SEQUESTRATION AND ITS IMPACT ON COLLEGES AND UNIVERSITIES

Crowell & Moring
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The webinar will begin shortly.
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Welcome & Overview

- Connection between colleges and universities and federal funding
- Environment of budgetary uncertainty
- Impacts of budgetary uncertainty
- Contract and grant risk mitigation techniques
- Employment law implications
Relevance of federal funding

• Colleges and universities ("C&U") are significant recipients of federal funding
• Major categories of federal funding to C&Us
  – Contracts and subcontracts (DoD, HHS, NIH, etc.)
  – Grants and subawards (NIH, DoD, NSF, etc.)
  – Financial aid (Pell grants, work study grants, loans, DoD tuition assistance, etc.)
    • Pell grants, etc. safe for now, but careful scrutiny is needed
    • DoD has already targeted tuition assistance
Relevance of federal funding (cont’d)

- USASpending.gov
  - Central database of federal spending information
  - Includes such information as:
    - Breakdowns of contract and grant awards by recipient and sub-recipient, state, awarding agency, etc.
    - Links to grant and contract opportunities
    - Helpful guidance and information
  - Limitations
    - Limited information on smaller agencies
    - Dollar-figures often outdated or slightly inaccurate
Federal Debt Has Exploded Since 2001
and will crowd out the economy if left unchecked

Source: Bipartisan Policy Center
No single thing can be blamed – policy choices, demographics, and economy all played a part.
Recent Budgets Show Few Areas to Cut

Source: Bipartisan Policy Center
Era of budgetary uncertainty

• Sequestration
  – Budget Control Act of 2011 established budget caps and requires “savings” of $109B/year through FY2021
  – If spending exceeds the budget caps or will not produce the $109B/year in savings, then must sequester
  – Sequestration = uniform cuts to each federal project, program, or activity as needed to achieve spending cuts
  – Expect sequestration each year through FY2021
  – Even if no sequester, reduced federal spending likely
Era of budgetary uncertainty (cont’d)

• Debt ceiling
  – Statutory limit on total U.S. government debt
  – Increasing debt ceiling does not authorize new spending; rather, authorizes accrual of more debt to pay for spending that has already been authorized
  – Historically been increased as a matter of course
  – Increasingly political battle
  – If breached, U.S. will default on many of its obligations, causing shutdown, economic turmoil, etc.
Era of budgetary uncertainty (cont’d)

• Continuing resolutions
  – Most federal funds are only available for obligation during a particular time period, after which they “expire”
  – Congress provides new funding to replace the expiring funding through annual appropriations acts
  – To prevent funding gaps, appropriations acts need to be enacted by October 1 of each year (day 1 of fiscal year)
  – When appropriations acts are delayed, Congress covers the gap by a continuing resolution (CR)
  – Difficult for agencies to do long-term planning under CR
  – If CR is not enacted in time, government shutdown is likely
Era of budgetary uncertainty (cont’d)

• Aggressive lobbying
  – After a decade of free-flowing federal funding, the battle for federal contracts and grants is now a zero-sum game
  – Business sectors and interest groups have begun aggressively lobbying Congress to protect their programs’ interests against sequestration and budget cuts
  – Congress has shown that it will amend sequester laws to protect programs when political pressure mounts:
    • Passage of legislation exempting TSA personnel from furloughs
    • Provision in FY13 appropriations mandating that DoD continue Tuition Assistance Program
Impacts of uncertainty on funding

• Decreased supply of contracts and grants
  – Funding cuts will likely translate into fewer or lower-value contract and grant awards
  – Agencies may decline to exercise options under existing contracts
  – Increased competition for contracts and grants as supply drops and demand remains constant

• BUT increase in enforcement and oversight activities
Impacts of uncertainty on funding (cont’d)

• Increased risk of delays and problems in contract administration
  – CR may limit or prohibit agencies from spending money on “new starts,” so projects may be delayed until passage of appropriations acts
  – Threat of sequester may cause agencies to delay spending until later quarters of fiscal year, when financial picture is more certain
  – Agency furloughs will create workload backlogs, leading to delays in contract/grant award and problems in administration
Impacts of uncertainty on funding (cont’d)

• Increased risk of terminations & de-scopes
  – Agencies may seek to de-scope or terminate for convenience contracts or grants and to reapply the savings to other, higher priority programs
  – Agencies may be more inclined to terminate for default (T4D) when conditions allow, and/or less inclined to work with contracts to prevent T4D
  – Risk of budget-driven termination is higher for contracts/grants paid with unexpired funds
Impacts of uncertainty on funding (cont’d)

