

**Alert | Health Emergency Preparedness Task Force:
Coronavirus Disease 2019**



March 23, 2020

Implications for Federal Contractors of OMB’s March 20 Memo, ‘Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)’

Late on Friday, March 20, 2020, the U.S. Office of Management and Budget (OMB) issued Memo M-20-18, entitled “[Managing Federal Contract Performance Issues Associated with the Novel Coronavirus \(COVID-19\)](#).” This GT Alert summarizes the important ramifications for federal contractors of this OMB Memo and its Attachment, which includes 12 Frequently Asked Questions and Answers (FAQs).

The OMB Memo begins by stating that “Federal contractors play a vital role in ... the critical response efforts to COVID-19” and “identifies steps to help ensure [the health and] safety [of Federal contractors] while maintaining continued contract performance in support of agency missions, wherever possible and consistent with [CDC] precautions.” The Memo notes that contractors “may currently be unable to access their Federal work sites as a result of building closures, quarantines or implementation of social distancing practices” and “urge[s]” agencies “to work with their contractors, if they haven’t already, to evaluate and maximize telework,” which is discussed further below, “for contractor employees, wherever possible.”

The Memo “encourage[s]” agencies “to leverage the special emergency procurement authorities authorized in connection with the President’s [March 13] emergency declaration under section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207” (Stafford Act). As discussed below, “[t]hese flexibilities include increases to the” micro-purchase and simplified acquisition thresholds, and “the threshold for using simplified procedures for certain commercial items,” “which are designed to reduce friction for contractors ... and the government and enable more rapid response to the many pressing demands agencies face.” The Memo cautions that “availability of these flexibilities does not mean they will always be suitable,” but “empower[s]” “the acquisition workforce” “to use the acquisition flexibilities, as needed, consistent with good business judgment in response to this national emergency.”

The FAQs included as an Attachment to the OMB Memo provide a discussion of, and some practical guidance regarding, various significant COVID-19 issues facing Federal contractors. Federal contractors facing or anticipating COVID-19-related impacts to contract performance should carefully review these FAQs, and work closely with their agency contracting officers (COs). While this guidance was issued by OMB (and not a contracting agency), contractors should consider using it to help address and resolve any COVID-19-related contracting issues with their cognizant COs, including providing the guidance to COs.

Telework

FAQ 1 addresses whether agencies should “be directing their Federal contractors to follow the lead of the Federal Government in their use of telework for their contract employees as described in” two OMB COVID-19 Telework Memos. In response, OMB appears to strongly state that the “Federal Government’s telework law and recent announcements cover only Federal managers and employees, not contractors or their employees. Federal contractors are responsible for managing their workforces, including how telework is used by their employees, consistent with their own telework policies and the contract terms they have negotiated with Federal agencies.”

This statement, however, is mitigated by OMB’s comment that “in the spirit of OMB’s guidance, which seeks to **maximize the use of telework**, and FAR 7.108, which instructs agencies not to discourage contractor use of telework when consistent with contractual requirements, **agencies are strongly encouraged to work with their contractors to evaluate and maximize telework for their contractor employees, wherever possible, as a way to enable continued contract performance consistent with the health and safety of their contractor and government personnel.**” (Emphasis added.) OMB further explains that this “**includes modifying contracts that do not currently allow for telework.** If a contract does not lend itself to telework, for example, because it must be performed at a government facility, **agencies should consider being flexible on delivery schedule contract completion dates.**” (Emphasis added.) Contractors that take advantage of Federal telework opportunities should consider having specific telework policies in place, including maintaining records reflecting the employees that telework and the dates/times and projects on which they teleworked.

Mitigating COVID-19’s Impact on Contractors

In a previous GT Alert, “[Actions Federal Government Contractors Should Consider in Response to COVID-19](#),” we summarized possible relief available to Federal contractors and subcontractors for delays, disruptions, suspension of or stop work orders, and terminations resulting from COVID-19. The OMB Memo addresses some of these issues.

