

**DRAFT MEMORANDUM**  
**CONTINUITY OF GOVERNMENT CONTRACTING INDUSTRIAL BASE**

Last week, Congress and President Trump enacted the Coronavirus Aid, Relief, and Economic Security (CARES) Act to provide funding and various authorities to preserve public health and economic stability in various sectors. This includes federal contracting—a market sector that employs several million American workers and is vital for enabling Federal agencies to meet the needs of the citizenry. The CARES Act builds upon numerous measures and tools already available under various statutory authorities and in the Federal Acquisition Regulation, title 48 of the Code of Federal Regulation (“CFR”), and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 CFR Part 200.

The attached DRAFT MEMORANDUM is intended to apply these tools consistently across Federal agencies to ensure continuity of performance—and the integrity of capacity—for recipients of Federal procurement contracts and assistance awards and their subawardees (collectively, “contractors”) during the COVID-19 public health emergency.

The attached DRAFT MEMORANDUM is written to be issued by the Office of Management and Budget (OMB) and its Office of Federal Procurement Policy (OFPP), in the same way that OMB and OFPP have issued similar guidance during other disaster efforts (e.g., Hurricane Katrina). It is designed to direct a unified approach by Federal agencies in applying available tools for maintaining cash flow to, and productivity from, contractors consistent with the role of OMB and OFPP in guiding critical federal procurement policy.

The OMB memorandum could stand on its own or, if necessary, facilitate issuance of class deviations from the Federal Acquisition Regulation (FAR) by the [Principal Director of Defense Pricing and Contracting](#) (for Defense Department agencies), the [Civilian Agency Acquisition Council](#) (CAAC) (for civilian agencies), and the Office of Federal Financial Management.

This DRAFT MEMORANDUM is being circulated for comment to the [Procurement Round Table](#) (PRT) and to key industry associations (National Defense Industry Association, Professional Services Council, U.S. Global Leadership Coalition, Interaction, etc.) for widespread distribution among industry groups and for further presentation to OMB.

## DRAFT OMB MEMORANDUM

Congress and the President, in enacting the bipartisan Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, have made clear their intent to save lives while preserving the continuity and capacity of the Federal government and private sector during the public health emergency declared on January 31, 2020 for COVID-19. The health and safety of all Americans necessitates quarantines and social distancing practices. At the same time, the Federal government must continue operations that meet the needs of our citizens.

Private-sector organizations play a vital role in supporting these Federal programs—from providing supplies in the battle against COVID-19 to food and logistics for the military, energy to operate facilities and transportation, defense equipment, cybersecurity and IT services, and basic administrative services.

This Memorandum directs Federal agencies to implement specific measures to ensure the continuity of services and goods from the contractor industrial base (including for-profit and non-profit organizations) on which they depend. [OPTIONAL: It is anticipated that this Memorandum will be implemented through Class Deviations to the Federal Acquisition Regulation, title 48 of the Code of Federal Regulation (“CFR”), and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 CFR Part 200.]

Clear direction and guidance regarding contractor productivity and cost recovery during the COVID-19 health crisis are essential. Without such clarity, many contractors—particularly small businesses and non-profits—will be forced to lay off and furlough their work forces, which would diminish near-term agency performance and damage long-term Federal effectiveness. Reconstituting the contractor workforce is likely to be far more costly and difficult than retaining these resources (productively employed to the extent possible) during this health crisis. Clear direction about Federal expectations and commitments will give contractors the direction and confidence to keep their workforce intact and to take steps to maximize productivity to the extent practicable.

