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September 2013

### Federal Grant & Contract News for Nonprofits - September 2013

Unfortunately, as the 2013 government fiscal year comes to a close, we again face severe federal financial uncertainty as the Consolidated and Further Continuing Appropriations Act of 2013 (P.L. 113-6) expires at 11:59 PM on Monday, September 30. As such, organizations that rely on federal funding and federal support must plan for the very real possibility of another, and perhaps prolonged, government shutdown.

On September 17, 2013, the Office of Management and Budget (OMB) issued a memorandum to all executive branch agencies titled "Planning for Agency Operations During a Potential Lapse in Appropriations." While the memo is optimistic that Congress will act before the shutdown, the memo advises agencies to update "their plans for operations in the absence of appropriations, consistent with Section 124.2 of OMB Circular A-11." The memo further advises that "agency leaders should ensure that only those activities that are 'excepted' pursuant to applicable legal requirements would continue to be performed during a lapse in the appropriation for those activities." The memo also attaches some frequently asked questions that address various technical questions about particular matters related to agency operations during a lapse in appropriations.

These FAQs provide guidance on how agencies should handle matters relating to existing and anticipated contracts and grants, including awards, oversight, payment, etc. Some of the more notable questions and answers, which may serve as a useful guide to nonprofits in navigating this challenging time, are as follows:

**Q1. When an appropriation has lapsed, may an agency incur a new obligation – by signing a new contract or grant, or by extending a contract or a grant, or by exercising a renewal option – when the funding source for that obligation would be the lapsed appropriation?**

**A1:** No, except in very limited circumstances.

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**Q2. May an agency incur a new contractual or grant obligation in order to address emergency circumstances, even though the annual appropriations, against which the obligation would be charged, have lapsed?**

**A2:** Yes, if the new obligation is necessary to address emergency circumstances that imminently threaten the safety of human life or the protection of property.

**Q3. May an agency incur a new contractual or grant obligation – even though the appropriation for this obligation has lapsed – as part of the agency carrying out a program that is separately funded through an appropriation that remains available?**

**A3:** That depends on whether the authority to incur the obligation during the lapse is a "necessary implication" of the program.

**Q4. May an agency incur a new contractual or grant obligation that would be charged against an appropriation that remains available for obligation if the agency would not incur any related obligations (such as for administrative activities by agency employees) for which the appropriation has lapsed?**

**A4:** Yes. In this situation, the agency may incur the new contractual or grant obligation, since both the contract or grant obligation itself, and the obligations for necessary related activities (e.g., the administrative actions that are needed in order for the agency to incur the contract or grant obligation),

may be charged against an available appropriation.

**Q5: The agency has previously awarded a contract or grant, and the contractor or grantee is in the midst of performance. If there has been a lapse in the appropriation that funds the federal employees who supervise or support the performance of the contract or grant, can the federal employees continue these activities during the funding lapse?**

**A5:** In most cases, the absence of appropriations would prevent the continuation of such supervision or support. Routine ongoing activities, related to the agency's contract and grant administration, would not usually be authorized to continue when there has been a lapse in the appropriation that funds the contract and grant administration activities.

There are very limited circumstances under which such work may continue, notwithstanding the lapse in appropriations. As is further explained (in the OMB memo), these limited circumstances are when the continued performance of the contract or grant administration is "necessarily implied" for carrying out:

- . An "orderly shutdown" when there has been a lapse in appropriations;
- . One of the "excepted" activities as referenced above (i.e., express statutory authorizations, emergency circumstances, and the President's constitutional authorities); or
- . A congressionally authorized or appropriated function for which Congress has provided funding that remains available during the lapse, where the suspension of the related activity (during the funding lapse) would prevent or significantly damage the execution of the terms of the statutory authorization or appropriation.

**Q6: The agency has previously awarded a contract or grant, and the contractor or grantee is in the midst of performance. In addition, the agency has determined that, due to a lapse in the appropriation that funds the federal employees who supervise or support the performance of the contract or grant, those federal employees cannot continue these activities during the funding lapse. In the absence of such supervision or support, may the contractor or grantee nevertheless continue performance?**

**A6:** If the continued supervision or support, during the lapse period, is not critical to the contractor's or grantee's continued performance during that period, then the contractor or grantee may continue to proceed with its work. This is the case, for example, if an agency had obligated funds representing the entire price for a good or service under a contract or task order before the funding lapse began. In that example, the agency would not have to issue an affirmative direction to the contractor or grantee to continue performance, such as a notice to proceed. Instead, the contractor or grantee could continue to engage in performance. (It is always prudent to be in communication with the contractor or grantee to avoid a misunderstanding.)

However, depending on the duration of a funding lapse, the absence of available federal employee oversight may lead an agency to reconsider whether the contract or grant activity should continue to be performed. In particular, if the continued supervision or support, during the lapse period, is critical to the contractor's or grantee's continued performance during that period, then – where consistent with law and the terms of the contract or grant – the agency should instruct the contractor or grantee to suspend performance.

The same would be true if continued performance depends on the participation of other federal agencies or the availability of other Federal facilities that would be precluded by the lapse of appropriations.

**Q7: The agency has previously awarded a contract or grant, and the contractor or grantee is in the midst of performance. In addition, the agency has determined that the continued performance of the contract or grant, during a lapse in appropriations, does not require the supervision or support of federal employees who may not continue to perform these activities during the funding lapse. In that case, should performance of the contract or grant always continue during the funding lapse?**

**A7:** The first consideration is whether continued performance of the contract or grant is required in order for the agency to comply with its authorization or appropriations statute.

If it is the case that continued performance is statutorily required, then performance should proceed.

If continued performance is not statutorily required, then the agency should consider whether having the

contract move forward is a sensible use of taxpayer funds in light of the lapse of appropriations. In this regard, there might be situations in which the continued performance of a contract would be wasteful due to the impact that the funding lapse is having on other agency activities. For example, if a federal building is closed due to the funding lapse, it might be wasteful to have a contractor perform its normal duties of emptying trash cans every day in the building's offices. In that situation, the agency should consider whether to have the contractor suspend performance.

If an agency decides that continued performance would be wasteful and thus should be suspended during the funding lapse, the agency should take appropriate contractual action (which would be part of the agency's orderly-shutdown activities). Contracting staff will need to work closely with agency counsel in making and implementing these decisions to minimize costs to the government.

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**Q9: In the case of a contract or grant that has been previously awarded (and thus for which available funds were obligated), can federal employees be excepted from furlough in order to make timely payments to the contractor or grantee in accordance with the contract or grant?**

**A9:** No, except in very limited circumstances.

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**Q10: Can an agency pay a contractor or grantee, during a funding lapse, for performance under a contract or grant that the agency awarded during the funding lapse under one of the exceptions to the Antideficiency Act (see Q&As 1-2)?**

**A10:** No. As is the case with federal employees who are excepted from furlough to perform authorized activities during a funding lapse, the agency will incur obligations for the excepted work that a contractor or grantee is authorized to perform during a funding lapse. However, as with the pay of the excepted federal employees, the agency cannot liquidate those contract and grant obligations until an appropriation is enacted.

For the OMB memo and the complete text of the FAQ questions and answers, [click here](#).

For more information, please contact [Dismas Locaria](#), [Melanie Jones Totman](#), [Elizabeth Buehler](#), or [Jeffrey Tenenbaum](#).

*This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.*

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