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OMB Issues COVID-19 Guidance for Government Contract Performance

The Office of Management and Budget (OMB) issued guidance on March 20, 2020, to the heads of executive departments and agencies regarding contract performance issues associated with COVID-19. That guidance, in the form of a [memorandum](#) titled *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)*, prioritizes the health and safety of all Americans, including contractor personnel, and recognizes the critical role that ongoing contractor performance will play in fulfilling critical agency missions.

To strike the necessary balance between precautions and performance, OMB urges agencies to work with contractors to evaluate and maximize telework for contractor employees, and to be flexible in providing extensions to performance for COVID-19 related interruptions. Additionally, OMB recommends that agencies consider keeping skilled professionals or key personnel in a mobile-ready state for critical or high priority activities and that agencies evaluate whether they can retool existing contracts for pandemic-response functions. The memorandum also encourages agencies to leverage special emergency procurement authorities in connection with the Stafford Act, discussed below.

More specifically, the memorandum provides responses to frequently asked questions (FAQs) on the following topics:

- **Contractor Teleworking.** OMB notes that the federal government's telework law covers only federal managers and employees, not contractors or their employees. OMB, however, "strongly encourages" agencies to work with contractors to maximize telework. Specifically, it recommends modifying contracts that do not currently allow for telework and being flexible on completion dates.
- **Impact of COVID-19 Quarantines on Contract Schedule.** If contractor personnel must be quarantined due to exposure to COVID-19, OMB recommends that agencies discuss schedule impacts with contractors to explore options like teleworking or finding substitute employees. If those options are not feasible, OMB explains that quarantine restrictions due to exposure to COVID-19 may be considered excusable delays under the Federal Acquisition Regulation (FAR). If all else fails, agencies may consider re-procuring from another contractor and potentially terminating an existing contract for convenience, but OMB encourages agencies to be as "flexible as possible" in finding solutions. Regardless of whether an agency decides to terminate a contract for convenience, negotiate a no-cost settlement, or adjust a contractor's delivery schedule, OMB advises that such actions should **not** negatively impact a contractor's performance ratings.
- **Requests for Equitable Adjustment for COVID-19 Safety Measures.** OMB recommends considering requests for equitable adjustment (REAs) on a case-by-case basis and taking into account whether requested costs are allowable and reasonable to protect the health and safety of contractor employees (eg. did the contractor take actions consistent with Centers for Disease Control and Prevention (CDC) guidance; did the contractor reach out to the contracting officer or the contracting officer's representative to discuss appropriate actions).
- **In-Person Acquisition-Related Activities.** OMB recommends that agencies evaluate whether to proceed with in-person activities like industry days, contractor debriefings, and inspections on a case-by-case basis. Taking CDC recommendations into consideration, agencies should consider virtual activities when possible and, when face-to-face interaction is essential, practice social distancing.
- **Emergency Procurement Under the Stafford Act.** President Trump declared a national emergency under the Stafford Act, making the flexibilities identified in FAR 18.202 available for agencies to use to support COVID-19 response efforts. OMB encourages agencies to use those flexibilities, which include:
 - An increase in the micro-purchase threshold from \$10,000 to \$20,000 for domestic purchases and to \$30,000 for purchases outside of the United States

- An increase in the simplified acquisition threshold from \$250,000 to \$750,000 for domestic purchases and to \$1.5 million for purchases outside of the United States
- The ability to use simplified acquisition procedures up to \$13 million for purchases of commercial items

Because COVID-19 is a national emergency, in this case, the Stafford Act does **not** require agencies to create preferences for local firms.

- **System for Award Management (SAM) Registration.** Lastly, OMB released one FAQ aimed at contractors: current SAM registrants with registrations expiring before May 17, 2020, will be granted a one-time, 60-day extension. The memorandum does not clarify whether the extension will be automatic or if contractors must request it, but we expect additional information in the near future.

OMB invites agencies to direct additional questions to its Office of Federal Procurement Policy mailbox. It will continue to provide updates and information as needed, which we will monitor and report [here](#).

Early and regular communication with your government customer has never been more important. Contractors that anticipate delays, performance issues, or absences of key personnel due to COVID-19 should initiate conversations with their contracting officers as soon as possible and highlight OMB's direction that agencies and contractors should work together to find mutually acceptable solutions.

If such solutions are unobtainable, for whatever reason, the Perkins Coie government contracts team stands ready to assist clients as they navigate performance issues that might arise during the COVID-19 pandemic.

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