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B-324146

September 12, 2013

The Honorable Harold Rogers
Chairman
Committee on Appropriations
House of Representatives

Subject: *Office of Management and Budget Guidance on the Worker Adjustment and Retraining Notification (WARN) Act*

Dear Mr. Chairman:

This letter responds to your request for GAO's opinion on questions arising from the memorandum issued by the Office of Management and Budget (OMB) on September 28, 2012, entitled Guidance on Allowable Contracting Costs Associated with the Worker Adjustment and Retraining Notification (WARN) Act.[1] You asked that we address four questions: (1) Is OMB's guidance mandatory or does it otherwise require a contracting officer to find WARN Act related costs that a federal contractor incurs in connection with a potential sequestration[2] allowable for reimbursement by the federal government under cost reimbursement type contracts? (2) Does a contracting officer have the discretion to determine if costs incurred for failure to comply with the WARN Act are reasonable? (3) Can an agency reimburse a contractor for any WARN Act related costs that exceed the contract's cost ceiling? (4) Does OMB's guidance prohibit reimbursement of WARN Act related costs incurred by a contractor in circumstances not addressed by OMB's guidance?

As discussed below, we conclude that (1) OMB's guidance does not mandate that contracting officers treat WARN Act liability costs as allowable for reimbursement or otherwise alter a contracting officer's responsibility to apply the cost allowability requirements under the Federal Acquisition Regulation (FAR)[3] to a contractor's request for reimbursement of costs; (2) a contracting officer has discretion to determine whether a contractor's costs incurred for failure to comply with the WARN Act are reasonable; (3) OMB's guidance does not alter the operation of a contract's limitation of cost or

[1] OMB Memorandum M-12-19, *Guidance on Allowable Contracting Costs Associated with the Worker Adjustment and Retraining Notification (WARN) Act* (Washington, D.C., Sept. 28, 2012) (OMB Guidance).

[2] Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, as amended by the Budget Control Act of 2011. Pub. L. No. 112-25.

[3] The FAR is set forth in title 48 of the Code of Federal Regulations (CFR).

funds clause, which provides a ceiling on the government's liability under a cost reimbursement contract; and (4) the guidance does not prohibit reimbursement of WARN Act related costs arising under circumstances not specified under the guidance. Consistent with our regular practice in preparing legal opinions,[4] we obtained OMB's legal views on these issues.[5]

BACKGROUND

WARN Act

Generally, the Worker Adjustment and Retraining Notification Act (WARN Act) requires employers with at least 100 employees to provide written notice to affected employees, the relevant state entity, and the local government at least 60 days in advance of ordering a plant closing or mass layoff that is reasonably foreseeable.[6] Employers who fail to provide the required written notice are subject to civil actions, which may include payment to each aggrieved employee of back pay, benefits, and attorney's fees.[7] Employers are also subject to a civil penalty to be paid to the unit of local government affected by the employer's failure to provide the written notice required by the WARN Act.[8]

DOL Guidance

According to the Department of Labor (DOL), the federal agency responsible for administering the WARN Act,[9] federal contractors had raised questions as to whether they were required by the WARN Act to provide notices 60 days in advance of the potential January 2, 2013, sequestration.[10] In response, DOL issued Training and

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[4] GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at http://www.gao.gov/legal/lawresources/resources.html.

[5] Letter from GAO Assistant General Counsel for Acquisition and Sourcing Management to Acting General Counsel, Office of Management and Budget, January 18, 2013 (Request for OMB's Views), and Letter from Deputy General Counsel, Office of Management and Budget, to GAO Assistant General Counsel for Acquisition and Sourcing Management, February 22, 2013 (OMB Response).

[6] 29 U.S.C. § 2102(a).

[7] 29 U.S.C. § 2104(a).

[8] 29 U.S.C. § 2104(a)(3).

[9] 29 U.S.C. § 2107.