Effective immediately, consistent with the intent of CARES Act and other existing procurement and grant authorities, Federal agencies shall require their contractors:

1. to continue operations and performance, in accordance with their Federal awards, to the maximum extent practicable while maintaining quarantines and social distancing practices;

2. to evaluate and implement telework for contractor employees, wherever possible, as an important tool for enabling continued contract performance and maximizing contractor productivity<sup>1</sup>;
3. to continue to maintain and pay their employees and contractors during the period of any disruptions or closures related to the COVID-19 public health emergency, to the extent required for the performance of current and new awards<sup>2</sup>;
4. to provide paid leave to contractor employees who are not able to perform work at their normal place of work due to COVID-19 closures or restrictions and are not able to telework because their duties cannot be performed remotely<sup>3</sup>;
5. to make such workforce payments at current levels of wages, salaries, benefits, and other compensation that such contractor paid the employees of such contractor on January 31, 2020;
6. to furlough employees only to the extent directed by agency stop work orders;
7. to grant paid leave or sick leave during this health crisis to the extent necessary;
8. to identify where COVID-19 will impact the contractor's ability to meet the contract requirements to deliver goods and services and where meeting those requirements will require adjustments to the schedules, budgets, and financial ceilings of the contracts, and to submit appropriate requests for equitable adjustment as soon as practicable;
9. to submit requests for equitable adjustments to fixed-price agreements to address the financial impacts of COVID-19;
10. to calculate the impacts of COVID-19 on their provisional indirect rates and to reach agreement with their agencies on temporary adjustments to their indirect rate agreements;
11. to continue invoicing the Federal government under the applicable terms of their cost-type instruments;
12. to maintain records of these measures (including efforts and effectiveness of teleworking) and any impacts on productivity due to COVID-19, and provide access to such records, upon request, for audit<sup>4</sup>; and
13. to flow down these same measures to their subcontractors and suppliers.

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<sup>1</sup> This provision is based on M-20-18, OMB Memorandum to the Heads of Executive Departments and Agencies, Subject: Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19), March 20, 2020.

<sup>2</sup> This provision applies tools described in Section 18006, Continued Payment to Employees, of the CARES Act and which are inherent in the Federal procurement and grants authorities.

<sup>3</sup> CARES Act Section 3610, Federal Contractor Authority.

<sup>4</sup> This provision applies tools described in Section 19010, Access to Information, of the CARES Act and which are inherent in the Federal procurement and grants authorities.

Federal agencies also shall, to the maximum extent practicable:

1. continue administering Federal awards and awarding new instruments to maintain government programs and operations;
2. continue timely paying invoices for contractors that are performing productively, that are taking reasonable steps to continue performing productively, or that provide a reasonable explanation, in the discretion of the agency, for why COVID-19 is impeding or delaying performance;
3. consider all COVID-19 related costs to be allowable costs pursuant to FAR Part 31 and 2 CFR Subpart E;
4. use the authority under Section 3610 of the CARES Act to pay the costs of contractor employees and subcontractors that are unable to perform work due to COVID-19, without the need for equitable adjustments wherever possible;
5. modify contracts and grants to reimburse any paid leave (up to 40 hours per week) that a contractor provides in order to keep its or its subcontractors' employees in a "ready state," provided that the employees (i) cannot perform work at their regular location due to facility closures or other restrictions, and (ii) cannot telework because their job duties cannot be performed remotely, and immediately pay invoices based on leave paid to covered employees;
6. provide equitable adjustments to fixed-price contracts to compensate the contractor for maintaining a "ready" workforce of covered employees;
7. promptly reach agreement with contractors on equitable adjustments to contract schedules, budgets, and financial ceilings due to COVID-19 impacts, to ensure that the contractor can continue to meet the contract requirements to deliver goods and services;
8. promptly reach agreement with contractors on adjustments to provisional indirect rates agreements to ensure continuity of performance and capacity during the COVID-19 public health emergency;
9. apply these tools "without consideration" so that contractors does not need to concede something of value in exchange for the COVID-19 reimbursement;
10. utilize for such contractor payments the funds made available to an agency by the CARES Act or any other Act available to the agency;
11. utilize these tools equally to contracts, grants, cooperative agreements and task orders, delivery orders, other transactions, and other contractual agreements; and
12. apply a risk-based approach to commence audits of contractor records regarding COVID-19 impacts and workforce productivity to identify and minimize waste, fraud, and abuse during this public health emergency.

Nothing in this Memorandum is intended to shield contractors that misuse these measures from the government's standard remedies of default terminations, suspension and debarment, and civil and criminal penalties for fraud.