec's Civil Code exemplifies three common themes that emerge in almost all force majeure provisions regardless of jurisdiction: the event (1) was "unforeseeable at the time of contracting," (2) was "caused by an external force," and (3) was brought about by effects that cannot be mitigated by the party.[44]

Despite civil law courts inferring the application of force majeure provisions even if not expressly included, civil law countries such as France also include theories of unforeseeability and force majeure in their public procurement codes,[45] largely allocating the risk to contracts in a similar fashion as common law countries. However, as noted above, even civil law countries without express force majeure provisions in their government contract regulations will likely impute a force majeure provision into the contract.

B. Force Majeure Provisions in Common Law Jurisdictions

"Under the common law of contracts," parties are bound to perform all of their obligations under a contract.[46] Contrary to civil law jurisdictions, force majeure provisions in common law countries, such as the United States and Canada, are generally "creature[s] of consent," and only apply if expressly included in a contract by the parties.[47] This reality reflects the desire of the United States and other common law countries to enforce contracts by determining the intent of the parties at the time of contracting, allowing parties the freedom to contract how they choose.[48]

Regardless of common law jurisdictions' unwillingness to adopt force majeure provisions statutorily, the provisions used in these jurisdictions generally include three common elements when used: the event (1) can occur by human or natural forces, (2) "cannot have reasonably been foreseen by the parties," and

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[43] *Id.*

[44] *See* Knoll & Bjorklund, *supra* note 34, at 4 (emphasis omitted).

[45] *See Public Procurement Contracts in the Context of the COVID-19 Crisis in France*, CMS LAW-NOW (May 29, 2020), https://www.cms-lawnow.com/ealerts/2020/05/public-procurement-contracts-in-the-context-of-the-covid-19-crisis-in-france?cc_lang=en [https://perma.cc/D5ZY-AR9Z].

[46] *See* Paul Venus, *Force Majeure and COVID-19—What You Need to Know*, LEXOLOGY (Mar. 18, 2020), https://www.lexology.com/library/detail.aspx?g=9d59884e-a093-44a1-97e4-97f69fa12925 [https://perma.cc/A96Y-U4GE].

[47] *See* Polkinghorne & Rosenberg, *supra* note 41, at 1.

[48] *See* Nancy Yamaguchi et al., *Cross-Border Transactions Caught at the Crossroads: Navigating the Global COVID-19 Crisis Through Force Majeure Provisions*, MORGAN, LEWIS & BOCKIUS LLP 1, 4 (July 2020), https://www.morganlewis.com/pubs/2020/07/cross-border-transaction-caught-at-the-crossroads-navigating-the-global-covid-19-crisis-through-force-majeure-provisions-cv19-o [https://perma.cc/B2E4-K5EG].

(3) "was completely beyond the parties' control and they could not have prevented its consequences."[49] However, parties are generally free to shape their own provisions to meet their specific contractual needs.[50] While the finer points may differ on a case-by-case basis, force majeure provisions often specifically define and limit (1) the definition of force majeure under the contract, (2) examples of events that may be considered a force majeure event, (3) notice or other procedural requirements to invoke the clause, and (4) the relief granted.[51]

While the common law system does not imply the existence of a force majeure provision that is not expressly provided for in a contract, the common law does offer contracting parties some limited relief through the principles of impossibility of performance, frustration of purpose, and impracticability of performance.[52] However, these doctrines are more open to interpretation by courts than a strictly defined and limited force majeure clause.[53] Thus, express clauses, like force majeure, create more certainty in contracting than the implied doctrines of impossibility, impracticability, and frustration.

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[49] *See* Venus, *supra* note 46 (citing Lebeaupin v. Richard Crispin & Co. [1920] 2 KB 714); Rand-Whitney Containerboard Ltd. P'ship v. Town of Montville, No. 96-CV-413, 2005 WL 2481480, at *2–5 (D. Conn. Aug. 31, 2005) (explaining that a foreseeable need does not qualify as a force majeure event and the duty to mitigate damages begins at the time of the breach of contract).

[50] *See generally Force Majeure Under Common Law*, ASHURST (Mar. 17, 2020), https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide—-force-majeure-under-common-law/[https://perma.cc/UUE7-CQ45] (discussing the different approaches that common law contracts may choose to take in constructing a force majeure provision).

[51] *See* Polkinghorne & Rosenberg, *supra* note 41, at 3–4.

[52] A party's contract performance is excused for "impossibility of performance . . . when an unforeseen event makes performance objectively impossible." *Client Alert: Impossibility, Frustration of Purpose, and Impracticability: Doctrines That May Excuse Contractual Performance During the COVID-19 Pandemic*, BLEAKLEY PLATT & SCHMIDT LLP (Apr. 28, 2020), https://www.bpslaw.com/client-alert-impossibility-frustration-of-purpose-and-impracticability-doctrines-that-may-excuse-contractual-performance-during-the-covid-19-pandemic/ [https://perma.cc/4T7K-ZZ2N]. "Frustration of purpose" applies in a narrower context when a change in circumstances after contract formation "makes one party's performance worthless to the other." *Id.* Lastly, impracticability of performance applies to the sale of goods and is "essentially a codification of the [impossibility] doctrine." *Id.* The principles behind these doctrines originated with *Taylor v. Caldwell*, *see* 122 Eng. Rep. 309, 314 (1863). Two decades later, the US Supreme Court would adopt the same rule of law in *The Tornado*, *see* 108 U.S. 342, 351 (1883).

[53] *See* David J. Ball et al., *Contractual Performance in the Age of Coronavirus: Force Majeure, Impossibility and Other Considerations*, NAT'L L. REV. (Mar. 18, 2020), https://www.natlawreview.com/article/contractual-performance-age-coronavirus-force-majeure-impossibility-and-other [https://perma.cc/93HQ-J2CK].

C. Force Majeure Risk Allocation for General Contracts

At the outset, "contract liability is strict liability."[54] Catastrophic events—such as the September 11 terrorist attacks and the Ebola virus epidemic—compound the common risks that come with conducting business in an ever-changing economy.[55] Therefore, contracts must not only consider common contracting risks but must also prepare as much as possible for events that are unforeseeable.

Despite the rule of strict liability, parties to a contract often engage in a bargaining process to minimize their risk and maximize their reward by molding the contract to their specific needs.[56] Force majeure clauses work to allocate the risk of nonperformance to one party upon the occurrence of an event that the parties could not have foreseen.[57] These clauses put parties on notice for certain events that may suspend or excuse performance.[58] Therefore, force majeure provisions allow contracting parties to mitigate the risk of a breach of contract due to an unforeseeable event.[59] The force majeure provision ideally also addresses questions, such as what remedies are available when the clause is invoked, who can invoke the clause, and what constitutes inability to perform.[60]

While all contracts are accompanied by risks that may occur during the ordinary course of business and contracting—such as financial risk, legal risk, security risk, etc.[61]—the risks and

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[54] *See* Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413, 1413 (June 2009) (quoting RESTATEMENT (SECOND) OF CONTRACTS ch. 11, intro. note (1981)) ("Contract liability is strict liability. It is an accepted maxim that *pacta sunt servanda*, contracts are to be kept. The obligor is therefore liable in damages for breach of contract even if he is without fault," and even if circumstances have made the contract more burdensome or less desirable than he had anticipated.).

[55] *See* Peter J. Wiazowski & Trevor Zeyl, *Contract Performance in a Coronavirus World: Force Majeure Clauses and the Doctrine of Frustration*, NORTON ROSE FULBRIGHT (Mar. 18, 2020), https://www.nortonrosefulbright.com/en/knowledge/publications/844d7cf4/contract-performance-in-a-coronavirus-world-force-majeure-clauses-and-the-doctrine-of-frustration [https://perma.cc/EQC8-XD4B] ("[F]orce majeure clauses . . . protect the parties from events that are agreed to be outside normal business risk.").

[56] *Using Contractual Risk Allocation Provisions to Minimize Risk and Maximize Reward*, PRAC. L. COM. 1 (July 10, 2013), Westlaw W 5-532-2743.

[57] *Id.*

[58] P.J.M. Declercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 J.L. & COM. 213, 214 (1995).

[59] *See Risk Allocation in Commercial Contracts*, PRAC. L. COM. TRANSACTIONS (2022), Westlaw W 4-519-5496.

[60] *See* Matt T. Paxton, *Force Majeure—Allocating Risks for Unforeseen and Uncontrollable Events—Are Raccoons a Force Majeure Event?*, AHLERS CRESSMAN & SLEIGHT PLLC (Apr. 4, 2013), https://www.acslawyers.com/force-majeure-allocating-risks-for-unforeseen-and-uncontrollable-events-are-raccoons-a-force-majeure-event/ [https://perma.cc/8LDG-3FXP].

[61] *See* David Parks, *Overview of 4 Common Contract Risk Types*, CONTRACT LOGIX, https://bit.ly/3wIvvnt [https://perma.cc/3DPF-S5WR].

effects of specific unforeseeable events differ based on the nature and type of contract at hand.[62] For example, while common risks in construction contracts include weather and labor strikes that may delay a project, contractors to government agencies face unique risks at a national level outside of the ordinary course of business.[63]

D. Force Majeure Risk Allocation for Government Contracts

The federal government and individual government agencies face different contracting risks as compared to other sophisticated parties. For most contracting parties, "[t]he essential risk is thus financial."[64] The other main contracting risk outside of cost is performance risk, requiring an analysis of which party bears the responsibility to perform.[65] For private parties, as force majeure clauses excuse the performance of one party, that party may face financial disruption due to a delay but usually is not encumbered with loss of reputation or further business opportunities.[66] However, when the government is party to a contract, the government bears unique risks, such as "the risk of not obtaining . . . services or supplies when needed . . . or the risk that the agency will be discredited because of the way its contracts are performed."[67]

Generally, the assumption with private contractors is that they aim to "maximize personal welfare[ ] or profits," whereas the government ideally seeks to maximize the public welfare.[68] In contracts between a private party and the state, however, the government must decide how to balance public interests with the ultimate goal of having an efficient contracting process and management system.[69] Three of the federal government's largest

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62 *See Contract Types*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 21, 2021), https://www.cdc.gov/contracts/about-cdc-contracts/types.html [https://perma.cc/3EAT-MYHX].

