

October 17, 2018

Hon. Mick Mulvaney
Director
Office of Management and Budget
Executive Office of the President
Eisenhower Executive Office Building
1650 Pennsylvania Ave, NW
Washington, DC 20503

Subject: Improving contract guidance and communication for a potential lapse in appropriations

Dear Director Mulvaney,

On behalf of the Professional Services Council (PSC), I am pleased to provide a white paper outlining PSC's recommendations for improving the government's guidance and communication in advance of any future potential lapse in federal appropriations for work performed under contracts. We would welcome the opportunity to discuss these recommendations with you or your staff, or to answer any questions you may have.

During and after the government shutdowns when federal appropriations lapsed in early 2018 (as well as previous shutdowns), PSC collected information and anecdotes from our member companies about their shutdown experiences, particularly relating to their best—and worst—examples. Across the board, we were told that companies whose customer agencies communicated clearly and proactively with their vendors in advance of a potential lapse in funding had the smoothest shutdown experiences. Conversely, contractors whose customer agencies provided unclear, incomplete, inaccurate, or no guidance experienced much greater disruption from even the temporary absence of funding.

While there are many actions that contractors can and should take before, during, and after a potential lapse of funding—steps that PSC continually communicates to our member companies—much of the process remains wholly within the purview and control of OMB and the individual federal agencies. We believe that relatively small improvements to OMB guidance and agency contingency plans, changes that do not require regulatory intervention, will yield benefits and stability for both government and industry that far exceed the effort required to implement them. The attached white paper spells out such potential changes.

Thank you in advance for your attention to these recommendations. We commend your ongoing efforts to improve federal agencies' communication with their contractors and believe these recommendations are a natural extension of this important work.

Should you have any questions or need more information, please do not hesitate to contact me (chvotkin@pscouncil.org) or Jeremy Madson (madson@pscouncil.org), PSC's Director of Public Policy. We may both be reached at 703-875-8059.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan Chvotkin". The signature is fluid and cursive, with the first name being more prominent.

Alan Chvotkin
EVP & Counsel
Professional Services Council

Attachment: PSC White Paper: Recommendations for Guidance Related to Contractor Performance and Communication in the Event of Lapse in Appropriations and Government Shutdown

CC: Hon. Russell Vought, Deputy Director
Hon. Margaret Weichert, Deputy Director for Management
Ms. Lesley Field, Administrator (Acting), Office of Federal Procurement Policy

White Paper: Recommendations for Guidance Related to Contractor Performance and Communication in the Event of a Lapse in Appropriations and Government Shutdown

As directed by the Office of Management and Budget (OMB), federal agencies are required to prepare contingency plans for executing an “orderly” government shutdown in the event of a lapse in appropriations, with an emphasis on which functions may continue, and which must stop.¹ The Professional Services Council (PSC) recommends expanding OMB guidance and agency contingency plans to direct that federal agencies:

- 1) provide specific, clear instructions about what work can and cannot continue in the event of a lapse in appropriations by including language in contract documents (and even solicitations) for all work performed by contractors (whether under contracts, task orders, delivery orders, purchase orders, or other mechanisms); and
- 2) communicate proactively with contractors in advance of a potential lapse in appropriations, to reinforce or supplement any guidance provided via contractual language.

Taking these steps will help ensure a consistent, accurate application of policy and associated operational posture in the event of a lapse in appropriations. Such direction will also facilitate allowable continuity of program operations, and help minimize unnecessary cost, confusion and disruption for both government and industry.

During recent federal government shutdowns, the dialogue between agencies and industry has been that “contractors should stop working unless specifically told they can continue.” In our view, to support the government, the correct interpretation is that “contractors should continue performing the work they were contracted to do unless instructed to stop, or if there is no way they can continue to perform.” Even when the government stops working, contractors can help maintain continuity of operations by continuing to work, if necessary funding and oversight remains available.

There are multiple strategies, guidance documents, memos and presentations on preparing for a government shutdown, from both government and industry. There are multiple clauses that are included in contracts that refer to “limitations in funding” and “stop-work.” There are various forms of funding (such as multi-year or no-year funding) and contract types (such as fixed-price or cost-plus). But the required actions by contractors in the event of a lapse in appropriations are rarely discussed until a government shutdown actually occurs.

While everyone can and should prepare for a lapse in federal funding, and the resulting shutdown actions, the reality is that the decision to “officially” shut down and/or stop work is so serious and politically charged that triggering agency shutdown plans is often not done until the last minute. This leaves little time for government agencies and contractors to effectively execute these plans, however

¹ See OMB Circular A-11, Section 124, available at: <https://www.whitehouse.gov/wp-content/uploads/2018/06/s124.pdf>.

well designed, and even less time for government officials and contractors to communicate with employees, subcontractors, or other stakeholders.

