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OMB Instructs Agencies To Prepare (Again) for Sequestration

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On January 14, 2013, the Office of Management and Budget (OMB) released a memorandum to the heads of executive departments and agencies instructing them to plan regarding the uncertainty of fiscal resources in Fiscal Year 2013.

How we got to where such planning is necessary is no secret. As the OMB memorandum relates, the American Taxpayer Relief Act of 2012 (ATRA), the last minute deal to avoid triggering tax increases and sequestration, only delayed the debate on deficit reduction measures for two months. Accordingly, unless Congress acts to amend current law, the President is required to issue a sequestration order on March 1, 2013, that will cancel approximately $85 billion in budgetary resources across the Government. The memorandum recognizes that additional uncertainty is created by the expiration on March 27, 2013, of the Continuing Appropriations Resolution under which the Government has been operating. Add to this a need to increase the debt ceiling as soon as mid-February 2013, and there are the makings of a perfect storm.

According to OMB, despite press reports that some agencies were not planning for sequestration in 2012, prior to the passage of ATRA, agencies "had already engaged in extensive planning for operations under post-sequestration funding levels . . . ." In light of "persistent budgetary uncertainty," OMB instructed agencies to continue these planning activities, in coordination with OMB, and "intensify efforts to identify actions that may be required should sequestration occur."

OMB provided "guiding principles" that agencies should follow to the extent practicable, including:

- Use available flexibility to reduce operational risks and minimize impacts on the agency's core mission;
- Identify and address "operational challenges that could potentially have a significant deleterious effect on the agency's mission or otherwise raise life, safety, or health concerns;" and
- Identify appropriate means to reduce civilian workforce costs, such as hiring freezes, releasing temporary employees or not renewing term or contract hires, authorizing voluntary separation incentives and voluntary early retirements, or administrative furloughs.

Of particular interest to contractors, OMB also instructed agencies to:

- Review grants and contracts to identify cost savings that can be achieved, consistent with contractual terms and conditions;
- Take into account funding flexibilities, including the availability of reprogramming and transfer authority; and
- Be cognizant of the requirements of the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-2109.

Although OMB instructed agencies to "intensify" their planning for potential sequestration, it also stated that agencies generally should not undertake measures specifically designed as a response to sequestration. Instead, agencies should take those actions that need to be taken immediately or near-term in light of continuing budgetary uncertainty. "Agencies presented with these circumstances should continue to act in a prudent manner to ensure that operational risks are avoided and adequate funding is available for the remainder of the fiscal year to meet the agency's core requirements and mission."

Perhaps OMB's memorandum is a hint at its prediction of the ability of Congress and the White House to reach a deal to avoid sequestration the second time around; perhaps it is intended to signal the White House's seriousness in not making a deal inconsistent with the Administration's policy objectives solely to avoid sequestration. Whatever the motivation, agencies are now instructed to begin taking actions that could affect contractors by delaying or canceling contract awards, declining to extend contracts or exercise options, or limiting funding on incrementally funded contract work. This risk is more acute for contracts that might not relate to agency "core missions."

Given OMB's instruction to agencies to take actions "consistent with the applicable terms and conditions" of the contract, contractors should be mindful to ensure that this guidance is followed. In addition, contractors might consider reviewing their contracts and identifying cost-saving measures that could be proposed if there are signs that funding will be reduced on a contract. For example, contractors could look to see what work might be reduced without defeating the profitability of the contract, suggest schedule adjustments that work for the contractor, but also save costs, or propose alterations to the payment schedule. In this manner, contractors may be able to help the agency achieve cost reductions without unduly compromising the benefits of the contract to the contractor.