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Client Question: What are a contracting officer's (CO's) responsibilities in accordance with Office of Management and Budget (OMB) Memorandum M-13-22, "Planning for Agency Operations During a Potential Lapse in Appropriations?"

The Short Answer

ASI Government's September 2013 *Advisory™*, "Contracting Implications of a Government Shutdown"¹ analyzed and discussed some of the provisions of M-13-22. We have researched the provisions of M-13-22 focusing on the CO responsibilities and decisions therein. One of the foundational understandings which we confirmed in our review of M-13-22 in this context is that very few actual decisions with respect to those contracting actions which may potentially be taken in the circumstances of a funding lapse are within the CO's purview. Rather, these decisions are executive-level decisions to be made with respect to which functions and activities must be continued despite the funding lapse because they are "excepted" activities/functions.

"Excepted" activities are those which fall into recognized categories of activities which have been recognized by the Government Accountability Office (GAO) and Department of Justice (DOJ) as exceptions to the Antideficiency Act for which obligations may be incurred by agencies during a funding lapse. We conclude that the decisions as to which agency activities that would be funded by appropriations which have lapsed qualify as "excepted" activities, whether performed by in-house personnel and/or under contracts, are decisions that must be taken at the most senior levels in the agency. Officials who make these decisions will base them on M-13-22, existing Justice Department guidance which is reflected in M-13-22, in consultation with agency counsel and, if necessary, in consultation with designated OMB resource personnel. As a result of such agency-level decisions, we believe that the primary role of an affected CO is essentially one of implementing the agency-level decisions which may affect contracts under the CO's cognizance.

Supplemental and Substantiating Details

Foundational to our research findings is the fact that M-13-22 points out that:

[n]ormally, routine, ongoing operational and administrative activities relating to contract or grant administration (including payment processing) cannot continue when there is a lapse in funding. Therefore, agency employees who are paid with annual appropriations and who perform an activity associated with contract or grant administration (including

¹ Available at <https://www.gotovao.com/index.cfm?action=comment&id=0430051992000443>

oversight, inspection, payment, or accounting) should generally not continue work during a funding hiatus. (*p. 3, Attachment 1, 2nd paragraph*)

This general unavailability of contract administrative personnel, including the CO, is emphasized throughout the M-13-22 attachments as meaning that such employees, who are in almost all cases paid out of lapsed annual appropriations, are to be furloughed except for those who are working on contracts for “excepted” activities – and only for the period of time required to perform such efforts.

As reflected in M-13-22, Attachment 1, Part I.A, the “excepted” activities or functions for which an agency may incur obligations despite a lapse in the appropriations which ordinarily fund them are summarized as follows:

- 1) A statute or other legal requirement expressly authorizes an agency to obligate funds in advance of appropriations.
- 2) The function addresses emergency circumstances, such that the suspension of the function would imminently threaten the safety of human life or the protection of property.
- 3) The function is necessary to the discharge of the President's constitutional duties and powers (e.g., Commander-in-Chief or conducting foreign relations).

M-13-22 Attachment 1, Part I.A, further describes DOJ explanations of the emergency circumstances exception as requiring both of two conditions to be present:

(a) a reasonable and articulable connection between the obligation (in this case, involving a contract or grant) and the safety of life or the protection of property, and

(b) some reasonable likelihood that either the safety of life or the protection of property would be compromised in some significant degree by failure to carry out the function in question -- and that the threat to life or property can be reasonably said to be near at hand and demanding of immediate response.

As the Antideficiency Act states, the emergency exception does not authorize the continuation of ongoing, regular functions of government, the suspension of which would not imminently threaten the safety of human life or the protection of property.

In addition, M-13-22 Attachment 1, Part I.B, notes that GAO and DOJ recognize the Antideficiency Act permits obligations to be incurred for “[a]ctivities that an agency must continue, in the absence of appropriations, because their continuation is ‘necessarily implied’ from the authorized continuation of the foregoing activities.”

The efforts of agency contracting and contract administration/oversight related employees in the performance of their functions with respect to “excepted” activities being performed under contracts are considered to be “necessarily implied” activities. DOJ’s amplification on this characterization, per M-13-22 Attachment 1, Part I.B, can be synopsised as: (1) “orderly shutdown” - must be very limited in duration as explained in Attachment 2, Part B; (2) Antideficiency Act “excepted activities;” and (3) activities which have been “Congressional authorized and funded.”

The foregoing exceptions to the incurrence of obligations despite an appropriations lapse do not mean that any payments – to employees or to contractors – should be made until after funds have

been appropriated via either continuing resolution or regular appropriation act(s). The only cases in which contractors may receive payments are when “the agency's failure to make the payment- during the funding lapse itself would result in an imminent threat to life or property, or would critically impair the President's constitutional functions, or would prevent or significantly damage the execution of a congressionally authorized and funded function.” (M-13-22, Attachment 1, Part C.)

Once agency leadership has made determinations of activities and functions constitute “excepted” activities, COs will have been excepted from furlough for the purpose of enabling contractor performance of specifically identified “excepted” activities. CO activities and decisions, as outlined in M-13-22, which are required to enabling such contractor efforts are outlined in Table 1.