• Increased use of incremental funding
  – Agencies usually must obligate full funding at time of contract award
  – Incremental funding is exception that allows agency to obligate funding in multiple steps
  – Typically used in cost-reimbursement contracts for high-cost projects over multiple years
  – But now, DoD is using incremental funding authority (FAR 52.232-22) to make multiple obligations for single contract within the same year
  – Creates additional administrative burdens for contractors (e.g., 75 percent funding notification)
Impacts of uncertainty on funding (cont’d)

• Special targeting of grants
  – Grants are generally not as critical for agency operation and functionality as compared to direct expenses (e.g., staff salaries) or contracts for goods and services (e.g., IT services)
  – Agencies will generally protect their own first
  – If faced with choice, agencies may target grants for elimination or termination rather than other forms of federal spending
Steps to identify and mitigate risk

• Know the type and year of funding used for your contracts and grants
  – Sequestration only applies to the funds made available for that fiscal year, not prior years (e.g., current sequester only applies to FY13 funds, not remaining FY12 funds)
  – CR only relevant where no other unexpired funding source is available (e.g., DoD R&D funds are two year-funds, so appropriations gap not as problematic for these funds)
  – Identifying the type and year of funding used for your contracts, grants, upcoming options, etc. will allow you to gauge the degree of risk you face
  – Accounting and appropriation information (a.k.a., the “fund cite”) will be included on Standard Form 33 field 21
Steps to identify and mitigate risk (cont’d)

• Know the authority for your program
  – Many federal authorities and programs have an expiration (a.k.a. “sunset”) date
  – Congress often finds it easier to let program or authority expire or sunset than to terminate an existing program
  – May be especially likely where expiration or sunset of authority/program is “scored” as having positive fiscal impact
  – Knowing the authority for your program allows you to gauge the risk and, if necessary, engage in proactive efforts (e.g., lobbying) to extend the authority
Steps to identify and mitigate risk (cont’d)

• Know the authority of government actors
  – U.S. government is generally not bound by statements or commitments of personnel who act beyond limits of their authority
  – Confirm the actual authority of any person who purports to give orders or directions on behalf of the government
  – In nearly every situation, only the contracting officer or grants officer will have the authority to order changes that would require incurring extra costs or doing extra work
Steps to identify and mitigate risk (cont’d)

• Avoid working “at risk”
  – U.S. government is generally not required to reimburse contractor or grantee for costs incurred in excess of the amount made available under the contract or grant
  – Given current financial realities, agencies may be even more inclined to refuse payment for work performed “at risk”
  – Identify the funding limits applicable to your contracts and grants, and your rights and obligations when these funding limits are reached
Steps to identify and mitigate risk (cont’d)

• Track actual costs to protect recovery
  – In the event of a termination for convenience (in whole or in part), your recovery will depend on your ability to verify your costs incurred
  – Do not need to maintain records at the level of detail used for certified cost and pricing data, but enough to verify and demand compensation for costs incurred in the event of a termination
Steps to identify and mitigate risk (cont’d)

• Carefully draft subcontracts and sub-grants
  – Many contracts or grantees enter into subcontracts or sub-grants/sub-awards, by which lower-tier entity performs portion of work from prime contract or grant
  – Certain provisions should be included in these agreements to protect prime contractor or grantee’s interests in the event of adverse gov’t action. E.g.:
    • Stop Work Order
    • Termination for convenience
    • Changes
    • Limitation of Liability
Steps to identify and mitigate risk (cont’d)

• Frequently engage with contracting officers and grants officers
  – These are the persons who will likely have the most information about your contracts and grants
  – May not tell you *everything*, but duty of good faith and fair dealing prevents them from misleading or misrepresenting facts to you
  – No limit to the degree or frequency of contact you can have related to the proper administration of your contract or grant; don’t be afraid to call them
Steps to preserve and enforce rights

• Changes and constructive changes
• Termination of contract for convenience
• Termination of contract for default
• Grants
Preserving and enforcing rights (cont’d)

• Recognize changes and constructive changes
  – Whenever the gov’t requests or causes any form of change, determine whether the change is within scope and cost/price of existing contract
  – If it is not, may be entitled to an adjustment or claim for any excess costs incurred to comply with change

• To protect your interests, it is critical to:
  – Recognize the change
  – Put the government on notice
  – Reserve your right to money and/or time
  – Identify and track the impacts
  – *Risk mitigation strategy: state assumptions and critical path clearly in proposals*
Preserving and enforcing rights (cont’d)