63 *See* C. Todd Lopez, *DOD Focuses on Minimizing Cyber Threats to Department, Contractors*, U.S. DEP'T OF DEF. (Aug. 13, 2020), https://www.defense.gov/Explore/News/Article/Article/2312512/dod-focuses-on-minimizing-cyber-threats-to-department-contractors/ [https://perma.cc/HQ59-F2F5] (stating that "efforts related to the [Defense] [D]epartment's Cybersecurity Maturity Model Certification . . . are underway to mitigate risks as they relate to both the department and contractors"); *see also Top 6 Construction Delay Factors*, ALICE TECHS. (Aug. 19, 2021), https://blog.alicetechnologies.com/construction-delay-factors [https://perma.cc/9QH8-4XVB].

64 Nash, *supra* note 19, at 693.

65 *Id.* at 693, 710.

66 *See id.* at 693.

67 *Id.*

68 *See* Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257, 273, 320 (1991).

69 *See* Andrew Smith, *New Administration's Infrastructure List Could Mean Billions of Dollars in Government Contract Opportunities*, GA. TECH ENTER. INNOV. INST. (Jan. 16, 2017), https://gtpac.org/2017/01/26/new-administrations-infrastructure-list-could-mean-billions-of-dollars-in-government-contract-opportunities/ [https://perma.cc/3ML3-XD23].

areas of risk, with respect to contracting that intersects with public welfare, are associated with the economy, defense and national security, and infrastructure.[70]

On the economic scale, the federal government's spending on different sectors can have an aggregate effect reflected in the country's gross domestic product, the measure of a nation's economic growth.[71] Locally, federal spending and contracting drives the regional economy of areas that are the largest recipients of federal contract dollars.[72] Globally, foreign acquisition can also cause adverse economic effects due to unforeseeable events—such as wars, intranational conflicts, and political tensions with other foreign nations—affecting the economy of foreign countries and, thereby, affecting their contracts with the United States.[73] For example, in May 2021, China issued updated procurement guidelines requiring "up to 100% local content on hundreds of items."[74] These guidelines, coupled with President Biden's subsequent "Buy American" executive order, will affect billions of dollars' worth of trade between the two nations.[75] Further, rising tensions in the policy environment between China and the United States were compounded by the COVID-19 pandemic, impacting supply chains and causing national manufacturers to divert trade and reallocate workers, often leading to increased layoffs.[76]

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[70] *See* Lisa Brown, *Massive Government Contracting Drives Economy*, GLOBEST (Sept. 28, 2018, 3:45 AM), https://www.globest.com/2018/09/28/massive-government-contracting-drives-economy/?slreturn=20200822181318 [https://perma.cc/R27X-E6EC]; Mayfield, *infra* note 80; Bousquin, *infra* note 86 (discussing the impact and risk associated with government contracts related to the economy, defense, and infrastructure).

[71] *See* Tejvan Pettinger, *Impact of Increasing Government Spending*, ECON. HELP (Mar. 19, 2019), https://www.economicshelp.org/blog/2731/economics/impact-of-increasing-government-spending/ [https://perma.cc/2GMR-9CJ2].

[72] *See* Brown, *supra* note 70 ("[T]he federal government procured $116 billion in R&D . . . and where these dollars flow really drives the regional economy.").

[73] *See* Richard D. Harroch et al., *The Impact of the Coronavirus Crisis on Mergers and Acquisitions*, FORBES (Apr. 17, 2020, 6:00 AM), https://www.forbes.com/sites/allbusiness/2020/04/17/impact-of-coronavirus-crisis-on-mergers-and-acquisitions/?sh=d4b2a5f200ad [https://perma.cc/PT8D-KLUD].

[74] Andrea Shalal, *China Quietly Sets New "Buy Chinese" Targets for State Companies—U.S. Sources*, REUTERS (Aug. 2, 2021), https://www.reuters.com/business/aerospace-defense/china-quietly-sets-new-buy-chinese-targets-state-companies-us-sources-2021-08-02/.

[75] *Id.*; *see also* Press Release, White House, Off. of the Press Sec'y, Fact Sheet: Biden-Harris Administration Issues Proposed Buy American Rule, Advancing the President's Commitment to Ensuring the Future of American is Made in America by All of America's Workers (July 28, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/28/fact-sheet-biden-harris-administration-issues-proposed-buy-american-rule-advancing-the-presidents-commitment-to-ensuring-the-future-of-america-is-made-in-america-by-all-of-americas/ [https://perma.cc/DH29-M374].

[76] *See* Yukon Huang & Jeremy Smith, *In U.S.-China Trade War, New Supply Chains Rattle Markets*, CARNEGIE ENDOWMENT FOR INT'L PEACE (June 24, 2020), https://carnegieendowment.org/2020/06/24/in-u.s.-china-trade-war-new-supply-chains-rattle-markets-pub-82145 [https://perma.cc/6FBM-J3LY].

As one of the world's economic leaders, the US federal government's ability to contract, at what scope and to what expense, has the power to tip the scales of economic growth, in regional US cities and in foreign countries by manipulating the global marketplace.[77]

The US Department of Defense (DOD) also utilizes procurement to obtain materials such as military hardware, upgrades to existing equipment, and weapons.[78] The DOD's procurement spending has one of the largest impacts on US military presence internationally.[79] Disruptions in the supply chain affect the DOD's ability to contract for materials and services needed by its military branches and foreign allies when contractors, subcontractors, and vendors are unable to manufacture or acquire needed items or meet deadlines.[80] For example, Italy's industrial facilities were negatively impacted by COVID-19, affecting the US Air Force's ability to receive needed materials for a US nuclear program.[81] Further, forty-eight defense acquisition programs—including contractors such as Boeing and Lockheed Martin—were delayed due to COVID-19.[82]

The federal government not only faces these national risks that may delay or hinder contracting, but also faces external risks from foreign governments. Contractors for the DOD often receive classified information, and the misuse or inadequate protection of this information potentially endangers the national security of the country.[83] These oversights by contractors have the potential to create incredible cybersecurity risks.[84]

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[77] M. Ayhan Kose et al., *The Global Role of the U.S. Economy: Linkages, Policies, and Spillovers* 1, 19 (World Bank Ctr. for Applied Macroeconomic Analysis, Working Paper No.7962, 2017), https://openknowledge.worldbank.org/handle/10986/26021 [https://perma.cc/E9NX-HCX9].

[78] *See* HEIDI M. PETERS & BRENDAN W. MCGARRY, CONG. RSCH. SERV., IF10599, DEFENSE PRIMER: PROCUREMENT (2021), https://fas.org/sgp/crs/natsec/IF10599.pdf [https://perma.cc/UW2N-VDN6].

[79] *See* HEIDI M. PETERS, CONG. RSCH. SERV., R44116, DEPARTMENT OF DEFENSE CONTRACTOR AND TROOPS LEVELS IN AFGHANISTAN AND IRAQ: 2007-2020, 1 (2021), https://sgp.fas.org/crs/natsec/R44116.pdf [https://perma.cc/PL4W-QHTN].

[80] *See* Mandy Mayfield, *COVID-19 Pandemic Delaying Some Defense Programs*, NAT'L DEF. INDUS. ASS'N (May 11, 2020), https://bit.ly/3sQd3se [https://perma.cc/5LU9-2MTT] (noting that small business are integral to the supply chain for federal contracts and that the federal government is looking at internal solutions, such as accelerating percentages, and external solutions, such as working with international partners, to protect the supply chains).

[81] *See* Aaron Mehta & Valerie Insinna, *Chaos, Cash and COVID-19: How the Defense Industry Survived—and Thrived—During the Pandemic*, DEF. NEWS (Mar. 15, 2021), https://www.defensenews.com/industry/2021/03/15/chaos-cash-and-covid-19-how-the-defense-industry-survived-and-thrived-during-the-pandemic/ [https://perma.cc/MQD2-47QX].

[82] *Id.*

[83] *See* Derek B. Johnson, *Supply Chain Security: The Subcontractor Risk*, DEF. SYS. (Apr. 1, 2019), https://bit.ly/3wwAkl2 [https://perma.cc/CB46-FPV5].

[84] *See id.* (stating that in 2018, Chinese hackers targeted a US Navy contractor and uncovered "'massive' amounts of sensitive data").

While other sophisticated parties to a contract may experience construction delays or financial loss in contracts for private infrastructure projects, such as office buildings or retail stores, the federal government is often party to contracts for *public* infrastructure projects, such as roads, highways, and bridges.[85] When unforeseeable events come to fruition and parties are unable to perform under the contract, the federal government is left with incomplete, yet crucial infrastructure projects that citizens rely on.[86] Infrastructure projects have an important impact on public welfare and quality of life. Public infrastructure allows cities to grow, decentralize, and regulate economic activity by mitigating problems associated with transportation, waste management, and educational facilities.[87] Historically, developments in the transportation sector leading to modern day trains allowed workers to live farther from workplaces, expanding the size of the urbanized area.[88] These considerations of public welfare and quality of life may be affected if force majeure events occur that render performance impossible or render the government unable to adequately pay for services.