[10] DOL, *Training and Employment Guidance Letter No. 03-12* (Washington, D.C.: July 30, 2012) (DOL Guidance), at 1. We note that there was, in fact, no sequestration on January 2, 2013. In the American Taxpayer Relief Act, Congress postponed the

Employment Guidance Letter No. 03-12 on July 30, 2012, to state workforce agencies, state workforce administrators, and state workforce liaisons to provide clarity regarding the WARN Act responsibilities of federal contractors.[11] DOL's guidance provided that the WARN Act does not require federal contractors to provide notices 60 days in advance of the potential January 2, 2013, sequestration to their employees working on government contracts funded from sequestrable accounts. DOL advised that to provide such notice 60 days in advance of January 2, 2013, would be inappropriate in light of the uncertainty as to whether sequestration would occur, and the lack of information about fiscal year 2013 funding, how agencies might implement required reductions, and to what extent, if any, specific contracts would be affected.[12] DOL's guidance stated that in the absence of such information, potential plant closings or layoffs resulting from contract terminations or cutbacks are speculative and unforeseeable.[13]

Given such uncertainty, DOL explained that issuing notices 60 days in advance of the potential sequestration date of January 2, 2013, would be inconsistent with the purpose of the WARN Act. The WARN Act is intended to provide notice to employees who are reasonably expected to be affected by a plant closing or layoff so they may have an opportunity to seek alternative employment or obtain necessary training on a timely basis.[14] For this reason, the WARN Act is not designed to require employers to provide notice to workers who have only a speculative chance of suffering such consequences.[15]

In addition, DOL noted that it is unlikely contractors could issue legally sufficient WARN Act notices 60 days prior to the potential January 2, 2013, sequestration because they would lack the specific information required to be provided in the notices.[16] For example, regulations implementing the WARN Act require notices to include the expected date of the first separation, the job titles of positions to be affected, and the names of the workers currently holding affected jobs.[17] Therefore, DOL advised that even if federal contractors were to send out generalized notices indicating that sequestration may lead to layoffs, additional notices would likely be required for

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sequestration to March 1, 2013. Pub. L. No. 112-240, § 901(c), 126 Stat. 2313, 2370 (Jan. 2, 2013).

[11] DOL Guidance, at 1.

[12] DOL Guidance, at 3-4.

[13] DOL Guidance, at 4.

[14] DOL Guidance, at 2 and 4.

[15] DOL Guidance, at 2.

[16] DOL Guidance, at 5.

[17] 20 C.F.R. § 639.7 (2012).

employers to comply with the WARN Act if and when the employer does have the requisite information.[18]

Finally, DOL explained that the WARN Act and its implementing regulations recognize that there may be situations in which an employer cannot give 60 days advance notice. The Act makes provision for an unforeseeable business circumstances exception which is applicable when "the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required."[19] DOL's guidance provided there would not be sufficient information available 60 days before January 2, 2013, for federal contractors to issue legally compliant WARN Act notices.[20] However, DOL's guidance also recognized that there might come a point when a contractor would have sufficient information to reasonably foresee that the effects of the sequester would require a mass layoff or plant closure, and contractors' obligations to provide notices under the WARN Act would be triggered at that time.[21] If the timing of this trigger were to occur less than 60 days before the date of the layoff or closure, then the contractor would be able to avail itself of the unforeseeable business circumstances exception and provide less than the full 60 days notice.[22]

OMB Guidance

Subsequent to DOL's guidance, some federal contractors were still considering issuing WARN Act notices 60 days in advance of the potential January 2, 2013, sequestration.[23] According to OMB, federal contractors raised additional questions as to whether the federal government would reimburse them for costs they might incur for failure to provide WARN Act notices 60 days in advance of the potential January 2, 2013, sequestration.[24] In response, OMB issued Memorandum M-12-19, entitled Guidance on Allowable Contracting Costs Associated with the Worker Adjustment and Retraining Notification (WARN) Act, on September 28, 2012, after consultation with DOD and other federal agencies.[25]

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[18] DOL Guidance, at 5.

[19] 29 U.S.C. § 2102(b)(2)(A); DOL Guidance, at 3.

[20] DOL Guidance, at 4.

[21] DOL Guidance, at 4.

[22] DOL Guidance, at 3-4.

[23] OMB Guidance, at 1.

[24] OMB Guidance, at 1; OMB Response, at 1.

[25] OMB Response, at 1-2.

OMB issued its memorandum as a "government-wide guidance document" to executive agency Chief Financial Officers and Senior Procurement Executives.[26] OMB's issuance of memoranda of this type is consistent with the statutory responsibility of the Administrator for Federal Procurement Policy, an OMB official, to provide overall direction and leadership to executive branch agencies on federal procurement issues.[27]

DISCUSSION

In responding to your request, we address: (1) whether OMB's guidance is mandatory, requiring contracting officers to reimburse any contractor costs incurred for failure to comply with WARN Act requirements in connection with a potential January 2, 2013, sequestration, or otherwise has the effect of amending the FAR; (2) whether a contracting officer has the discretion to determine that costs incurred by a contractor for failure to comply with the WARN Act are reasonable, (3) whether a contractor would remain liable for WARN Act liability costs, to the extent they exceed the contract's ceiling cost, even though they have otherwise been determined by the contracting officer to be allowable; and (4) whether OMB's guidance prohibits reimbursement of WARN Act related costs incurred by a contractor in circumstances not addressed by OMB's guidance.