A. Excusable Delays

FAQ 2 asks “[i]f contractor personnel must be quarantined due to exposure to the virus, whether or not related to performance of the contract, and **this action results in a slip in the contract schedule, may contracts be extended or otherwise altered?**” (Emphasis added.) OMB answers: “**Yes.** Government contracts provide for excusable delays, which may extend to quarantine restrictions due to exposure to COVID-19. For example, *see* FAR clauses 52.249-14, 52.212-4(f), and 52.211-13,” the first two of which reference excusable delays resulting from “quarantine restrictions,” “epidemics,” “acts of God” and certain government actions.

On this issue, OMB further states that the CO “should discuss the situation with the contractor to determine if other options are available (e.g., ability of employee to telework or to find a substitute employee).” If no other options are feasible, “it may be appropriate to re-procure elsewhere if possible.” As to the existing contractor who is unable to perform, any action taken by the CO “should be ... for the convenience of the government (e.g., through use of the relevant convenience termination clause or a no-cost settlement) and without negatively impacting the contractor's performance rating.” In this regard, OMB states that “**Agencies are encouraged to be as flexible as possible in finding solutions.**” (Emphasis added.)

B. Requests for Equitable Adjustment & Changes

FAQ 3 asks, how should agencies “address **requests for equitable adjustment [REAs]** associated with costs related to **safety measures taken by contractors to protect their employees from COVID-19**, including costs associated with performance disruptions caused by the government (e.g., closure of an office building) when performance doesn't allow for telework”? (Emphasis added.) OMB states that REAs “should be considered on a case-by-case basis in accordance with existing agency practices, taking into account, among other factors, whether the requested costs would be allowable and reasonable to protect the health and safety of contract employees as part of the performance of the contract.” According to OMB, within FAR Part 31, “Contract Cost Principles and Procedures,” FAR 31.201-3 states that the “reasonable” standard is “what a prudent person would do under the circumstances prevailing at the time the decision was made to incur the cost (e.g., did the contractor take actions consistent with CDC guidance; did the contractor reach out to the [CO] or the [CO] representative to discuss appropriate actions).”

OMB further observes that a “number of contract clauses may be helpful in managing COVID-19 issues.” For example, agencies “may”: (i) “make changes” “using the appropriate changes clause that applies to the contract (*see* FAR clauses 52.243-1 through 52.243-3 or clause 52.212-4(c));” and (ii) “[i]f necessary, generally after considering other alternatives, ... suspend or stop performance through clause 52.242-14, Suspension of Work, and clause 52.242-15, Stop Work Order.” From the contractors' perspective, if an Agency does not take appropriate action to address delays, disruptions and the like, contractors should be aware of their possible right to allege constructive suspensions of work or to recover under (if applicable) FAR 52.242-17, Government Delay of Work.

Finally, in its **FAQ 3** commentary, OMB states that Agencies: (a) “may take into consideration, whether it is beneficial to keep **skilled professionals or key personnel in a mobile ready state** for activities the agency deems critical to national security or other high priorities (e.g., national security professionals, skilled scientists);” and (b) “should also consider whether contracts that possess capabilities for addressing impending requirements such as security, logistics, or other function **may be retooled for pandemic response** consistent with the scope of the contract.” (Emphasis added.)

C. Building Repair

FAQ 4 advises that, whether repair work is “continued or stopped” in a federal building closed to the public because of COVID-19, “should be addressed on a case-by-case basis, taking into consideration the health and safety of government and contractor employees.” CDC and local public health guidance should be considered “to determine if there is a risk-based reason to stop work and, if work continues, steps that might need to be taken to address the health and safety of workers.”

D. In Person vs. Virtual Activities

FAQ 5 states that Agencies “should evaluate, on a case-by-case basis, whether to proceed with in-person activities, taking into account” CDC “guidance,” and “advice or direction from state and local public health authorities.” “Consistent with CDC recommendations, Agencies should consider steps such as practicing appropriate social distancing and following other guidance if in-person or face-to-face interaction is essential.” Agencies “should consider virtual activities, such as online industry conferences, video proposals, and other innovative steps in planning their acquisitions.”