The federal government, due to the unique contracting risks it faces, is not in the business of losing time, reputation, or money.[89] Thus, government contracts and the regulations that govern them typically allocate most of the risk to contractors, leaving those contractors in a volatile environment of uncertainty.[90] Further, the force majeure-like provision in the FAR creates potential traps for contractors that could deprive contractors of relief for nonperformance.[91]

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[85] *See* James McBride & Anshu Siripurapu, *The State of U.S. Infrastructure*, COUNCIL ON FOREIGN REL. (Aug. 4, 2021), https://www.cfr.org/backgrounder/state-us-infrastructure [https://perma.cc/LYV4-P2UU] (discussing an infrastructure package passed by the House of Representatives that provided for federal spending on bridges, roads, and public transit).

[86] *See* Joe Bousquin, *$9.6B Worth of Infrastructure Projects Delayed or Cancelled During COVID-19*, CONSTR. DIVE (Aug. 4, 2020), https://www.constructiondive.com/news/96b-worth-of-infrastructure-projects-delayed-or-canceled-during-covid-19/582713/ [https://perma.cc/8G2Z-L9Q3] (noting that the American Road and Transportation Builders Association reported that sixteen states had "project delays or cancellations worth approximately $5 billion").

[87] *See* Andrew F. Haughwout, *Infrastructure and Social Welfare in Metropolitan America*, FRBNY ECON. POL'Y REV. (Dec. 2001), https://www.newyorkfed.org/medialibrary/media/research/epr/01v07n3/0112haug.html [https://perma.cc/N5D6-PMYN].

[88] *See id.*

[89] *See* Hibshman, *supra* note 22.

[90] *See, e.g.*, Lambert Constr. Co. v. Fed. Aviation Admin., DOTCAB 77-9, 78-1 BCA ¶ 13,221 (showing a typical risk allocation).

[91] *See* Beezley & Osborne, *supra* note 32 (detailing some of the requirements that contractors must meet for their nonperformance to be excused and the difficulty of meeting such requirements as exemplified by the COVID-19 pandemic).

II. THE FEDERAL ACQUISITION REGULATION AND ITS EXCUSABLE DELAY PROVISION

The US federal government's bargaining power during contract formation "far outweighs that of . . . contractor[s]," as the FAR is largely formulated to meet the government's needs as a sovereign entity and to fulfill its duty to serve public interests.[92] While a contractor's failure to perform its obligations under a contract "establishes a prima facie case of default,"[93] the excusable delay provision does not leave contractors without any adequate remedy for such nonperformance.

Since its adoption in 1984, provisions of the FAR have been periodically revised and updated to reflect the needs of the nation and federal government. As recently as July 2021, multiple government agencies proposed an amendment to the FAR to address changes in "domestic preferences in [g]overnment procurement."[94] The excusable delay provision has only been amended once, in May 2007, for minor clarification and language changes.[95]

As previously discussed, FAR § 52.249-14, the excusable delay provision, serves as the default force majeure provision for most US government acquisition contracts.[96] Under the provision, excusable delays excuse the contractor from nonperformance and allow for a time extension.[97] On the other hand, inexcusable delays—delays within the control of the contractor or its subcontractor—do not absolve the contractor of liability for nonperformance and do not allow for any relief.[98]

The beginning of an excusable delay claim commences with the contracting officer (CO) of the contract denying a claim made by the contractor.[99] The contractor may appeal the denial

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[92] *See* Lauren Olmstead, Note, *The Amazon-ization of Federal Procurement: Using the Uniform Commercial Code to Moderate an Inevitable Innovation*, 48 PUB. CONT. L.J. 101, 112 (2018).

[93] *See id.* at 111.

[94] *See* Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements, 86 Fed. Reg. 40,980, 40,980 (proposed July 30, 2021) (to be codified at 48 C.F.R. pts. 1, 25, 52).

[95] *See* 48 § C.F.R. §52.249-14 (2007); *e.g.,* 72 Fed. Reg. 27364 (May 15, 2007) (summary of final rule).

[96] 48 C.F.R. § 52.249-14 (2007). See also §§ 52.212-4(f), 52.213-4I, 52.249-8, and 52.249-9 for the excusable delay provisions for commercial item, simplified acquisitions, fixed-price supply and service contracts, and fixed-price research and development contracts.

[97] 48 C.F.R. § 52.249-14. While the FAR does not define "delay," "delay" is commonly understood as "an act or event that extends the time required to perform tasks under a contract." *See* George R. Stumpf, *Schedule Delay Analysis*, 42 COST ENG'G J. 32 (2020).

[98] *See id.* at 33.

[99] *See Appealing Claims to the ASBCA*, WHAY L. FIRM, https://www.whaylaw.com/asbca [https://perma.cc/2P2L-96TD].

of the claim to the appropriate Board of Contract Appeals,[100] such as the Armed Services Board of Contract Appeals (ASBCA) or the Civilian Board of Contract Appeals (CBCA). The appropriate board reviews the case *de novo*, with the board's decision appealable to the US Court of Appeals for the Federal Circuit.[101] The court of appeals provides great deference to the board's decision and will only set aside a Board decision if the decision is fraudulent, arbitrary, capricious, grossly erroneous, "or if such decision is not supported by substantial evidence."[102]

A. The First Hurdle—The Types of Delays That May Be Excusable

Notably, the excusable delay provision provides stringent requirements that contractors must meet in order to receive a time extension on the contract and to eliminate liability to the government for default.[103] The government bears "the initial burden" of showing that a contractor did not adequately perform its obligations or that the contract was not timely completed.[104] Once the government has met its burden, the burden then shifts to the contractor to jump the first hurdle—showing that any delay experienced was excusable.[105]

The excusable delay provision provides a nonexhaustive list of occurrences that *may* qualify as an excusable delay: "(1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather."[106] In determining whether there is an excusable delay, however, courts do not confine contractors to this list.[107] While the text of the provision seems clear on its face, in that occurrences outside of the contractor's control are excusable, the mere fact that the delay was caused by an enumerated excuse does not

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[100] *See* Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. BAR J. 279, 348–49 (2002).

[101] *See id.*

[102] *See id.* at 349 (quoting 41 U.S.C. § 609(b)).

[103] *See* Beezley & Osborne, *supra* note 32.

[104] *See* Yates-Desbuild Joint Venture v. Dep't of State, CBCA 3350, 17-1 BCA ¶ 36,870 (quoting Cent. Ohio Bldg., Inc., PSBCA 2742, 92-1 BCA ¶ 24,399).

[105] *See id.*

[106] 48 C.F.R. § 52.249-14.

[107] *See Yates-Desbuild*, CBCA 3350, 17-1 BCA ¶ 36,870 (holding that "a change in the [Government of India's] policy . . . that forced [the contractor to] temporarily remove workers from India . . . [was] not [the contractor's] fault" and was an "excusable delay[ ]").

necessarily give the contractor the ability to rely on the occurrence alone to seek relief.[108]

B. Unforeseeability of the Delay

In addition to proving that the delay was excusable, the contractor must also prove that the event was unforeseeable to both contracting parties at the time the contract award was given.[109] The CBCA[110] has stated that the purpose of the excusable delay provision is "to protect the contractor against the unexpected, and its grammatical sense both militate against holding that the listed events are always to be regarded as unforeseeable, no matter what the attendant circumstances are."[111] To determine unforeseeability—an area of ambiguity in the provision—courts examine "the location of the work . . . and the circumstances under which the project must be completed."[112] Foreseeable delays that do not absolve contractors from liability for nonperformance include "delays due to normal weather conditions, subcontractor delays, late deliveries of materials . . . , [and] failure to evaluate project site."[113]

Occasionally, the government will assert successfully that certain occurrences, such as bad weather or a labor strike, do not qualify as unusually severe because the weather's severity was not unusual for that region or because the labor strike was foreseeable.[114] For example, a labor strike that did not

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[108] Fluor Intercontinental, Inc. v. Dep't of State, CBCA 1559, 13 BCA ¶ 35,334 ("With a basis for excusable delay established, relief . . . under the clause requires that . . . the failure to perform must be beyond the control and without the fault or negligence of the contractor, and the failure to perform . . . (1) must be one that the contractor could not have reasonably anticipated and taken adequate measures to protect against, (2) cannot be overcome by reasonable efforts to reschedule the work, and (3) directly and materially affects the date of final completion of the project.").

[109] *See Yates-Desbuild*, CBCA 3350, 17-1 BCA ¶ 36,870.

[110] *See Civilian Board of Contract Appeals*, U.S. CIVILIAN BD. OF CONT. APPEALS, https://www.cbca.gov [https://perma.cc/ND68-TQ4M] (describing the CBCA as an "independent tribunal . . . . [i]ts primary responsibility is to resolve contract disputes between government contractors and agencies under the Contract Disputes Act").

[111] *Yates-Desbuild*, CBCA 3350, 17-1 BCA ¶ 36,870 (quoting United States v. Brooks-Callaway Co., 318 U.S. 120, 122–23 (1943)); *see also* Tri-State Constr. Co. v. Dep't of Interior, IBCA 63, 57-1 BCA ¶ 1184 (explaining that "the mere fact that strikes are among the enumerated causes of [excusable] delay does not make every strike and its consequences unforeseeable").

[112] *See* BARRY B. BRAMBLE & MICHAEL T. CALLAHAN, CONSTRUCTION DELAY CLAIMS § 6.05 (7th ed. Supp. 12022), Westlaw; Ace Elecs. Assocs., Inc., ASBCA No. 11781, 67-2 BCA ¶ 6,456 (finding that loss of a key and indispensable laboratory technician who had been in charge of preproduction testing under the terminated contract at appellant's plant was unforeseeable).

[113] *See* BRAMBLE & CALLAHAN, *supra* note 112, § 1.01.