• Recognize changes and constructive changes
  – Formal changes
  – Also, be aware that other forms of gov’t action can also be treated as constructive changes for which compensation may be due:
    • Delays
    • Interference
    • Failure to provide information
    • Acceleration
    • Adding requirements
  – Don’t just “go along with it” when the gov’t requests or causes a change.
Preserving and enforcing rights (cont’d)

• Terminations for Convenience - T4C
  – Unique government provision intended to protect the government fisc from continuing contracts no longer necessary
  – CO’s authority to invoke is not completely unfettered, but close
Preserving and enforcing rights (cont’d)

• T4C - Procedure
  – Written Notice
    • May terminate contract in whole or part
  – Contractor Must
    • STOP terminated work
      – Including subcontractors & supplier
    • CONTINUE unterminated work
    • MITIGATE costs of stopping work
      – Protecting government property
Preserving and enforcing rights (cont’d)

• T4C - Recovery
  – Contract price for work delivered & accepted
    • Impact for changes (equitable adjustments)
  – Costs incurred + fair & reasonable profit for work in progress
  – T4C proposal preparation costs (and attorneys’ fees)
  – Settlement costs
Preserving and enforcing rights (cont’d)

• Contract deductive changes
  – Separate and distinct from partial termination, government may also remove work from contract via a “deductive change”
  – No bright line rule for whether removal of work should be partial T4C or deductive change
  – Contractor faced with deductive change generally may not recover overhead and profit from the deleted work
Preserving and enforcing rights (cont’d)

• Terminations for Default - T4D
  – A contractor’s unexcused present or prospective failure to perform in accordance with contract’s terms, specifications, or delivery schedule . . .
  – Common Grounds
    • Failure to deliver on time
    • Failure to make progress
    • Failure to meet specification
Preserving and enforcing rights (cont’d)

• T4D - Invocation
  – Cure Notices
    • *Required* for failure to make progress and various non-schedule failures
    • *Not Required* for failure to timely deliver or for anticipatory repudiation
  – Written Notice of Default
    • *May* be preceded by Show Cause letter
    • Can be upheld on any valid ground existing at time of Notice even if unknown to CO
Preserving and enforcing rights (cont’d)

• T4D – Remedies and Defenses
  – Defenses
    • Was there a default?
    • And, if so, was it excused?
  – Remedies
    • Liquidated damages?
    • Return of unliquidated progress payments
    • Excess reprocurement costs
    • Any other remedy available at law
Preserving and enforcing rights (cont’d)

• Grants
  – Under the standard grant provisions, government may only terminate (1) for grantees’s default, (2) with negotiated consent of grantees, or (3) at the sole election of the grantees
  – Impact: Restrictions on termination grounds and negotiation of remedies may decrease gov’t incentive to terminate grants for convenience to achieve sequester or other budget-driven cost savings
Preserving and enforcing rights (cont’d)

• Grants
  – If you receive notice that gov’t seeks to terminate the grant for grounds other than default, then (pending termination settlement) you should:
    • Follow government’s written directions in the termination notice regarding further eligibility of grant obligations
    • Not incur new obligations after the proposed effective date of the termination
    • Cancel as many outstanding obligations as reasonably possible
Reductions in Force

• Begin with the end in mind
  – Determine goal (e.g. reduce X headcount, reduce X dollars, eliminate particular programs, etc.)
  – Establish selection process from the outset
  – Appropriate decisional units and OWBPA notices
Reductions in Force (cont’d)

• Adverse impact analyses
  – Race (minorities and individual races), gender, age, other?
  – Conducted pursuant to attorney-client privilege
  – Preserve final RIF documentation and justifications
The WARN Act

• Triggering Events
  – Mass layoff
  – ‘plant closing’

• Conditional Notice

• Litigation Issues
Whistleblower Protection Laws

• Increased focus on whistleblower protection
  – FCA, SOX, Dodd Frank, ARRA, PPACA
  – 20+ other federal whistleblower laws enforced by OSHA
  – New whistleblower provisions in NDAA
  – State whistleblower protection laws
Whistleblower Retaliation Claim

• Protected activity
• Adverse employment action
• Causal link
• Absence of legitimate, non-retaliatory reason for adverse employment action
Adverse Employment Action

- Terminate/Demote/Reduce pay or benefits
- Transfer to different office
- Reduction in responsibilities
- Denial of leave/vacation requests
- Denial of opportunity for overtime
- Negative, or less positive, performance evaluations
- Failure to select employee for participation in a management training program
- Exclusion from meetings/email lists
Questions and Discussion

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