I. OMB Guidance Is Not Mandatory and Does Not Otherwise Require that Contracting Officers Reimburse WARN Act Liability Costs

You have asked whether OMB's guidance is mandatory or otherwise has the effect of requiring contracting officers to reimburse any costs assessed against a contractor for non-compliance with the WARN Act. We do not read OMB's guidance as committing the federal government to reimburse WARN Act liability costs. While OMB's guidance said the costs would be allowable, it made this determination in response to a specific hypothetical scenario posed by the federal contracting community.[28] For purposes of answering the hypothetical, OMB made certain assumptions that were key to its determination of allowability. However, in the case of an actual request for reimbursement of WARN Act liability costs, a contracting officer would be required to make actual determinations based on his or her application of the FAR cost principles[29] to the facts of that particular instance.

In its guidance, OMB reiterated that DOL, in its capacity as the federal agency responsible for administering the WARN Act, had determined that issuing WARN Act notices 60 days in advance of a potential January 2, 2013, sequestration was neither

[26] OMB Response, at 2.

[27] 41 U.S.C. § 1121(a).

[28] OMB Response, at 2.

[29] FAR cost principles applicable to contracts with commercial organizations are contained in subpart 31.2.

necessary nor appropriate due to the uncertain nature of the sequestration itself and the speculative nature of the impacts sequestration might have on specific contracts. In order to further minimize the potential for waste and disruption associated with the issuance of unwarranted WARN Act notices, OMB issued its memorandum to provide guidance regarding the allowability of certain liability and litigation costs associated with WARN Act compliance.[30] Specifically, OMB's guidance provided that if (1) sequestration occurs and an agency terminates or modifies a contract that in turn necessitates that the contractor order a closure or mass layoff that triggers the contractor's obligation to issue WARN Act notices, and (2) the contractor has followed a course of action consistent with DOL's guidance, then any resulting employee compensation costs for WARN Act liability assessed by a court, as well as attorney's fees and other litigation costs, would qualify as allowable costs and be reimbursed, if otherwise reasonable and allocable.[31]

In order for a contractor's costs to be deemed reimbursable and subsequently paid under a cost reimbursement government contract, the costs must be allowable. Under the FAR, "[a] cost is allowable only when the cost complies with all of the following requirements: (1) [r]easonableness; (2) [a]llocability; (3) [s]tandards promulgated by the CAS [Cost Accounting Standards] Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the circumstances; (4) [t]erms of the contract; (5) [a]ny limitations set forth in this subpart [FAR subpart 31.2]."[32] As part of the analysis to determine whether a cost meets the last of these requirements, the cost is assessed against the cost principles listed in section 31.205 of the FAR. They describe selected costs that are allowable and unallowable for government contracting purposes.[33] OMB's guidance specifically provides that it does not alter existing rights, responsibilities, obligations or limitations under individual contract provisions or the governing cost principles set forth in the FAR and other applicable law.[34]

We find that OMB's guidance does not change the analysis a contracting officer would use to determine whether such WARN Act liability costs are allowable under the FAR cost principles. OMB's guidance applied existing FAR principles to a hypothetical scenario in which a contractor had incurred WARN Act liability costs. However in doing so, OMB's guidance specifically caveated its finding of allowability by providing that in order for the costs to be reimbursed by an agency, the costs must otherwise meet the relevant FAR tests for reasonableness and allocability.[35] In addition, the cost must comply with the Cost Accounting Standards or generally accepted accounting principles

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[30] OMB Guidance, at 1.

[31] OMB Guidance, at 1-2.

[32] FAR § 31.201-2(a).

[33] FAR § 31.205.

[34] OMB Guidance, at 2.

[35] OMB Guidance, at 2.

and practices, and the terms of the contract. Therefore, OMB's guidance recognized that allowability determinations remain the responsibility of the cognizant contracting officer. If a contracting officer were presented with a request for reimbursement of such WARN Act related costs, he or she would apply the FAR cost principles to the contractor's actual circumstances and actions and make determinations as to each of the requirements necessary to find a cost allowable for reimbursement. Since OMB's guidance did not mandate that such costs would be deemed to comply with all of the allowability requirements, it cannot be said to mandate reimbursement of such costs, or have the effect of changing the FAR. As such, there was no need to amend the FAR or otherwise undertake administrative rulemaking procedures.