[114] *See, e.g.*, Diversified Marine Tech, Inc. v. U.S. Coast Guard, DOTCAB No. 2484, 93-2 BCA ¶ 25,720 (explaining that frequent rain and high humidity were

affect delivery times until two months after the contract was entered into was held as an unforeseeable event,[115] while a strike caused by the contractor's discontinuation of paying travel time for employees was deemed foreseeable due to the customs of the area.[116] Contractors are also often required to provide statistical evidence of unforeseeability or severity of an occurrence, and the lack thereof often bars contractors' claims for a time extension.[117]

C. Effect of Concurrent Delays by Contractors or Subcontractors

In addition to the above, contractors must also prove that the delay was of no fault of their own *or* of their subcontractors.[118] Even upon the showing of an unforeseeable occurrence, the contractor must also show that it did not contribute to or independently cause the delay.[119] While the problem of concurrent delays normally arises in cases disputing liquidated damages in which both the contractor and the government agency caused delays, a contractor's delay can also run concurrently to a force majeure event.[120] And although concurrent delays by contractors are less common in force majeure-like situations, concurrent delay claims "add several layers of complexity" to cases due to the various parties responsible for performance under the contract, and due to courts' inconsistency in defining concurrent delays.[121]

Another issue for contractors is the general rule that contractors are not absolved from liability for nonperformance

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foreseeable in the location, and therefore the contractor was not entitled to additional time); BRAMBLE & CALLAHAN, *supra* note 112, § 1.01.

[115] Woodington Corp., ASBCA No. 37885, 91-1 BCA ¶ 23,579.

[116] *Tri-State Constr. Co.*, IBCA 63, 57-1 BCA ¶ 1184.

[117] Lambert Constr. Co., DOTCAB No. 77-9, 78-1 BCA ¶ 13,221 (Both the contractor and the government utilized statistical data of historical weather patterns and conditions, including average rainfall, to prove the "unusual severity" of the weather conditions at issue.).

[118] 48 C.F.R. § 52.249-14(a) ("Except for defaults of subcontractors at any tier the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor.").

[119] *See* Yates-Desbuild Joint Venture v. Dep't of State, CBCA 3350, 17-1 BCA ¶ 36,870.

[120] *Concurrent Delay as a Defense to Liquidated Damages*, EXCELL CONSULTING INT'L, INC. (Dec. 5, 2019), https://www.excellconsulting.net/concurrent-delay-as-a-defense-to-liquidated-damages [https://perma.cc/X8YC-JRJ8].

[121] *See* Dr. Amin Terouhid, *Assessing Concurrent Delays: A Challenging Exercise*, ADROIT CONSULTANTS, LLC (Jan. 28, 2019), https://www.adroitprojectconsultants.com/2019/01/28/assessing-concurrent-delays-a-challenging-exercise/ [https://perma.cc/8BLR-GQWA]; BRAMBLE & CALLAHAN, *supra* note 112, § 1.01 (explaining that courts differ on whether the concurrent delay needs to be simultaneous, offsetting, critical, and how to apportion damages).

nor are they granted a time extension if the subcontractor encounters delay, unless the subcontractor was not at fault for the delay.[122] Courts generally interpret this rule strictly. In a case before the ASBCA, the court held that a circumstance in which the prime contractor was not liable for delay due to a subcontractor's nonperformance was an "exceptional circumstance[]."[123] A general principle of risk allocation is that "[r]isks associated with labor and subcontractor agreements . . . should be assigned to the contractor," as the contractor is "best able to deal with the [subcontractor]."[124] This rule adds an additional burden on contractors to diligently document possible delays that may affect their performance, including the delays created by subcontractors.[125]

D. Adequately Proving the Extent and Effect of the Delay

Adequate evidence that a delay qualifies as "excusable" under the FAR—namely, that the delay was unforeseeable and due to no fault of the contractor or subcontractor—*still* does not automatically provide relief to the contractor via a time extension.[126] Once the contractor recognizes a delay and the contractor has given proper notice, the contractor continues to bear the burden of proof in showing (1) that the delay prevented timely completion of the contract by proving the extent of the delay, (2) the amount of damages, and (3) that the contractor took reasonable efforts to mitigate the risks of the delay.[127]

It is generally held that contractors are only entitled to a time extension to the extent that the event "actually delayed performance," regardless of any finding of excusability.[128] The standard rule is that the unforeseeable occurrence must affect the "critical path"[129] of the contract, delaying "interim

[122] *See* John Manfredonia, *A Refresher on Delays in Federal Government Contracting*, MANFREDONIA L. (Feb. 21, 2007), http://manfredonialaw.com/wp-content/themes/sdvosblaw/Resources/A-Refresher-on-Delays.pdf [https://perma.cc/S2F3-AZHQ]; *see also* General Injectables & Vaccines, Inc. v. Gates, 527 F.3d 1375, 1376 (Fed. Cir. 2008).

[123] *See General Injectables*, 527 F.3d at 1376 n.1.

[124] Bruce C. Babchyck, Risk Allocation in Construction Contracting 27 (Fall 1992) (Master of Engineering thesis, University of Florida), https://calhoun.nps.edu/bitstream/handle/10945/23763/riskallocationin00babc.pdf?sequence=1&isAllowed=y [https://perma.cc/SG53-NEV7].

[125] *See* Beezley & Osborne, *supra* note 32.

[126] *See* Walter A.I. Wilson, *COVID-19 as a Cause for Excusable Delay in Federal Contracts*, NAT'L. L. REV. (Mar. 15, 2020), https://www.natlawreview.com/article/covid-19-cause-excusable-delay-federal-contracts [https://perma.cc/A9RU-4WSF].

[127] *See id.*

[128] Robert P. Jones Co. v. Dep't of Agric., AGBCA No. 391, 76-1 BCA ¶ 11,824.

[129] *See* Michael J. Patterson, Critical Path Method Networks and Their Use in Claims Analysis 2 (1984) (Master of Engineering thesis, University of Florida),

milestones" or "overall project completion."[130] Contractors cannot simply state that a delay affects the critical path nor can they rely on unsubstantiated assertions, but instead must back up their assertion with adequate evidence.[131]

For a contractor to succeed on an excusable delay claim, the contractor will need to have an "'as planned' schedule and an 'as built' schedule" to show how excusable delays impacted the "critical path" to completion.[132] The lack of any one of these plans could result in the court refusing to grant a time extension, even in the face of an otherwise unforeseeable event.[133] Critical path review is usually the most contentious part of a case examining whether a time extension is warranted or not as courts will often "inquire into the accuracy and reliability of the data and logic underlying the [critical path method] evaluation."[134]

As evidenced by the need to state with particularity the effect of delays on the critical path of the contract to establish causation, it is paramount that contractors back up each requirement of the excusable delay provision with adequate evidence, requiring constant documentation of project delays. *Ace Electronics Associates, Inc.* is the leading case exemplifying the particularity with which contractors must specify the delay in order for the contractor to obtain relief for nonperformance.[135] In *Ace Electronics*, the contractor claimed an excusable delay based on a flu epidemic that caused a "30% to 40% rate of [employee] absenteeism" in its plant.[136] While an epidemic is one

https://archive.org/details/criticalpathmeth1094519221 [https://perma.cc/PQQ3-X4NC] (defining "critical path" as "the longest continuous performance path through the network used to determine the shortest possible duration for the project").

[130] *See id.*; Darren S. Long, Documentation Requirements for Contractor Pursuit of Delay Claims 22 (July 1995) (M.S. thesis, Massachusetts Institute of Technology), https://www.semanticscholar.org/paper/Documentation-requirements-for-contractor-pursuit-Long/a5759f5837638dee49d9664bcb89338f3c76865e (last visited May 17, 2022).

[131] *See* AEI Pac., Inc., ASBCA No. 53806, 08-1 BCA ¶ 33,792 (holding that the contractor did not adequately prove that delays affected the critical path by relying only on unsubstantiated assertions and failing to rebut testimony from the government agency officials).

[132] *See* 1-A Constr. & Fire, LLP v. Dep't of Agric., CBCA 2693, 15-1 BCA ¶ 35,913.

[133] *See id.* (holding that because "1-A Construction never had an 'as-planned' schedule," it could not "show the extent to which . . . those defects actually caused a delay beyond the work performance period originally anticipated").

[134] *See* Yates-Desbuild Joint Venture v. Dep't of State, CBCA 3350, 17-1 BCA ¶ 36,870.

[135] Ace Elecs. Assocs., Inc., ASBCA No. 11781, 67-2 BCA ¶ 6,456.

[136] *Id.*; *see, e.g.*, Iversen Constr. Co. v. Dep't of Interior, IBCA 981-1-73, 76-1 BCA ¶ 11,844 (deeming contractor to not be actively pursuing its claim for a time extension by failing to support its claim of unusually severe weather with long-term weather records); Coliseum Constr., Inc. v. Veterans Admin. Med. Ctr., VABCA 2192, 86-2 BCA ¶ 18,857 ("Appellant has not shown the Board, with any specificity, how much performance was delayed by the unusually severe weather. A mere recitation of the

of the enumerated causes of excusable delay under the provision, the ASBCA denied relief because the contractor failed to show "when the flu epidemic occurred or its precise duration, what personnel were affected and the periods during which they were absent . . . whether such absences in fact caused delay . . . and if so the extent of such delay . . . ."[137] The ASBCA's decision in *Ace Electronics* put contractors across the country on notice that they should be specifically documenting the impact of all delaying events on their performance, and not merely relying on the occurrence of an enumerated event under the delay provision when pursuing a time extension claim.[138]

E. One Last Pitfall: The Need for Mitigation Efforts

Lastly, even after proving with particularity the existence of a delay, that the delay was not foreseeable nor the fault of the contractor or their subcontractor, and that the delay affected the critical path of the contract, the contractor is *still* not entitled to relief under the contract. Specifically, the contractor must also sufficiently show that the contractor attempted to mitigate any delay and that it provided sufficient notice to its CO.[139] If the contractor fails to reasonably mitigate damage, it will not be able to recover damages, "which could have been avoided by reasonable precautionary action on its part."[140] The delay provision itself explicitly states that, regardless of meeting the other requirements for an excusable delay, the contractor will still be deemed to be in default if "[t]he subcontracted supplies or services were obtainable from other sources."[141] Further, following from the rule that a contractor is responsible for the delays of its subcontractors, a contractor has a duty to reasonably mitigate any delays affecting its direct

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amount of rainfall or number of rain days during the performance period is insufficient to show excusable delay.").