Every agency and department of the federal government has an Agency Contingency Plan² to guide their own staff on next steps if there is a lapse in appropriations. While there is always a federal official who is empowered to act, taking action is often more problematic. If federal employees are told to come to work simply to leave their laptops and mobile phones, and instructed not to send emails or return calls or perform other work, and the building is then closed, who advises contractors on the status of their work? How do contractors let their employees, subcontractors, and vendors know what to do? Just as importantly, is the person making this decision or issuing direction to contractors properly informed and authorized to give that direction?

Our experience is that in the initial hours and days after a shutdown, there is more chaos than necessary, and oftentimes the direction given is inaccurate or inconsistent with requirements in law or agency shutdown plans.

Recommendations

- 1) **Provide specific, clear instructions about what work can and cannot continue in the event of a lapse in appropriations by including language in contract documents (and even solicitations) for all work performed by contractors (whether under contracts, task orders, delivery orders, purchase orders, or other mechanisms).** Providing such information goes beyond the standard FAR “Limitation of Funds” or “Stop Work” clauses. Those clauses are necessary but provide no clarity to either the government or industry about what will happen in the immediate event of a lapse in appropriations.

Include language in the contract that clarifies what the contractor should do if the government shuts down, and who is authorized to provide such guidance to the contractor (if the contracting officer is not available). This would not eliminate the government’s obligation to issue a stop-work order, but it would better enable all stakeholders to be prepared for a lapse in appropriations before it comes to pass.

For example, according to DoD’s 2018 contingency plan³:

“Contractors performing under a fully funded contract (or contract option) that was awarded prior to the expiration of appropriations may continue to provide contract services, whether in support of excepted activities or not. However, new contracts (including contract renewals or extensions, issuance of task orders, exercise of options) may not be executed, nor may increments of funding be placed on incrementally funded contracts or to cover cost overruns, unless the contractor is supporting an excepted activity. No funds will be available to pay such new contract or place additional increments of funding on contracts until Congress appropriates additional funds. ***The expiration of an appropriation does not require the termination of contracts (or issuance of stop work orders) funded by that appropriation unless a new obligation of funds is***

² See Office of Management and Budget “Agency Contingency Plan” webpage:

<https://www.whitehouse.gov/omb/agency-contingency-plans/>

³ “Guidance for Continuation of Operations During a Lapse in Appropriations,” January 18, 2018, available at:

<https://dod.defense.gov/Portals/1/Documents/pubs/GUIDANCE-FOR-CONTINUATION-OF-OPERATIONS-DURING-A-LAPSE-OF-APPROPRIATIONS.pdf>.

required under the contract and the contract is not required to support an excepted activity.” (Emphasis added.)

To this end, agencies could provide greater clarity about performance requirements and expectations in the event of funding lapse simply by including guidance language in the contract, such as:

In the event of a lapse in appropriations, the contractor shall continue to provide services under this fully funded (contract, task order, delivery order).

If the agency needs to provide specific guidance on which services will or will not continue during a lapse in appropriations, it can state that in the contract.

As another example, the DHS 2018 shutdown guidance⁴ states:

“Contractors performing under a fully funded contract may continue to perform unless government oversight or day-to-day interaction with government non-exempt employees is critical to the contractor’s continued performance during that period.”

In this scenario, an example of a clause that could be included in a contract might provide:

In the event of a lapse in appropriations, the contractor shall continue to provide services under this fully funded (contract, task order, delivery order), unless direct government oversight, or day-to-day interaction with government non-exempt employees, and/or access to government facilities is a mandatory requirement of contract performance.

As another example, under a Time and Materials contract for fifteen full-time employees, it is the government’s requirement to have seven critical personnel continue working during the lapse in appropriations and the other eight to stop work until appropriations are restored or other direction is provided by the CO or an authorized official. Here is potential language to include within this T&M contract:

In the event of a lapse in appropriations, the following positions are considered essential and shall continue work under this fully funded contract: Program Manager (1), Senior Systems Engineers (2), System Administrator (1), Cyber Security Analysts (3). The remaining positions shall stop work until government appropriations are restored.

Attached is a template which includes sample contract language.

- 1) **Communicate proactively with contractors in advance of a potential lapse in appropriations, to reinforce or supplement any guidance provided via contractual language.**

Contractors continually seek and welcome communication from the government in the days preceding a potential lapse in funding. This would be particularly helpful to everyone if, in addition to adopting the first recommendation above, Contracting Officers connect with contractors to simply say “in the event of a lapse in appropriations, refer to section [X] of your contract.” Agencies’ proactive, timely communication with their contractors to reinforce or supplement any guidance provided via contractual language is exceedingly helpful and should be strongly encouraged.