In its response to GAO, OMB noted that its guidance reflected its application of well established cost principles to specific factors posed by the contracting community.[36] In our view, the significance of OMB's guidance was to clarify that one of the factors a contracting officer would consider, when applying the FAR cost principles to determine allowability of WARN Act liability costs, would be whether the contractor had taken actions consistent with DOL's WARN Act guidance. However, this would be a fact specific determination to be made by the contracting officer on a case by case basis.

For purposes of addressing the hypothetical scenario, OMB assumed that the contractor had acted consistently with DOL's guidance by not issuing notices 60 days before the potential January 2, 2013, sequestration. However, DOL's guidance makes clear that a contractor's obligation to provide WARN Act notices is not a one-time decision, but rather depends on the changing circumstances of a contractor's situation and the information available to it. Therefore, if a contracting officer were to consider an actual request for reimbursement of WARN Act liability costs, one of the factors in his or her allowability determination would be an assessment of whether the contractor's ongoing actions were consistent with its WARN Act obligations as described by DOL's guidance. While OMB found WARN Act liability costs to be allowable in its hypothetical scenario, it did not require that such costs would necessarily be allowable in the context of actual requests for reimbursement of such costs. OMB noted in its response to GAO that in the event questions about the allowability of WARN Act costs were later to arise in the context of a particular contract, the cognizant contracting officer would need to apply the FAR to the specific circumstances of that case to determine the allowability of such costs.[37] OMB further provided that the outcome resulting from application of relevant FAR principles depends on the facts at issue and may accordingly change over time.[38]

II. Contracting Officers Have Discretion to Determine Reasonableness of WARN Act Liability Costs

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[36] OMB Response, at 2.

[37] OMB Response, at 3.

[38] OMB Response, at 4.

You asked whether a contracting officer would have the discretion to determine whether costs associated with WARN Act liability are reasonable considering such costs would have been assessed by a court against a contractor for failure to comply with the law. As previously discussed, in order for a cost to be deemed allowable for reimbursement, it must be reasonable.[39] To determine reasonableness, a contracting officer applies subsection 31.201-3 of the FAR to the facts and circumstances of the incurred costs for which reimbursement has been requested. This subsection of the FAR provides that a cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.[40]

As previously discussed, there is nothing in OMB's guidance that affects a contracting officer's existing responsibility to consider requests for reimbursement of WARN Act liability costs and apply the appropriate FAR provisions to determine reasonableness. The FAR provides that what is reasonable depends upon a variety of considerations and circumstances and would include, for example, the contractor's responsibilities to its employees.[41] In order to determine whether the nature and amount of the costs incurred by a contractor for WARN Act liability were those that would be incurred by a reasonable person in the conduct of competitive business, the contracting officer would consider, among other things, the information known to the contractor, the actions taken, and whether a contractor's obligation to issue WARN Act notices to its employees had been triggered. Such a determination would be made on a case by case basis depending on the particular facts and circumstances of each cost for which reimbursement is requested.

Under the FAR cost principles, the costs associated with certain types of proceedings are expressly unallowable. For example, costs incurred in connection with a defense against federal government claims or appeals, or the prosecution of claims or appeals against the federal government, are unallowable under subsection 31.205-47 of the FAR. However, under the relevant FAR principles, the employee compensation costs for WARN Act liability covered by OMB's guidance, namely back pay, benefits and attorneys' fees, are not expressly unallowable even though such costs are assessed by a court for failure to issue the required notices. Therefore, the contracting officer remains responsible for determining the reasonableness of such costs.

We note that employee compensation costs for WARN Act liability might at first glance seem to be governed by the cost principle of "fines and penalties" in subsection 31.205-15 of the FAR. This subsection provides that the "[c]osts of fines and penalties resulting

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[39] FAR § 31.201-2(a)(1).

[40] FAR § 31.201-3(a). If an initial review of the facts results in a challenge of a specific cost by the contracting officer, the burden of proof shall be upon the contractor to establish that such cost is reasonable. FAR § 31.201-3(a).