[137] *Ace Elecs.*, ASBCA No. 11781, 67-2 BCA ¶ 6,456.

[138] *Id.* (stating that the existence of an enumerated excusable delay does not make the occurrence "an excusable cause per se").

[139] *See* U.S. DEP'T OF STATE, FOREIGN AFFAIRS HANDBOOK, 14 FAH-2 H-141(a), RESPONSIBILITIES OF THE CONTRACTING OFFICER (2019) ("The contracting officer is the U.S. Government's authorized agent for dealing with contractors and has sole authority to solicit proposals, negotiate . . . modify, or terminate contracts and make related determinations and findings on behalf of the U.S. Government.").

[140] Yates-Desbuild Joint Venture v. Dep't of State, CBCA 3350, 17-1 BCA ¶ 36,870; *see also Ace Elecs.*, ASBCA No. 11781, 67-2 BCA ¶ 6,456 (further denying contractor recovery because contractor did not state "what efforts were made during such [employee] absences . . . to keep the work going"); J.C. Hester Co., Inc. v. Bureau of Indian Affs., IBCA 1114-7-76, 77-1 BCA ¶ 12,292 (in "denying the time extension request, the contracting officer found . . . the contractor made no effort to mitigate the effect of the delay").

[141] 48 C.F.R. § 52.249-14(b)(1).

performance and any delays resulting from its subcontractor's nonperformance.[142] Lastly, the CO is not required to give the contractor guidance on how to respond to any event, leaving the contractor at risk that, down the road, the CO or the court will decide that the contractor did not do enough to mitigate.[143]

Contractors, bound by the inflexible language and numerous requirements, are at a problematically inherent disadvantage under the FAR's excusable delay provision. This makes it difficult for contractors to efficiently allocate their risks and resources during contract performance. It is arguably in the government's best interest to place the contractor at greater risk for nonperformance. However, there are solutions that can be implemented to retain this advantage for the government while providing the contractor with the ability to attain needed relief.

III. CANADA'S EXCUSABLE DELAY PROVISION

Generally, the concept of force majeure in Canada—a common law jurisdiction—looks almost identical to that in the United States. That is, force majeure is nonexistent absent an explicit provision in a contract.[144] The leading Canadian case on the common law concept of force majeure is *Atlantic Paper Stock v. St. Anne-Nackawic Pulp and Paper Company*.[145] *Atlantic Paper Stock* defined force majeure as "generally operat[ing] to discharge a contracting party when a[n] . . . event . . . make[s] performance impossible," and that "[t]he common thread [among all force majeure clauses] is that of the unexpected, something beyond reasonable human foresight and skill," and narrowly interpreted the list of triggering force majeure events.[146]

Public Works and Government Services Canada (PWGSC) does most of the government purchasing for Canada, totaling over $200 billion each year.[147] "The leading legislation and policies that apply to federal contracts for goods and services" include those found in the Standard Acquisition Clauses and Conditions (SACC) Manual.[148] Canadian

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[142] *See id.*

[143] *See, e.g.*, Pernix Serka Joint Venture v. Dep't of State, CBCA 5683, 20-1 BCA ¶ 37,589 (holding that the contractor needed "to make its own decisions," without guidance from the DOS, "about the process for completing contract performance").

[144] *See* Polkinghorne & Rosenberg, *supra* note 41, at 2.

[145] Atl. Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co., [1976] 1 S.C.R. 580 (Can.).

[146] *Id.*

[147] *See* BRENDA C. SWICK, *Public Procurement in Canada: Overview*, PRAC. L. COUNTRY Q&A 2 (Jun. 1, 2014), Westlaw W4-521-6007.

[148] *See id.*

government contracts typically incorporate the SACC 2030 (11) Excusable Delay, Canada's force majeure-like default provision, into general procurement contracts.[149] Like the United States, Canadian law utilizes specific regulations for the procurement of military, defense, and construction.[150]

One caveat to using Canada as a model is that, despite the prevalence of force majeure provisions in commercial and federal procurement contracts, there is little case law interpreting the provisions and no case law interpreting the excusable delay provision itself.[151] This is because commercial contracts usually contain mandatory arbitration clauses and federal procurement contracts provide for internal alternative dispute resolution processes.[152] Thus, this Section will look at how Canadian courts have interpreted the various elements of general force majeure clauses that are also found within the SACC's excusable delay provision. This analysis will serve to envision how Canadian courts would review future disputes involving the SACC excusable delay provision.

The current version of the SACC defines an excusable delay as an event that meets the following four criteria: the delay (1) "is beyond the reasonable control of the [c]ontractor;" (2) "could not reasonably have been foreseen;" (3) "could not reasonably have been prevented by means reasonably available to the [c]ontractor;" and (4) "occurred without the fault or neglect of the [c]ontractor."[153] Upon the showing of these requirements, dates affected by the delay are "postponed for a reasonable time."[154] Only if Canada or one of its government agencies "cause[s] the delay by failing to meet an obligation under the [c]ontract" will the government be responsible for the costs incurred.[155]

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[149] *See* Marcia Mills, *Triggering an "Excusable Delay" Claim During the COVID-19 Pandemic: What Federal Contractors Need to Know*, FASKEN (Mar. 19, 2020), https://www.fasken.com/en/knowledge/2020/03/covid-19-triggering-an-excusable-delay-claim-during-the-covid-19-pandemic/ [https://perma.cc/PWZ3-E8NB]; *2030 11 (2014-09-25) Excusable Delay*, *supra* note 7.

[150] *See* Swick, *supra* note 147.

[151] *See also* Phuong T.V. Ngo & Daniel Chomski, *Canada: COVID-19 and "Excusable Delay": What Contractors with Canadian Federal and Provincial/Territorial Governments Need to Know*, MONDAQ (Mar. 31, 2020), https://bit.ly/3PK9Moa [https://perma.cc/W6N9-JVYA]; *Force Majeure*, OFF. OF THE PROCUREMENT OMBUDSMAN (Sept. 24, 2021), https://opo-boa.gc.ca/forcemajeure-eng.html#s2 [https://perma.cc/5C7E-Z6AD] (stating that few Canadian courts have reviewed force majeure common law clauses and not noting any courts revieing the excusable delay provision).

[152] *See* Michael P. Theroux & April D. Grosse, *Force Majeure in Canadian Law*, 49 ALBERTA L. REV. 397, 401 (2011); *Learn About the Procurement Dispute Management and Complaint Processes*, GOV. OF CANADA (May 14, 2021), https://www.tpsgc-pwgsc.gc.ca/app-acq/differends-disputes-eng.html [https://perma.cc/2BQ5-Q8TD].

[153] *2030 11 (2014-09-25) Excusable Delay*, *supra* note 7.

[154] *Id.*

[155] *Id.*

A. The Enumerated List, or Lack Thereof, of Excusable Events

One notable difference from the FAR is that the SACC does not include an enumerated list of possible excusable events.[156] Thus, contracting parties are likely able to include more specific events, such as legal lockouts and other labor disturbances[157] or "breakages of or accidents to . . . lines of pipe"[158] to the list of possible triggering events and can expressly exclude others.[159] Further, parties may include "basket clauses," such as "any other cause whatsoever beyond the reasonable control of the parties," at the end of the contract in addition to an enumerated list to cover events not specifically mentioned.[160] However, the Supreme Court of Canada has used the principle of *ejusdem generis*[161] to limit the language of the contract to the occurrence of an enumerated event over which the contractor exercised no control.[162] This interpretation means that these basket clauses are not always interpreted as broadly as the contracting parties may have intended them to be.[163]

B. Foreseeability, Cause, and Effect of the Delay

Canadian courts routinely interpret the foreseeability prong under a similar analysis as US courts, which entails evaluating the circumstances of the contract and knowledge of the parties at the time of contracting.[164] There is also a causation and impact requirement implicit in Canada's delay provision, but it does not state the extent to which performance must be

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[156] *See id*; 48 C.F.R. § 52.249-14.

[157] *See* Tenneco Can. Inc. v. B. C. Hydro & Power Auth., 1998 CarswellBC 662, para. 23 (Can. B.C. Sup. Ct.) (WL).

[158] *See* Atcor Ltd. V. Cont'l Energy Mktg. Ltd., 1994 CarswellAlta 231, para. 12 (Can. Alta. Q.B.) (WL).

[159] *See, e.g.*, Corbel Mgmt. Corp. v. Dep't of Pub. Works & Gov't Servs., PR-2009-009 (Can. Int'l Trade Trib. 2009), https://decisions.citt-tcce.gc.ca/citt-tcce/p/en/item/355336/index.do [https://perma.cc/5QQM-8YFF] (the bidder instructions expressly excluded "[m]isrouting, traffic volume, weather disturbances, [and] labour disputes . . . " from the acceptable reasons for late delivery of bid. Due to these instructions, the court declined to hold that traffic resulting from a car accident was unanticipated and not a force majeure event.).

[160] *See* Theroux & Grosse, *supra* note 152, at 403; *see also Tenneco Can.*, 1998 CarswellBC 662.

[161] *See* Theroux & Grosse, *supra* note 152, at 404 (*Ejusdem generis* provides that "when interpreting documents containing a list of specific items followed by more general items, the general items will not be interpreted in a broad or wide sense, but instead will be limited to the type or class of specific items previously listed.").

[162] *See id.*

[163] *See id.* at 403, 405–06.