E. Substantial Increases In Micro-Purchase & Simplified Acquisition Thresholds & Expanded Right to Purchase Commercial Items Through Simplified Acquisitions

As noted, on March 13, President Trump declared a Stafford Act national emergency. *See* FAR Subpart 26.2. As a result, **FAQ 8** states that “the flexibilities identified in FAR 18.202, ‘Defense or recovery from certain events,’ are available for use in supporting response efforts to COVID-19.” That FAR provision is within FAR Subpart 18.2, “Emergency Acquisition Flexibilities.” Accordingly:

- 1) The **micro-purchase threshold** is raised from \$10,000 to \$20,000 for domestic purchases and to \$30,000 for purchases outside the U.S.;
- 2) The **simplified acquisition threshold** is raised from \$250,000 to \$750,000 for domestic purchases and to \$1.5 million for purchases outside the U.S.; and
- 3) **Agencies may use simplified acquisition procedures up to \$13 million for purchases of commercial item buys.** [Emphasis added.]

This is an **important development** because acquisitions below the micro-purchase (in particular) and simplified acquisition thresholds require fewer (and almost none for micro-purchases) FAR clauses and FAR agency supplement terms, reduced agency review, fewer flow-down provisions (in simplified acquisitions) to subcontractors, and allow for the procurement process and awards to be completed more quickly, easily, and with less burden to the Agency or contractor. *See* FAR 13.002; FAR 13.201; *see also* Subpart 13.2, Actions At or Below the Micro-Purchase Threshold; FAR Subpart 13.3, Simplified Acquisition Methods. Notably, acquisitions exceeding the micro-purchase threshold but under the simplified acquisition threshold are ordinarily reserved (i.e., set aside) for small business concerns. *See* FAR 13.003(b). Since the Stafford Act emergency declaration is nationwide, there are no specific locally affected areas, *see* FAR 18.203(a), and “therefore no current action required from the acquisition workforce to create preferences for local firms.” *See* **FAQ 10**.

Other Issues Addressed by OMB

FAQ 6 observes that “[c]lear and timely communication between agencies and their industry partners is critical to supporting the government’s response to COVID-19 and to meeting other mission needs” and provides suggestions on communications.

FAQ 7 provides that current **registrants in the System for Award Management (SAM)** “with active registrations expiring before May 17, 2020 will be afforded a one-time extension [to re-register] of 60 days.” See FAR 4.1201(b); see also FAR 4.1200; FAR 4.1201(a), (c).

FAQ 9 discusses how Agencies can “leverage existing category management solutions and expertise across government.”

FAQs 11 & 12 provide that COVID-19 procurements will be tracked: (i) by the **Federal Procurement Data System**, through a National Interest Action (NIA) Code “used strictly for” COVID-19 reporting purposes and involving the use of the FAR Subpart 18.2 emergency procurement authorities, and (ii) for non-FAR Subpart 18.2 emergency procurement authorities, by “encourag[ing]” contractors “to use ‘COVID-19’ or ‘Coronavirus’ in their solicitation and related documentation to support easy key word searching.”

* * * * *

The OMB Memo also states that “[a]dditional acquisition-related questions should be directed to the Office of Federal Procurement Policy at MBX.OMB.OFPPv2@OMB.eop.gov.” While this is directed to Federal contracting officials (as opposed to contractors), nothing prevents contractors from posing questions through that email address. Contractors should exercise care, restraint, and good judgment in sending emails (if any) to this address.

For more information and updates on the developing COVID-19 situation, visit [GT’s Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#).

Authors

This GT Alert was prepared by:

- [Michael J. Schaengold](#) | +1 202.331.3146 | schaengoldm@gtlaw.com
- [Scott A. Schipma](#) | +1 202.331.3141 | schipmas@gtlaw.com
- [Danielle K. Muenzfeld](#) | +1 202.533.2393 | muenzfeldd@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany. [~]Houston. Las Vegas. London. ^{*} Los Angeles. Mexico City. ⁺ Miami. Milan. [»] Minneapolis. Nashville. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul. [∞] Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv. [^] Tokyo. [»] Warsaw. ⁻ Washington, D.C.. West Palm Beach. Westchester County.

This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer’s legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. [~]Greenberg Traurig’s Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ^{}Operates as a separate UK registered legal entity. ⁺Greenberg Traurig’s Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. [»]Greenberg Traurig’s Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP.*

∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¢Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2020 Greenberg Traurig, LLP. All rights reserved.