[41] FAR § 31.201-3(b)(3).

from violations of, or failure of the contractor to comply with, Federal, State, local, or foreign laws and regulations, are unallowable." However, because the employee compensation costs covered by OMB's guidance are not among those costs characterized as penalties under the WARN Act, the fines and penalties cost principle is not applicable for purposes of determining the allowability of employee compensation costs for WARN Act liability. It is important to note that the WARN Act does specifically characterize other costs that may be assessed by a court against a contractor for failure to provide WARN Act notices as civil penalties. For example, under the WARN Act, employers are subject to a "civil penalty" to be paid to the unit of local government affected by the employer's failure to provide the required notice.[42] This cost would be governed by the fines and penalties cost principle and therefore deemed unallowable for reimbursement.[43] OMB's guidance did not include these civil penalty costs among the WARN Act liability costs identified as allowable in its scenario.

III. OMB Guidance Does Not Alter Operation of Contract Cost Ceiling Clause

You have asked whether, in those situations where a contracting officer finds WARN Act liability costs to be allowable, contractors could be reimbursed for costs in excess of the estimated total contract costs. Cost reimbursement contracts include a limitation of cost or limitation of funds clause[44] that provides a ceiling on the government's liability under the contract. The limitation of cost/funds clause establishes a cost ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer.[45] OMB's guidance provides that it does not alter existing rights, responsibilities, obligations, or limitations under individual contract provisions or the governing cost principles in the FAR. Therefore, OMB's guidance does not alter the operation of a contract's limitation of cost or funds clause. As a result, contractors, not the government, generally will be liable for costs exceeding a contract's cost ceiling established by the limitation of cost or funds clause unless the contracting officer approves an increase in the ceiling.

IV. OMB Guidance Does Not Prohibit Reimbursement of WARN Act Related Costs Arising Under Circumstances Not Specified Under the Guidance

Finally, you also asked if OMB's guidance would prohibit reimbursement of costs associated with issuance of WARN Act notices if a company chose to issue such notices. In our view, OMB's guidance would not affect the ability of a contracting officer to reimburse contractors for WARN Act related costs other than those specifically addressed by OMB's guidance. OMB's guidance provides that it does not alter existing

[42] 29 U.S.C. § 2104(a)(3).

[43] FAR § 31.205-15(a).

[44] FAR §§ 52.232-20; 52.232-22.

[45] FAR §§ 52.232-20; 52.232-22; National Aeronautics and Space Administration–Constellation Program and Appropriations Restriction, Part II, B-320091, July 23, 2010.

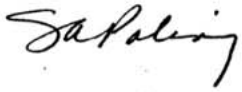
rights, responsibilities, obligations, or limitations under individual contract provisions or the governing cost principles in the FAR.[46] The guidance also provides that the allowability of such other WARN Act related costs, arising under circumstances not specified therein, would be determined by contracting officials applying the usual cost principles of allocability, allowability and reasonableness as set forth in the FAR. The guidance does not in any way alter or affect the existing responsibilities of contracting officers under the FAR to determine the allowability of other potential WARN Act related costs by applying the usual cost principles of allocability, allowability, and reasonableness to the specific circumstances of any requests for reimbursement of such costs.

CONCLUSION

OMB's September 28, 2012, guidance is not mandatory nor does it otherwise constrain a contracting officer's responsibility to apply the existing FAR principles of cost allowability to the specific facts and circumstances of a contractor's actions in order to determine whether WARN Act liability costs will be reimbursed by the federal government. Nor does the guidance have the effect of altering or amending FAR provisions. OMB's guidance reflected its application of FAR cost principles to a specific hypothetical scenario posed by the contracting community regarding whether certain WARN Act related costs would be reimbursed. However, in the case of an actual request for reimbursement of WARN Act liability costs, a contracting officer would still need to apply those same FAR cost principles to the specific facts and circumstances associated with the actual request. In addition, the contracting officer retains the discretion to apply the relevant FAR principles to determine the reasonableness of WARN Act liability costs by examining a contractor's actions that led to the incurrence of the costs. Finally, in those cases where a contracting officer determines that WARN Act related costs incurred by a contractor are reimbursable, the contractor generally will be liable for costs exceeding the contract's cost ceiling established by the limitation of cost or funds clause unless the contracting officer approves an increase in the ceiling.

We hope the information provided in this opinion is helpful to you. If there are questions concerning these matters, please contact Stephanie J. May, Managing Associate General Counsel at (202) 512-6293, or Kenneth E. Patton, Assistant General Counsel for Acquisition and Sourcing Management at (202) 512-8205.

Sincerely yours,



Susan A. Poling
General Counsel

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[46] OMB Guidance, at 2.