

Use of Alternate Care Sites in Response to COVID-19

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As a result of the COVID-19 outbreak and the related need for increasing numbers of hospital beds to accommodate those infected, federal, state, and local governments have started preparing for insufficient capacity in the current hospital infrastructure nationwide. The Federal Emergency Management Agency ("FEMA"), the U.S. Army Corps of Engineers (the "ACOE"), and the U.S. Department of Health and Human Services are working with state and local governments to offer solutions for this issue, primarily through the use of facilities known as Alternate Care Sites ("ACS").

ACS are existing structures such as hotels, conference centers, dormitories, and arenas that are being modified, converted, or retrofitted into facilities that can house non-acute and acute (i.e. those infected with COVID-19) medical patients. The government has begun approaching private property owners with requests to convert assets into ACS, and to date, the ACOE has awarded over a dozen contracts for development of properties into ACS. The ACOE is currently in the process of identifying numerous other locations across the country for use as ACS, and the list of approved sites and awarded contracts is growing daily.

The ACOE has prepared a manual (the "Implementation Manual") that outlines a step-by-step approach for identifying potential ACS, conducting site assessments, funding, utilization of FEMA mandated floorplans, contracting, construction, operation, etc. The Implementation Manual generally provides the following process in order for an ACS to receive federal funding:

Site Selection Process

- States initiate the process by submitting requests to FEMA for assistance with funding and converting existing facilities into ACS.
 - Within these requests, the states are encouraged to nominate specific sites.
- The ACOE is tasked with evaluating and approving/rejecting proposed sites.
- FEMA, in conjunction with the ACOE, determines whether to allocate a FEMA Mission Assignment (a "Mission Assignment") to the state requesting assistance.
- The ACOE awards contracts for specific ACS in each state granted a Mission Assignment.

Construction of ACS

- The ACOE will instruct the applicable state or local government entity (collectively, the "States") as to whether the ACOE itself will manage the contracts for the construction (i.e. construction, conversion or retrofitting) of an ACS, or whether it will delegate the task of negotiating and entering into the contracts to the States.
- Each ACS will be allocated a portion of the Mission Assignment funds to cover construction costs.

Preparation and Operation of ACS

- Typically, the States are tasked with procuring, installing and outfitting ACS with medical equipment in accordance with the Implementation Manual, and with operating and managing the ACS, including locating and engaging medical staff to run the ACS.

Restoration of ACS

- The issue of how an ACS will be restored to the facility's previous condition is a major point of concern.
- The Implementation Manual contemplates restoration as part of the overall process, but there is currently no information as to which party will be responsible for performing and funding the restoration work, or how the restoration work will be performed.

Agreements Related to ACS

- *Leases*
 - To date, most of the facilities chosen for conversion to ACS have been leased from the facility owners by the States (i.e. the entities chosen by each of the States to oversee operation and management of the ACS), although other occupancy agreements could be utilized.
- *Construction Contracts*

- The contract forms appear to still be in the drafting/negotiation/finalization phase by the involved federal government agencies, but the ACOE has hinted that the construction contracts will develop into standardized forms.

Other Considerations

- *Loans*
 - Assuming an ACS is encumbered by outstanding debt, the change in the use of the asset, the extent of reconstruction, and the type of occupant will require a revisiting of the loan documents and possibly the underwriting of the loan.
 - A lender whose loan is secured by an ACS should recognize that there will likely be competing interests between the lender and the State.
- *Environmental Liability/Biohazards*
 - Potential issues regarding the use of biohazardous materials in a newly converted ACS, and the implications of any newly created environmental liability, could arise.
- *Insurance Coverage/Responsibility*
- *Medical Lease Provisions*

Alternatives to the FEMA/ACOE ACS Process

- Some local governments have elected to bypass the formal process established by FEMA and the ACOE by negotiating directly with private property owners to lease properties for use as ACS.
 - These local governments are funding renovation of the facilities and the rent under the leases, and anticipate reimbursement from FEMA in the future.

The ACS process in response to COVID-19 presents uncharted territory evolving on a daily basis, and for now, the federal government and the States appear to be handling almost all aspects of the establishment and operation of the various ACS on a separately negotiated, case-by-case basis. Winstead is actively monitoring the progression of ACS selection, development, and operation.

**Updated as of April 14, 2020. This news alert may be updated from time to time as additional rules, regulations and guidance are set forth.*

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