Table 1 – Contracting Officer Decisions and Actions under Funding Lapse

Situation	Personnel Factors	CO Decision Conditions / • Action
<p>1 Contract action – w/ obligation of lapsed funds for excepted activities as determined by agency *M-13-22: Att. 1, @ II.A, Q&A1-4</p>	<p>Personnel are available for administrative, supervisory, or support activities – except that invoices and billings may not be processed for payment *M-13-22: Att. 1, @ I.A&B</p>	<p>Contract actions – including new awards, option exercises, etc. should be processed as usual EXCEPT that FAR 52.232-18, Availability of Funds clause or adaptation must be included.</p> <ul style="list-style-type: none"> • CO determines if standard FAR clause is sufficient or adaptation (developed in coordination with agency counsel) should be included.
<p>2 Contract action – w/ obligation of lapsed funds for non-excepted activities *M-13-22: Att. 1, @ II.A, Q&A1</p>	<p>Personnel are unavailable for administrative, supervisory, or support activities – including CO who would make award *M-13-22: Att. 1, 2nd paragraph</p>	<p>No action permitted.</p>
<p>3 Existing, fully funded contracts (non-severable requirement or multiple- year/no-year funding) – non-excepted activities performed offsite of any federal location *M-13-22: Att. 1, @ II.B, Q&A5-6</p>	<p>Personnel are unavailable for administrative, supervisory, or support activities – including payment processing, but with the possible exception, if authorized @ agency level (& by OMB if in excess of 3-4 hours), of the exception from furloughing personnel to perform shut down activities *M-13-22: Att. 1, 2nd para. & @ II.B, Q&A5-6; Att. 2, Q&A8</p>	<p>Does the nature of the contracted activity require routine feedback or milestone-specific guidance from government POCs to be continued?</p> <p>No - e.g., contract is for a study which does not require in-process government feedback and technical input (periodic progress reports may be required but government response is not required prior to continuation of contractor efforts)</p> <ul style="list-style-type: none"> • No action required – recommend that, as an ‘excepted’ shut-down activity the contractor be advised that contract administration functions, including processing of payments will not be available until funds have been made available <p>Yes – e.g., contract explicitly requires interim progress reporting and feedback is required for the contractor to continue performance</p> <ul style="list-style-type: none"> • Contract performance should be stopped – effort to issue Stop Work Order (SWO) per FAR 42.1302 should qualify as an ‘excepted’ shut-down activity

Situation	Personnel Factors	CO Decision Conditions / • Action
<p>4 Existing, fully funded contracts (non-severable requirement or multiple- year/no-year funding) – non-excepted activities performed in whole or in part onsite at a federal location impacted by the funding lapse *M-13-22: Att. 1, @ II.B, Q&A5-6</p>	<p>Personnel are unavailable for administrative, supervisory, or support activities – including payment processing, but with the possible exception, if authorized @ agency level (& by OMB if in excess of 3-4 hours), of the exception from furloughing personnel to perform shut down activities *M-13-22: Att. 1, 2nd para. & @ II.B, Q&A5-6; Att. 2, Q&A8</p>	<p>See #3 above PLUS: Can the performance be continued without access to the specified – or any other – impacted federal location? Yes – the government facility is not absolutely required <ul style="list-style-type: none"> • A contract modification should be issued to revise the place of performance as necessary to avoid performance at an impacted federal location; should qualify as an ‘excepted’ shut-down activity; likely to need an equitable adjustment pursuant to the provisions of the Government Property clause – but that can be negotiated later – after funding lapse ends No – government facility must be used for all/part of performance <ul style="list-style-type: none"> • Performance should be stopped via at least a partial SWO covering those portions requiring federal access and any other portions which cannot be continued independently; effort to issue SWO per FAR 42.1302 should qualify as an ‘excepted’ shut-down activity </p>
<p>5 Existing, fully funded contracts (non-severable requirement or multiple- year/ no-year funding) – non-excepted efforts - could be continued, but agency decided continuation to be wasteful in view of other funding lapse impacts *M-13-22: Att. 1, @ II.B, Q&A7-8</p>	<p>Personnel are unavailable for administrative, supervisory, or support activities – including payment processing, but with the possible exception, if authorized @ agency level (& by OMB if in excess of 3-4 hours), of the exception from furloughing personnel to perform shut down activities *M-13-22: Att. 1, 2nd para. & @ II.B, Q&A5-6; Att. 2, Q&A8</p>	<p>CO processes SWO per FAR 42.1302 identifying expectation of either ultimately terminating for the convenience of the government or re-starting once appropriations are enacted to enable termination iaw FAR part 49. (Assumption here is that actual termination would exceed available time for “orderly shutdown”).</p>

We hope this information is helpful and meets your needs.

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The information and opinions in this document are based on professional research of available information using sources deemed reliable. If your question involves legal issues, you may wish to consult an attorney for legal advice based on your particular situation.