[164] *See id.* at 407–08 (explaining that the court in *West Fraser Mills Ltd v. Crown Zellerbach Canada Ltd.* held that while the contractor could have foreseen the change in market conditions, the contract had no control over it and, thus, it was permitted under the force majeure clause).

delayed. Court decisions have shown that "in the absence of clear language about the impact required . . . courts have found a range of thresholds."[165] The causation requirement is also often intertwined with the requirement of mitigation, which necessitates that the contractor could not have prevented the delay by means reasonably available. Even if not expressly mentioned in the contract, courts have held that if contractors can perform their obligations in another manner outside of what is specified in the contract, the contractor cannot recover for delays, such as supply chain disruption or increased market prices.[166] For force majeure events occurring along the contractual chain negatively affecting the contracting parties' supplier, service provider, customer, etc., there is very little case law discussing the effect of a subcontractor's default.[167] "[T]he general rule," however, "is that a default by an independent contractor that impacts performance by the contracting party can be an event of force majeure to excuse that party's performance."[168] Lastly, Canadian courts hold, in line with US courts, that the delay cannot be at the fault of the contractor.[169] Although the Canadian provision closely mirrors the US provision in many aspects, there are clear distinctions in the Canadian provision that lead to different remedies and risk allocations for contractors.

C. Comparison of Requirements and the Remedies that Follow

The stark differences between the US FAR's excusable delay provision and Canada's SACC provision are the (1) clear notice requirements, (2) clear evidentiary requirements, and (3) the contracting authority's remedies upon an excusable delay.[170]

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[165] *See id.* at 414 (noting that the court in *Atlantic Paper* assumed an impossibility standard, while the court in *Atcor* assumed a "commercially unfeasible" standard).

[166] *See id.* at 415–16 (explaining that the court in *Atcor* reversed because the trial judge did not address whether Atcor could have performed its obligations in another manner); *see also* Domtar Inc. v. Univar Canada Ltd., 2011 CarswellBC 3501 (Can. B.C. Sup. Ct.) (holding that the supplier could not charge the buyer the market price "simply because the [supplier] could not obtain it anywhere else for less . . . . [m]aking commercially reasonable efforts to continue to perform must mean, at least, that both parties . . . share the burden of the rising prices").

[167] *See* Theroux & Grosse, *supra* note 152, at 409.

[168] *Id.*

[169] *See id.* at 407 ("The Court stated: 'I do not think [the contractor] can rely on a condition which it brought upon itself.'").

[170] Under the SACC provisions, "contracting authority" has the same effect as "contracting officer" under the FAR. *Compare Section 3–General Conditions: General Conditions–Higher Complexity–Goods: SACC 2030 01 (2016-04-04) Interpretation*, *in* SACC MANUAL, *supra* note 7 ("the person designated . . . . to act as Canada's representative to manage the Contract"), *with* 48 C.F.R. § 2.101 *Definitions* ("a person

The excusable delay provision under the SACC states that a delay in performance that is caused by an event meeting the provision's requirements "will be considered an excusable delay" if:

> the Contractor advises the Contracting Authority of the occurrence of the delay . . . as soon as the Contractor becomes aware of it [and] advise[s] the Contracting Authority, within 15 working days, of all the circumstances relating to the delay and provide[s] . . . for approval a clear work around plan explaining in detail the steps that the Contractor proposes to take in order to minimize the impact of the event . . . .[171]

These requirements set out, from the beginning, what the contracting agency expects from the contractor with respect to the notice and documentation required for a time extension.[172]

In contrast, the US approach leaves it up to the courts to determine if the mitigation steps are appropriate as, under the FAR, any acts taken to mitigate the delay are only examined *ex post* when the contractor disputes the CO's decision regarding a time extension.[173] An *ex post* analysis leaves room for judicial intervention and analysis of the contract, whereas the *ex ante* approach of the Canadian provision yields efficient risk allocation.[174]

While both governments have the ability to terminate contracts for convenience, the Canadian provision also allows the government to terminate the contract if the excusable delay has continued for at least thirty days.[175] In these situations, the provision further stipulates that "the Parties agree that neither will make any claim against the other for damages, costs, expected profits or any other loss arising out of the termination or the event that contributed to the [e]xcusable [d]elay."[176] Although this provision's purpose is to benefit the government agency, the contractor is still given clear notice, up front, of the possible effect of a long-lasting excusable delay and decreasing uncertainty. Thus, the differences between the Canadian and US provisions, while seemingly slight, provide clearer requirements for Canadian contractors allowing them to more efficiently allocate their risk prior to entering into a contract.

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with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings").

[171] *2030 11 (2014-09-25) Excusable Delay*, *supra* note 7.

[172] *Id.* (requiring notice within fifteen days and a clear, detailed "work-around plan").

[173] *See* Ace Elecs. Assocs., Inc., ASBCA No. 11781, 67-2 BCA ¶ 6,456.

[174] *See* George G. Triantis, *Unforeseen Contingencies: Risk Allocation in Contracts*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS 100, 100–11 (Boudewijn Bouckaert and Gerrit de Geest eds., 2000).

[175] *2030 11 (2014-09-25) Excusable Delay*, *supra* note 7.

[176] *Id.*

IV. COMPARATIVE ANALYSIS OF RISK ALLOCATION

The distinct requirements and language of the Canadian and US provisions also serve to allocate the risk to contractors in different ways. While the US provision takes a more rigid approach to analyzing a contractor's excusable delay claim, the Canadian provision allows for more flexibility for a contractor to argue that the unforeseeable event falls within the excusable delay provision. This key difference can lead to vastly different outcomes and remedies for contractors.

A. Risk Allocation Under the US Excusable Delay Provision

"[I]ncidental to its sovereign immunity," the US federal government enjoys a broad unilateral termination right for convenience under the FAR.[177] The construction of the FAR represents the government's responsibility "to serve the public interest," with the government having almost all of the bargaining power—many FAR provisions are essentially copied and pasted into contracts with little to no modification.[178] Thus, in contrast to contracts between private parties, FAR provisions are rarely the product of any extensive negotiation between a contractor and the government agency.[179]

The ability of contractors to be compensated for such delays is increasingly difficult as contractors must not only document the occurrence of the event in detail but also how it affected the contractor's performance.[180] Contractors often struggle in "thinking broadly or creatively enough about potential types of cost impacts" prior to contract formation that might entitle them to an extension or delay.[181] Further complicating matters, some clauses contain strict notice requirements, and some contracts may fall under multiple

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[177] *See* Olmstead, *supra* note 92, at 119; *e.g.*, 48 C.F.R. §52.249-2(a) (example of a Termination for Convenience provision for Fixed-Price contracts allowing the government to "terminate performance of work under this contract in whole or, from time to time . . . in the Government's interest").

[178] *See* Olmstead, *supra* note 92, at 112; 48 C.F.R. § 52.104 (stating that "[t]he contracting officer must not modify provisions and clauses unless the FAR authorizes their modification").

[179] While the contract itself can be modified pursuant to 48 C.F.R. § 43.103, there is no indication that the specific FAR provisions may be modified.

[180] *See* Beezley & Osborne, *supra* note 32 ("[T]he contractor should be prepared to prove aspects [of the event] . . . that materially impacted performance . . . .").

[181] *See COVID-19: Preparing for Its Effects on Government Contracts*, COVINGTON & BURLING LLP 6 (2020), https://www.cov.com/-/media/files/corporate/publications/2020/04/covid-19-preparing-for-its-effects-on-government-contracts-takeaways.pdf [https://perma.cc/TP5K-EGF7].

regulatory provisions, requiring contractors to be acutely aware of the different provisions governing their contract.[182]

"The Christian Doctrine," arising from a "Court of Claims' 1963 decision," complicates contractors' ability to know exactly what provisions bind them.[183] The doctrine holds that certain provisions of the FAR will be automatically included in contracts if the provision reflects "a deeply ingrained strand of public procurement policy."[184] Courts have taken a broad view of this holding, with a 1993 ASCBA case incorporating FAR § 52.249-8, which includes an excusable delay section for fixed-price supply and service contracts.[185] Therefore, even if contractors are not expressly bound by the requirements of a delay provision, they may be implicitly bound if the court chooses to incorporate the provision into the contract.[186]

The specific requirements under the US excusable delay provision create obstacles to recovery, as contractors must balance overseeing and ensuring adequate progress under a contract and trying to document any possible events that may count as an excusable delay in the future. Further, the strict construction of the notice requirements, even taking into account the fact that the court often waives the notice requirement if the CO had actual knowledge of the delay, places the contractor at risk for not providing sufficient notice of the delay.[187]

Despite the standard form provided by the delay provision, the provision itself still includes some ambiguity, and interpretation is left up to the courts—what qualifies as unforeseeable, out of the contractor's control, severe enough of an event, or sufficient mitigation steps?[188]

Outside of the requirements inherent in the provision are factors at play that put the risk on the contractor. The initial decision of whether to grant a contract a time extension goes not to the courts, but to the contractor's CO.[189] COs and the agencies that they represent often fail to focus on contractor performance

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[182] *See id.*

[183] *See* Edward V. Arnold, *The Christian Doctrine: The Double-Secret Contract Clause*, MONDAQ (Apr. 16, 2019), https://www.mondaq.com/unitedstates/government-contracts-procurement-ppp/798410/the-christian-doctrine-the-double-secret-contract-clause [https://perma.cc/QF24-APNE].

[184] *See id.*

[185] *See id.*

[186] Via the Christian Doctrine. G.L. Christian & Assocs. v. United States, 312 F.2d 418 (Ct. Cl. 1963).

[187] *See* Airco, Inc. v. Bureau of Mines, IBCA 1074-8-875, 76-1 BCA ¶ 11,822.

[188] *See* Lambert Constr. Co. v. Fed. Aviation Admin., DOTCAB 77-9, 78-1 BCA ¶ 13,221; Yates-Desbuild Joint Venture v. Dep't of State, CBCA 3350, 17-1 BCA ¶ 36,870; Dravo Corp. v. Corps of Eng'rs, ENGBCA No. 2950, 71-1 BCA ¶ 8676 (discussing these issues).

