

OMB Tells Agencies to Be Flexible When Managing Contracts in the Time of COVID-19

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WHAT: As the novel coronavirus (COVID-19) continues to significantly impact day-to-day life, federal contractors have been seeking guidance from agencies on how COVID-19 will affect their contracts. On Friday, March 20, 2020, the Office of Management and Budget (OMB) issued a memorandum to the heads of executive departments and agencies to address the management of federal contract performance issues associated with COVID-19. The memo urges agencies to be flexible in allowing contractors to telework and asks agencies to allow extensions for those contracts that cannot support flexible work arrangements. The memo also reminds agencies of the emergency procurement authorities that are available under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), including increasing the micro-purchase and simplified acquisition thresholds to allow for quicker procurements. Finally, the memo includes responses to “Frequently Asked Questions” about teleworking, mitigating the impact of COVID-19 on contractors, contractor requests for equitable adjustment (REAs), increasing flexibility in procurement activities, and tracking contract spending related to COVID-19.

In answering a question about responding to contractor requests for equitable adjustments (REAs), OMB encourages agencies to consider REAs on a case-by-case basis, taking into account, among other factors, whether the requested costs are allowable and reasonable. The memo provides examples of what a prudent contractor would do in the face of COVID-19 that may result in the incurrence of costs: take actions consistent with the Centers for Disease Control and Prevention (CDC) guidance and reach out to the contracting officer to discuss appropriate actions. Importantly for certain service contractors, the

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memo suggests that agencies should consider REAs for idle labor costs when “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).”

OMB’s memo provides helpful guidance for contracting officers and federal contractors, and is consistent with our prior guidance. Contractors should share the memo with their contracting officers when they are seeking guidance about how the COVID-19 crisis will impact their contracts.

WHEN: The memorandum was issued on March 20, 2020.

WHAT DOES IT MEAN FOR INDUSTRY: The new guidance out of OMB should be encouraging to Federal contractors for many reasons. First, the widespread guidance should help standardize agencies’ responses to performance issues arising out of COVID-19. Second, the memo makes clear that the burden of the impacts of COVID-19 should not fall on the contractor. As we previewed in an earlier alert, a number of contract clauses may provide an excuse for nonperformance and/or allow for an equitable adjustment if COVID-19 impacts contract performance. The memo highlights these clauses and encourages agencies to consider granting REAs if the costs are allowable and reasonable. Third, by taking advantage of flexible work arrangements, Federal contractors can continue to perform and potentially mitigate the need for future requests for extensions or REAs.

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