

EPA Contract Freeze May Pave Way For Similar Reviews

By **Daniel Wilson**

Law360, Nashville (February 8, 2017, 5:33 PM EST) -- The U.S. Environmental Protection Agency's recently lifted freeze on contracts and grants had little immediate impact on contractors, but may prompt future contracting changes under new agency leadership or similar, perhaps more disruptive, contract reviews at other federal agencies.

The White House said on Feb. 3 that the temporary freeze, implemented in late January to allow a review of the EPA's current deals, had been lifted without any action being taken. But although contractors have escaped any immediate impact beyond a little heartburn, they should also take into account that the review could inform future contracting decisions at the EPA, as well as prompting similar reviews at other federal agencies, attorneys said.

The freeze first came to light after multiple press reports emerged on Jan. 23 stating that the EPA, at the behest of the incoming administration, had temporarily issued a suspension on grant and contract activity to conduct a review, prompting contractors and Democratic lawmakers alike to raise the alarm over the unexpected freeze.

Industry group the Professional Services Council, for example, said in a Jan. 25 letter that its members had not been directly informed about the suspension and thus were missing crucial details such as whether it applied only to new contracts or also to payments on existing deals.

PSC President and CEO David Berteau said that although there may be good reasons for the reported freeze, the EPA should share those reasons publicly to allow contractors to "understand the dynamics of the EPA action, and plan for any disruption and its impact on their workers."

He further urged the EPA to make the suspension last "the shortest duration possible," avoiding issues such as disruptions to both business and government operations or inadvertent increases in costs on halted deals that need to be restarted.

The EPA soon responded to those concerns, saying the suspension was intended to give the agency a chance to review grants and contract information for the incoming administration.

It sought to play down the impact of the freeze, however, saying in a Jan. 26 statement that it was "continuing to award the environmental program grants and state revolving loan fund grants to the states and tribes; and we are working to quickly address issues related to other categories of grants."

Subsequently, acting EPA Administrator Catherine McCabe said in a Jan. 27 email to EPA workers that the review was "perfectly normal for a new administration." She also noted that review of its grant programs had been completed and said that existing grants would continue to proceed.

What McCabe's announcement did not mention, however, is whether the review on contracts had been completed. Reports continued to trickle out over the next week, before the White House announced on Feb. 3 that the probe had been completed. The result of the review, the EPA told Law360 on Tuesday, was that "no contracts were delayed and all contracts are proceeding normally."

That was echoed by Jennifer Goodman Horowitz, a spokeswoman for CGI Group Inc. — one of the EPA's largest contractors — who said that its current EPA contracts "are in place and remain unchanged." And attorneys contacted by Law360 also backed the EPA's claims, saying they had not received reports from the industry about existing EPA deals being affected by the freeze.

As such, the biggest current concern around the freeze is the lack of communication from the EPA, attorneys claimed.

"The way the freeze was not announced but reported probably generated far more anxiety than the actual impact of the freeze itself," Crowell & Moring LLP partner David Robbins said. "[It] is the same set of fears and concerns contractors had to deal with with the sequester budget — an inability to plan and an uncertainty about the future. It's a resilient business community ... but more communication is better than less in these areas."

But although EPA contractors appear to have gotten off largely unscathed for now, the true impact of the review may only be seen further down the road once the White House has its full agency leadership in place, several attorneys said.

Details catalogued in the review may form the basis of broader contracting decisions made by the new leadership — and President Donald Trump has made no secret of his plans to shift the EPA's direction — such as declining to exercise options for additional contract years on existing deals or canceling some pending solicitations.

"The fact is, government spending is political," Bass Berry & Sims PLC partner Richard Arnholt said. "Government grant awards and contract awards reflect policy decisions by an administration — they're one of the mechanisms by which the government effects its policy."

Approximately 30 EPA contracts are currently at the solicitation or draft solicitation phase, with a \$1.6 billion, multiple-award deal for environmental remediation and hazardous material removal, expected to be awarded later in 2017, as the largest pending deal.

Also, although it is possible that the administration's edict was driven mostly by its antipathy towards the EPA, Trump has promised to slash what he perceives as wasteful federal spending, and the EPA freeze may only be the first in a series of similar agency contracting reviews, some of which could be much more disruptive to contractors, several attorneys said.

"Given how much uncertainty there is, and how much change can be expected as new leadership comes in, you can't rule out that it's going to happen again," Robbins said.

The EPA is responsible for around \$1.4 billion in contract spending and \$4 billion grant spending each year, according to official federal figures, small by federal agency standards. A review of contracts and grants at a higher-spending agency could result in a longer freeze, given a larger volume of deals to be sifted through, attorneys noted.

If similar freezes and reviews do come to pass, there are a number of steps contractors can take to mitigate the issue, with existing contingency plans for dealing with issues such as bid protests and federal shutdowns serving as good places to start, attorneys said.

Contractors, for example, should have a plan in place for halting all nonessential work on federal contracts, such as knowing which employees can be temporarily laid off and which must keep working, they claimed.

"You can't have your people sitting around waiting for the government to award work; there is generally no remedy for a contractor to be made whole for government delays in awarding contracts, and you're not going to get reimbursed," Pillsbury Winthrop Shaw Pittman LLP counsel Glenn Sweatt said.

"Contractors must have plans to reallocate their resources and personnel to other chargeable work, or have other contingency plans in place."

If possible, contractors should also square away their obligations to subcontractors, making sure they know whether they are on the hook for payments under existing contracts even if federal payments stop, and carefully monitor their costs on work that cannot be halted so they can submit a request for reimbursement once the freeze is lifted, attorneys claimed.

Perhaps most importantly, contractors should stay in regular contact with their agency contracting officers, making sure there are as few surprises as possible on either side, they said.

"Communicate early and often with your contracting officer and make sure you're both on the same page in terms of what specifically you're being asked not to do and that you're communicating clearly back what work you're stopping, and to the extent that there's work you can't stop, communicate that back as well," Wiley Rein LLP partner Tracye Howard said.

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