[189] *See* 48 C.F.R. § 52.249-14(c).

after the contract has been awarded.[190] The DOD and a number of other agencies have faced criticism due to "inadequate policies, procedures, and technology" in place to account for contract performance.[191] Thus, while the structure of the FAR is to promote the efficiency of the acquisition process, the lack of adequate oversight after a contract has been created undermines that exact goal.

Part of playing the role of a government contractor includes accepting the fact that "[t]he contractor possesses little power to negotiate and must accept this unequal bargaining power as a condition of doing business with the government."[192] Failure to think ahead, and failure to document, will often leave contractors without relief. The FAR and the provisions contained within the FAR are not without critique, and there is an argument to be made that the risk *is* appropriately placed on contractors as the federal government balances not only monetary risk, but a multitude of other risks unique to a sovereign entity: public welfare, national security, foreign relations, etc.[193] However, the structure of the delay provision causes it to function as a rigid, bright-line rule, allowing for little flexibility and little input from the contractor. Thus, the rigidity of the US provision, barring contractors from recovery unless each requirement of the provision is fully met, highlights the notion that contractors, not the government, should bear the risk of an unforeseeable event.

B. Risk Allocation Under the Canadian Excusable Delay Provision

Contrary to the US provision acting as bright-line rule, Canada's provision acts more as a flexible standard.[194] While the SACC includes much of the same language of the FAR provision, the SACC's clear requirements make it easier for contractors *ex ante* to prepare for and insure against possible excusable delays by knowing what is expressly required from them. One main

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[190] *See* Allan V. Burman, *Six Practical Steps to Improve Contracting*, IBM CTR. FOR THE BUS. OF GOV'T 1, 5, https://www.businessofgovernment.org/sites/default/files/SixPracticalSteps.pdf [https://perma.cc/6QEF-KR4A]; *see also* Laurel Adams, *Lack of Contract Oversight Puts Billions at Risk*, THE CTR. FOR PUB. INTEGRITY (Feb. 4, 2011), https://publicintegrity.org/accountability/lack-of-contract-oversight-puts-billions-at-risk/ [https://perma.cc/756S-JLJJ].

[191] *See* KRONOS, IMPROVING ACCOUNTABILITY WITH BETTER CONTRACTOR OVERSIGHT 1, 2 (2016).

[192] Olmstead, *supra* note 92, at 112.

[193] Nash, *supra* note 19, at 695.

[194] *See 2030 11 (2014-09-25) Excusable Delay*, *supra* note 7 (containing no enumerated list of possible excusable delays).

difference between the US and Canadian force majeure default in government contracts is that the Canadian provision lacks the enumerated list of possible triggering events used in the US list.[195] In fact, there is no mention of possible triggering events in the Canadian provision.[196]

While US government contracts incorporating the excusable delay provision seem to never stray from the enumerated list of triggering events due to a "copy and paste" approach,[197] Canadian contractors seemingly have more freedom to tailor the list of possible triggering events to the circumstances and specificity of their contract.[198] Thus, while the Canadian government's bargaining power still greatly outweighs that of the contractor, the lack of an enumerated list gives contractors an extra inch of bargaining power as they are given a voice in defining what events could lead to an excusable delay. However, because the format of SACC 11 gives contractors more freedom to negotiate what language and events are included in an excusable delay provision, this also means that courts have more leeway in interpreting such language often resulting in a stricter interpretation than possibly expected by the contracting parties.[199]

SACC 11 also does not include language regarding what happens in the event that the contractor's subcontractor or supplier defaults thereby causing the contractor to default.[200] The 2012 version of the excusable delay provision, however, included an enumerated list of possible triggering events including "acts of God, . . . acts of the government, . . . and failure of subcontractors to perform or make progress due to such causes."[201] The superseded provision continues to state that the subcontractor's default, under the circumstances mentioned, will qualify as an excusable delay for the contractor's default

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[195] *See id.*; 48 C.F.R. § 52.249-14.

[196] *See 2030 11 (2014-09-25) Excusable Delay*, *supra* note 7.

[197] *See* Yates-Desbuild Joint Venture v. Dep't of State, CBCA 3350, 17-1 BCA ¶ 36,870; *see also, e.g.*, N. Am. Aviation, ASBCA No. 11603, 68-1 BCA ¶ 6,998 (excluding triggering events outside of the standard Armed Services Procurement Regulation clause); Versar, Inc., ASBCA No. 56857, 12-1 BCA ¶ 35,025 (noting that contract used express language of FAR 52.249-14 without any additions).

[198] *See* Theroux & Grosse, *supra* note 152, at 403 (stating that "the list of specified events should be tailored to the unique circumstances of a given contract").

[199] *See id.* at 406 ("[T]here is no rule of law requiring narrow interpretation of a force majeure clause against the party seeking its protection. . . . [but] courts often do apply a strict construction.").

[200] *See 2030 11 (2014-09-25) Excusable Delay*, *supra* note 7 (does not mention subcontractors or subcontractor delay).

[201] *Archived Excusable Delays: SACC Z1801C (2012-07-16)*, PUB. WORKS & GOV'T SERVS. CAN., https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/5/Z/Z1801C/2 [https://perma.cc/ME9Y-GYZH].

unless the CO ordered the contractor "to procure such services or supplies from other sources" and the contractor failed to do so.[202] This may indicate that, even absent an express provision, courts may hold contractors liable for subcontractor delays that are not excusable themselves.[203]

However, contrary to the US provision, SACC 11 explicitly provides for more communication between the contractor and CO on the front end of the delay.[204] While US courts evaluate the contractor's mitigation steps or lack thereof *ex post*, SACC 11 provides for the contractor and contracting authority to determine what mitigation steps should be taken prior to any dispute.[205] While the US provision mentions that the CO can order the contractor to purchase supplies or services from other sources in the event of a subcontractor default in an effort to mitigate delays, SACC 11 takes it one step further, requiring the contracting authority to see *all* proposed mitigation steps from the contractor.[206] This, in theory, should lead to a decrease in disputes *ex post* concerning the sufficiency of mitigation steps.

SACC 11 is also clearer regarding the requirements and effects of an excusable delay for both contractors and the contracting agency than the US provision.[207] SACC 11 provides that the contractor advise the contracting agency "of the occurrence of the delay or of the likelihood of the delay as soon as the Contractor becomes aware of it."[208] Contrary to the language of the FAR, SACC 11 explicitly encourages contractors

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[202] *Id.*

[203] Furthermore, the SACC provides that "[e]ven if Canada consents to a subcontract, the Contractor is responsible for performing the Contract." *Section 3–General Conditions: General Conditions–Higher Complexity–Services: 2035 06 (2013-06-27) Subcontracts*, *in* SACC MANUAL, *supra* note 7.

[204] *2030 11 (2014-09-25) Excusable Delay*, *supra* note 7.

[205] *Compare 2030 11 (2014-09-25) Excusable Delay*, *supra* note 7 (providing that the contractor provides the contracting authority "for approval a clear work around plan . . . to minimize the impact of the event" prior to any litigation), *with* Yates-Desbuild Joint Venture v. Dep't of State, CBCA 3350, 17-1 BCA ¶ 36,870 (evaluating mitigation steps taken by contractor).

[206] *Compare* 48 C.F.R. § 52.249-14(b) ("If the failure to perform is caused by the failure of a subcontractor . . . the Contractor shall not be deemed to be in default, unless . . . . (2) [t]he Contracting Officer ordered the Contractor . . . to purchase . . . from the other source . . . ."), *with 2030 11 (2014-09-25) Excusable Delay*, *supra* note 7 ("The Contractor must also advise the Contracting Authority, within 15 working days, of all the circumstances relating to the delay and provide to the Contracting Authority for approval a clear work around plan explaining in detail the steps that the Contractor proposes to take in order to minimize the impact of the event causing the delay.").

[207] *See 2030 11 (2014-09-25) Excusable Delay*, *supra* note 7 (giving detail of the different effects that an excusable delay may have on the contract); 48 C.F.R. § 52.249-14(c) (merely stating that "the delivery schedule shall be revised" upon the finding of an excusable delay).

[208] *2030 11 (2014-09-25) Excusable Delay*, *supra* note 7 (emphasis added).

to get out in front of a possible excusable delay.[209] While one would expect that a US contractor would notify the CO as soon as possible about a possible delay, there is nothing in the provision that expressly *requires* this.[210] The fifteen-day requirement for the contractor to provide the contracting agency with the circumstances of the delay and a work-around plan also is further evidence that SACC 11 is formulated to enable both parties to deal with possible delays on the front end in the most efficient way.[211]

Lastly, the right of the contracting authority to terminate the contract if the excusable delay has continued for thirty days or more is the subsection that is the most detrimental to contractors.[212] Under this subsection, the contractor and contracting authority both agree "that neither will make any claim against the other for damages, costs, expected profits or any other loss arising out of the termination or the event that contributed to the [e]xcusable [d]elay."[213] Similar language is also seen in the SACC's Termination for Convenience general provision,[214] and thus, Canadian contractors are likely familiar and prepared for this possibility—this language seemingly leaves both parties without a remedy in the event of a termination.[215] The contractor has no right of appeal to dispute the contracting authority's decision or decision-making process.[216] As discussed throughout, while the differences between the Canadian and US provisions may seem minimal at first glance, they can have a monumental impact on contractor recoveries. The Canadian provision provides guidance for how the United States can update its procurement regulations to still insulate the government from unnecessary risk while also providing more stability for contractors.

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[209] *Compare* 48 C.F.R. § 54.249-14 (stating that only "upon request of the contractor" will the contracting officer "ascertain the facts and extent of the [delay]"), *with 2030 11 (2014-09-25) Excusable Delay*, *supra* note 7 (requiring notice of the delay within fifteen days).