⁴ “Procedures Relating to a Federal Lapse in Appropriations,” January 19, 2018, available at: https://www.dhs.gov/sites/default/files/publications/18_0119_MGMT_DHS-Contingency-Plan-FINAL.PDF.

Benefits to Government and Industry

- Government acquisition professionals would not be deluged with as many requests for “what do I do in the event of a shutdown?” as the deadlines approach.
- If a Continuing Resolution is anticipated (rather than a full shutdown), industry could readily review contract clauses in advance through guidance provided by associations such as PSC. Likewise, government counterparts, including CORs and Program Managers, could be reminded that the often last-minute decision (CR or Shutdown, what will it be?) is covered in contracts and the continuation of work is governed by the contract clauses.
- Prime contractors could include the government’s contractual shutdown direction information via flow-down in their subcontracts and in their employment agreements for project-specific work.
- Having such terms in a contract from the start will prevent wasted time and resources sorting out who should work and who should not and the associated financial impacts for government contractors and their employees. During a government shutdown, while many civil servants are furloughed, furloughing contractor employees may not be necessary. A contractor’s employees also may not be eligible for back pay, causing financial hardship for them and their families due solely to confusion about the implementation and ramifications of a shutdown.
- While there is no need to change the FAR immediately, standard clauses should be included in the FAR; pending such revisions, providing such ‘what if’ language to Contracting Officers to use when solicitations are being prepared would be beneficial to all.
- If agency guidance changes in the future, these contract clauses could be modified quickly through unilateral individual contract amendments (or a mass modification).
- Contractor compliance with related federal laws, such as minimum wage, WARN Act, etc.

We would welcome the opportunity to provide additional information or discuss these recommendations. Please contact [Jeremy Madson](mailto:Jeremy.Madson) or policy@pscouncil.org for more information.

October 17, 2018

Sample Contract Language Providing Guidance in the Event of a Lapse in Appropriations

Scenario/Example A:

Contractors are performing under an existing, fully funded contract (or contract option, task order, or delivery order) that was awarded prior to the expiration of appropriations, and/or a new obligation of funds is not required.

Suggested Contract Language:

In the event of a lapse in appropriations, the contractor shall continue to provide services under this fully funded (contract, task order, delivery order).

Scenario/Example B:

Certain services may continue during a lapse in appropriations, while others may not, even where funding may be available, based on other factors such as availability of oversight by government personnel. For example, per DHS 2018 shutdown guidance, “Contractors performing work under a fully funded contract may continue to perform work unless government oversight or day-to-day interaction with government non-exempt employees is critical to the contractor’s continued performance during that period.”

Suggested Contract Language:

In the event of a lapse in appropriations, the contractor shall continue to provide services under this fully funded (contract, task order, delivery order), unless direct government oversight, or day-to-day interaction with government non-exempt employees, and/or access to government facilities is a mandatory requirement of contract performance.

Scenario/Example C:

Under a Time and Materials contract for a team of fifteen full-time employees, it is the government’s desire to have seven critical personnel continue working during the lapse and the other eight to stop work until appropriations are restored.

Suggested Contract Language:

In the event of a lapse in appropriations, the following positions are considered essential and shall continue work under this fully funded (contract, task order, delivery order): Program Manager (1), Senior Systems Engineers (2), System Administrators (1), Cyber Security Analysts (3). The remaining positions shall stop work until government appropriations are restored.

Sample Language for Communication with Contractors in Advance of an Anticipated Lapse in Funding:

In the event of a lapse in appropriations, refer to section [X] of your contract.

About the Authors

The **Smart Contracting Working Group (SCWG)** within PSC's Acquisition and Business Policy Council was formed to look for opportunities to improve the federal procurement system that would benefit both government and industry. Commonsense policies and consistently applied procedures for how and when the government acquires services can greatly enhance the effectiveness and efficiency of the federal acquisition system. In many areas, improvements to government business and buying policy—whether through statute, regulations, or agency guidance—will lead to positive outcomes that far exceed the magnitude of the changes themselves.

The **Acquisition and Business Policy Council (ABPC)** is PSC's principal body for developing positions and acting on major, cross-cutting acquisition policy issues. Its focus encompasses wide-ranging issues such as multiple award and schedules contracts, the role of contractors, federal acquisition workforce development, commerciality, contract type and competitiveness, requirements development and evaluation strategies, alternative acquisition models, internal and external communication, and industrial base health and competition. The ABPC fosters formal and informal partnerships with policymakers and allied stakeholders, and works toward an outcome-oriented federal services acquisition process through focused advocacy, timely programming, and other avenues.

The **Professional Services Council (PSC)** is the voice of the government technology and professional services industry. PSC's 400 member companies represent small, medium and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the trade association's members employ hundreds of thousands of Americans in all 50 states and across the globe.