

# PUBLICATION

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## Coronavirus: Important OMB Guidance About Government Contract Performance Issues During COVID-19 Crisis

March 23, 2020

**On March 20, 2020, the Deputy Director for Management at the U.S. Office of Management Budget (OMB) issued important guidance to federal government agencies about how they should handle various contract performance issues resulting from the novel coronavirus (COVID-19).**

OMB's Memorandum (Memo M-20-18) encourages government agencies to use flexible work solutions with government contractors during the COVID-19 outbreak. On March 19, 2020, Baker Donelson issued a client alert – Coronavirus: What Government Contractors Should Do Now to Address Possible Delays or Suspensions of Work. OMB's Memo M-20-18 provides even more guidance related to these topics from the perspective of the federal government and therefore should be closely reviewed by all federal contractors. We have summarized some of its provisions below.

### Teleworking

Several federal government agencies, states, and municipalities have closed offices or encouraged the workforce to telework to discourage the spread of COVID-19. If a government contractor's personnel performs its contract work in a federal office, and that office closes, questions arise about whether the contractor can also perform its contract through teleworking. The OMB is encouraging this practice. OMB's Memo M-20-18 states that "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 performance. . . ." The guidance makes clear that this maximization of teleworking should include modifying contracts that do not currently allow for telework. Government contractors who are trying to determine the best way to perform their contracts should talk with their contracting officers about teleworking as a potential alternative.

### Excusable Delays

Memo M-20-18 encourages agencies to be as flexible as possible when contractor personnel are quarantined due to exposure to COVID-19. For example, the guidance describes the excusable delays clauses discussed in our [prior alert](#) and confirms that "[e]xcusable delays that result in adjustments to the contractor's delivery schedule should not negatively impact a contractor's performance rating" if the delay results from the COVID-19 outbreak. These comments show that OMB is encouraging federal agencies to be reasonable and flexible when addressing issues arising from the outbreak of the virus.

### Equitable Adjustments

An equitable adjustment is "[a]n appropriate modification of the amount due under a contract, or the time required for its performance, because of the issuance of a change order, which is just, fair, and right in consideration of the facts and circumstances of the individual case." [Appeal of Kenyon Magnetics, Inc.](#), GSBGA No. 5263, 80-2 B.C.A. (CCH) ¶ 14624 (July 31, 1980). Equitable adjustments typically include an amount for profit.

OMB's Memo M-20-18 provides instruction to federal agencies on addressing requests for equitable adjustments associated with the COVID-19 outbreak, such as contractors incurring costs to protect their own employees and work disruptions caused by office closures. The Memo states that requests "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." The Memo also confirms the various Changes Clauses (found between FAR 52.243-1 through FAR 52.243-7) that can be used by federal agencies to change the government contract to address the crisis.

It is very important to give written notice and contemporaneous documentation showing the adverse impacts when requesting an equitable adjustment or communicating other types of contract performance issues caused by the government or the COVID-19 outbreak. A lack of written notice, contemporaneous documentation, or reasonableness in the contractor's actions in response to the virus will certainly be considered by the government when determining whether the incurred costs are compensable as an equitable adjustment.

### **Relief Regarding Re-Registration in System for Award Management (SAM)**

[Memo M-20-18](#) confirms that contractors with current SAM registrations that expire before May 17, 2020 will be afforded a one-time extension of 60 days.

### **Adjustments to Acquisition Thresholds**

[FAR 18.202](#) allows increases to acquisition thresholds when the head of an agency determines that the acquired supplies or services are to be used to support the response to an emergency or major disaster. On March 13, 2020, President Donald J. Trump [declared a nationwide emergency](#) under the Stafford Act to fight the COVID-19 outbreak. The emergency declaration allows the provisions at [FAR 18.202](#) to be utilized for COVID-19 response efforts. Accordingly, [Memo M-20-18](#) confirms that for purchases related to the response effort, the micro-purchase threshold is raised to \$20,000 for domestic purchases and \$30,000 for purchases outside the United States, the simplified acquisition threshold is raised to \$750,000 for domestic purchases and \$1.5 million for purchases outside the United States, and agencies may use simplified acquisition procedures up to \$13 million for purchases of commercial items to support the response effort. The increase in acquisition thresholds reduces the regulatory burden for purchases related to the COVID-19 response effort as the thresholds determine which FAR clauses apply to a particular transaction. While [Memo M-20-18](#) encourages agencies to use "sound fiscal prudence," the increase in acquisition thresholds shows that the federal government is using maximum flexibility to quickly order supplies and services to address COVID-19.

### **OMB's Guidance Confirms that Agencies Should Use Flexibility in Addressing Unprecedented Business Disruption**

COVID-19 will cause an unprecedented disruption for businesses and government. OMB's [Memo M-20-18](#) confirms that OMB wants federal agencies to use maximum flexibility to assist federal contractors and their workforce to ensure the successful performance of federal contracts. Contractors should reference OMB's guidance when seeking contract modifications or other accommodations from the government related to their government contracts. Baker Donelson's Government Contracts Team routinely assists contractors with contract compliance and negotiations. If you have any questions or need assistance with this topic, please contact any attorney on Baker Donelson's [Government Contracts Team](#). For more information and general guidance on how to address legal issues related to COVID-19, please visit the [Coronavirus \(COVID-19\): What You Need to Know](#) information page on our website.