[210] The default provision for fixed-price contracts provides that "[t]he Contractor, within 10 days from the beginning of any delay . . . notifies the Contracting Officer in writing of the causes of delay," but does not require any work-around plan. *See* 48 C.F.R. § 54.249-10 *Default (Fixed-Price Construction).*

[211] *2030 11 (2014-09-25) Excusable Delay*, *supra* note 7 (as compared to the US provision, only analyzing mitigation efforts *ex post*).

[212] *See id.*

[213] *Id.*

[214] *Section 3–General Conditions: General Conditions–Higher Complexity–Goods: SACC 2030 32 (2020-05-28) Termination for Convenience*, *in* SACC MANUAL, *supra* note 7.

[215] The SACC excusable delay provisions seemingly provides no route of appeal for this termination right of the government. *See 2030 11 (2014-09-25) Excusable Delay*, *supra* note 7; *see also* Theroux & Grosse, *supra* note 152, at 401 (mentioning that the lack of Canadian case law regarding force majeure clauses is related to "the prevalence of arbitration provisions").

[216] *See* Mills, *supra* note 149 (mentioning the government's right to terminate after thirty days without mention of any contractor ability to appeal this decision). *See generally 2030 11 (2014-09-25) Excusable Delay*, *supra* note 7 (containing no mention of any appeals process).

V. SOLUTION: ADOPTING LANGUAGE OF THE CANADIAN PROVISION TO PROVIDE GREATER PROTECTION FOR CONTRACTORS AND MORE EFFICIENCY IN CONTRACTING

One can easily argue that the federal government should be afforded the broad protections against a contractor's default or delay given by the allocation of risk under the FAR's excusable delay provision. However, there are avenues that can be taken that will not disrupt this risk allocation while also providing more security for contractors. Codifying a force majeure provision in the FAR clarified the principles of this civil law concept as applied to government contracts. This codification has also led to reduced transaction costs and increased efficiency as the FAR has become akin to that of a boilerplate provision with modification of such provisions unless otherwise authorized.[217] However, more can be done by streamlining the excusable delay provision to mirror some aspects of Canada's delay provision, ensuring that COs have the proper resources for efficient contract oversight.

The reality of regulations such as the FAR is that there is no perfect solution, but rather a myriad of imperfect solutions to choose from.[218] Each alternative focuses on different aspects, such as maximizing efficiency or flexibility, and the adoption of one over another will necessarily result in tradeoffs.[219] Modifying the FAR's excusable delay provision to include SACC 11's requirements around notifying the CO or contracting authority about the delay and providing a work-around plan could lead to less disputes and appeals of a CO's decision to provide, or not provide, a time extension.

SACC 11 is structured to provide more coordination between a contractor and CO at the front end of a delay.[220] This, ideally, takes away the question of whether sufficient mitigation steps were taken and whether proper notice was given as SACC 11 also includes an express fifteen-day requirement for the work-around plan.[221] While this is a seemingly minor revision to

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[217] *See General Contract Clauses Toolkit*, PRAC. L. COM. TRANSACTIONS (2022), Westlaw W95184339.

[218] *See* Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT. L. 361, 362 (2018) ("We argue that, whatever one's preferred goal, different institutional processes will mediate the pursuit of that goal in highly imperfect ways. All institutional processes are imperfect, and all of them are imperfect in different ways given the dynamics of participation within them.").

[219] *See id.* at 361–62.

[220] This is accomplished through the SACC 11 provision providing for notice and a work-around plan. *2030 11 (2014-09-25) Excusable Delay*, *supra* note 7.

[221] *Id.*

the excusable delay provision, this modification could result in more efficient contracting for both parties, one of the main goals of privatization.[222]

However, SACC 11's language is indicative of Canadian government agencies' faith in their COs and subsequent contract oversight. In the United States, the situation is different, as numerous reports indicate a lack of effective oversight and CO training.[223] While briefly modifying the FAR to provide more efficient oversight is a step that can be taken to protect both parties under the contract, further developments and improvements in education and training of COs is imperative if effective contract oversight, under any regulation, is to be attained.[224]

Further, while the lack of an enumerated list of possible triggering events in SACC 11 provides more bargaining power for Canadian contractors, the enumerated list in the FAR provides increased certainty with respect to the parties' intent and future litigation. However, going forward, the drafters of the FAR should allow minor modifications of this enumerated list by considering the surrounding circumstances and specificities of different contracts and how expressly including or excluding certain events could efficiently allocate the risk and streamline transaction costs. Further, allowing flexibility *ex ante* in defining the terms of the provision can protect parties against judicial intervention that may not adequately interpret the intended risk allocation.[225] Contractors are best equipped to deal with the risks associated with subcontractors, supply chains, or product

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[222] The work-around plan under SACC 11 likely contemplates whether the critical path of the contract will be affected by the delay, a requirement in finding an excusable delay under both provisions. As US litigation on excusable delays often concerns disputes over whether the critical path was affected, a work-around plan that contemplates at the outset would be beneficial to both parties. *See generally* Yates-Desbuild Joint Venture v. Dep't of State, CBCA 3350, 17-1 BCA ¶ 36,870 (discussing critical path and mitigation efforts).

[223] *See, e.g.*, OFF. OF INSPECTOR GEN., U.S. DEP'T OF STATE, ISP-I-18-33, MANAGEMENT ASSISTANCE REPORT: DISPERSAL OF CONTRACTING OFFICER REPRESENTATIVES CREATES OVERSIGHT CHALLENGES 3 (2018) [hereinafter MANAGEMENT ASSISTANCE REPORT] (finding that "Oversight of Contracting Officer Representatives is a Challenge for the [State] Department"); *see also* Tanya V. Peel & Angel R. Acevedo, An Analysis of Army Contract Administration with Regard to Contracting Officer's Representatives, at v (Sept. 2016) (M.S. research project, Monterey, California: Naval Postgraduate School) ("[L]essons learned revealed that Contracting Officer Representative ("COR") training remains inadequate, communication among contracting personnel and CORs requires improvement . . . managers nominate CORs who lack technical knowledge and experience, and commanders and leaders neither understand the requirements needed to support contract administration requirements nor COR roles and responsibilities.").

[224] *See* Peel & Acevedo, *supra* note 223, at 46–48.

[225] *See* Triantis, *supra* note 174, at 111.

suppliers.[226] Contractors, not the government agency, retain an amount of control over the work being done by such actors and are in the best position to safeguard against risks.[227] Thus, giving contractors the opportunity to define their risks *ex ante* would not place more risk on the government agency, but instead, could make for more efficient contract performance and completion.

Modifying the FAR's excusable delay provision to be more in line with Canada's SACC 11 provision will allow contractors to better assess their possible future risks *ex ante* and build the cost of any such risks into their contracts.[228] However, adopting the Canadian approach does have its own tradeoffs.[229] While increasing flexibility by not including an enumerated list and providing for contractors and COs to work together, these modifications likely require more institutional buy-in. The US government will need to adequately train COs in order for them to effectively oversee these contracts. Further, as COs would work with contractors on the front end of a delay, rather than when called upon, this will increase monitoring costs. However, the increased flexibility and efficiency provided by pieces of the Canadian approach could make these tradeoffs worth their cost. The current limited oversight of US contracts is already resulting in excessive costs.[230] Allowing the COs and contractors to work effectively throughout the duration of a contract, rather than only when a delay or litigation requires it, will allow for a more efficient use of government resources and will allow contractors to better allocate their risks.

CONCLUSION

Allowing contractors to better assess their risks up front will lower transaction costs in the aggregate and increase the efficiency of government contracts as a whole. These modifications also take into account the unique risks that government and

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[226] *See* Thomas Marcinko, *Government Contractors Should Be Prepared to Invoke the Excusable Delays Clause*, ARONSON (March 23, 2020), https://aronsonllc.com/contractors-should-be-prepared-to-invoke-the-excusable-delays-clause/ [https://perma.cc/2BZH-293C]. *See generally* WIS. PROCUREMENT INST., FLOW-DOWN CLAUSES—MANAGEMENT AND RESPONSIBILITIES FOR FEDERAL CONTRACTORS (2018), https://www.wispro.org/wp-content/uploads/2014/12/Acquisition-Hour-Flow-down-Clauses-presentation.pdf [https://perma.cc/HW3B-VVAH] (explaining that under the FAR, prime contractors are required to include within the contracts with their subcontractors "flow down" clauses and these clauses contain certain contractual provisions that are applicable to the contractor and the subcontractor).

[227] *See* BABCHYCK, *supra* note 124, at 27.

[228] *See* Triantis, *supra* note 174, at 111.

[229] *See* Puig & Shaffer, *supra* note 218, at 362.

[230] *See* MANAGEMENT ASSISTANCE REPORT, *supra* note 223, at 6.

government agencies must balance while contracting. While the FAR, through the excusable delay provision, has sufficiently codified the theory of force majeure in order to lower transaction costs, as federal contracts greatly affect the public welfare, defense, and national security, the US government should continue to strive to develop and modify regulations to ensure that they adequately protect the government while also providing the requisite protection for contractors.

Streamlining the US FAR like that of the Canadian regulations will provide clearer requirements for contractors up front. This will continue to insulate the federal government from the risks that could adversely affect not only the national economy but also the public welfare and local economies. Streamlining the regulations will also put contractors in a less hostile, albeit still risky, environment, as contractors will be in a better position *ex ante* to determine and insure against future risks and understand their obligations and possible avenues of relief upon the occurrence of certain events. Merely consolidating the regulations into an easier, more digestible version would ideally lead to more federal contractors receiving needed relief from their contractual performance while still allowing the federal government the freedoms that it needs with respect to contracting. If the COVID-19 pandemic has taught us anything, it is that even the most unforeseeable of events are not impossible. It is imperative for the US government and its contractors to be able to adequately plan for, negotiate, and effectively oversee the contracts that affect not only the US global stance in the world economy but also local communities and their workers.

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