Millennium Challenge Corporation's Shutdown Contingency Plan

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MILLENNIUM
CHALLENGE CORPORATION
UNITED STATES OF AMERICA

Abstract

Overview

The Office of Management and Budget (OMB) requires all agencies to have a shutdown plan in the case of a lapse, or hiatus, in appropriations [1]. The Millennium Challenge Corporation intends to continue operations for a limited time using available carryover administrative fund balances; however, dependent upon the length of the lapse in appropriations, available balances may be exhausted and a determination made to implement this contingency plan. This plan for the Millennium Challenge Corporation (MCC) provides the legal background, overarching principles, and specific list of excepted personnel pertaining to an orderly shutdown while continuing select operations in conformance with applicable laws and regulations.

Of the approximately 315 staff currently in Washington, DC headquarters, and 26 staff currently stationed overseas, MCC's plan includes retaining:

- MCC's CEO (or acting designee) and the Private Sector Members of the Board of Directors as Senate-confirmed Presidential appointees
- 15 staff to conduct the orderly shutdown of operations (temporarily excepted for four hours, though travel arrangements to ensure the safe return of any MCC personnel traveling abroad may take longer; and any staff on travel are in addition to this number until their return to duty station)
- 22 personnel excepted up to the duration of the shutdown, including 13 Resident Country Directors (RCDs), 3 Threshold program directors, 3 headquarters staff, and 3 on-call personnel, responsible for public safety or the protection of property, including grant assets abroad, and to perform MCC's corollary responsibility to assist in diplomatic relations in those countries where multi-year funded compacts exist and are being developed
- 32 employees responsible for the continued operation of multi-year funded programs (excepted up to the duration of the shutdown)
- Depending on the timing of the shutdown relative to MCC's Quarterly Disbursement Request Package (QDRP) approval process, 13 additional personnel responsible for the continued operation of multi-year funded programs (temporarily excepted during the period required to complete QDRP approvals)

Section 4 below provides detailed lists of personnel in each of these categories.

Legal Background

Pursuant to the Constitution and a collection of statutes known as the Antideficiency Act (referred to herein as the "ADA") government agencies have no authority to incur obligations or make expenditures that cannot lawfully be funded from existing or prior appropriations. The ADA (31 U.S.C. §1341) prohibits all officers and employees of the federal government from entering into obligations in advance or in excess of appropriations or apportionments, including employing federal personnel except in emergencies, *i.e.*, those involving the safety of human life or the protection of property (31 U.S.C. § 1342). In addition, the ADA prohibits agencies from accepting voluntary services. As a result of lapses in

Table of Contents

Endnotes 9

appropriations over the years, the Attorney General and the Department of Justice's Office of Legal Counsel ("OLC") have issued opinions and described circumstances under which agencies may continue operations even when there is a lapse in appropriations. One such circumstance is when the function is necessary to the discharge of the President's constitutional duties and powers to conduct foreign relations. Other exceptions include activities funded with appropriations that do not expire at the end of the fiscal year—that is, multiple year and "no-year" appropriations. It also includes activities authorized by necessary implication from the specific terms of duties that have been imposed on—or of authorities that have been invested in—the agency. Also, these opinions and OMB guidance set forth categories of "excepted" personnel who may continue to function during all or part of a shutdown. These consist of (a) Senate-confirmed Presidential appointees, who are not subject to the ADA; (b) personnel conducting the orderly shutdown of operations (who are temporarily excepted); and (c) pursuant to 31 U.S.C. § 1342, agency employees responsible for public safety or the protection of property (who are excepted as long as the individual employee is required for the safety and/or protection function).

MCC has the legal authority to continue its operations even during a lapse in appropriations to the extent its programs are funded with no-year appropriations, which have largely been obligated. The main constraint is that while MCC's administrative expense funds are no-year appropriations, the amounts provided by Congress are typically sufficient only to pay for a single year's worth of operating costs, leaving little, if any, resources for continued operations during a lapse in appropriations. MCC relies on annually appropriated administrative funds to pay its staff and other administrative expenses. In the absence of available appropriations or carryover balances to continue paying staff during a lapse in appropriations, MCC will need to furlough non-excepted employees and reduce operations accordingly.

However, the OLC's opinions discussed above make it clear that the "necessary implication" exception to the ADA would authorize MCC to require an appropriate number of employees to work during a lapse in appropriations to administer the programs funded with no-year appropriations. The key to this exception is that the annually funded employees must be directly connected to the continuation of the multi-year funded program. Consequently, while MCC's previously funded compact and threshold programs may continue despite a lapse in appropriations, such a lapse will limit operations and staffing to those employees necessary to administer the no-year funded programs.

For MCC, this means that any exceptions of employees should be based on a congressionally authorized or appropriated function for which Congress has provided funding that remains available during the lapse, where the suspension of the related activity (during the funding lapse) would prevent or significantly damage the execution of the terms of MCC's statutory authorization or appropriation pursuant to the Millennium Challenge Act, (the "Act") Section 609(j), the duration of MCC's compacts may not exceed five (5) years. Most of the existing compacts are in the midst of implementation with critical deadlines and milestones approaching. Any delay in the implementation process is likely to cause these compacts to miss the five-year completion date, resulting in incomplete projects at the end of the compact term and a waste of previously invested taxpayer dollars.

When employees are designated as necessary for public safety and the protection of property, a similar justification is required. There must be some clear connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood

that the safety of human life or the protection of property would be compromised to some degree by a delay in the performance of the function in question.

Principles of MCC's Plan

In the event of a lapse in appropriations, MCC will continue to disburse prior program obligations, which are fully funded from past appropriations, to the extent quarterly project funding has been approved and excepted staff can provide sufficient oversight. This is consistent with OMB's guidance on work that should continue during a lapse in appropriations, including "the performance of contract obligations under no-year or multi-year or other funds remaining available for those purposes." Moreover, an interruption in compact disbursements to Millennium Challenge Accounts (MCAs) and their contractors/vendors could breach contract provisions and undermine ongoing projects, in particular by adding schedule and cost risks for time-constrained compacts.

Following the orderly shutdown of non-excepted operations, MCC will retain as excepted personnel throughout any lapse period the minimal number of personnel to ensure the safety of staff and protection of property, including grant assets overseas, and to provide essential oversight of existing compacts and threshold programs. MCC estimates needing our (Senate-confirmed) Chief Executive Officer (or acting designee) and 26 employees at headquarters; given our small size, this number is less than 10% of current staffing in Washington.

In addition, MCC's excepted personnel will need to include the Resident Country Director (or Team Leader) in each of our existing compact countries, and the program director for any MCC-managed Threshold program (subject to State Department concurrence on excepted personnel at overseas missions) given their critical oversight role for MCC's multi-year compact funds and grant assets, and to perform MCC's corollary responsibility to assist in diplomatic relations in those countries where multi-year funded compacts exist and are being developed. Section 4 below provides a detailed list of MCC's proposed excepted personnel.

Depending on the timing of any furlough, MCC will also need to make a temporary exception for the minimal number of additional staff required to approve quarterly compact disbursement requests from the MCAs. This is an essential component of MCC's oversight of past obligations for our compacts. Section 4.e. below provides a description of the preparations and plans to minimize this requirement while ensuring due diligence in reviewing and approving quarterly disbursements. Also, in the case of an extended lapse in appropriations, MCC may temporarily designate different employees as excepted from the furlough in order to meet the needs of managing multi-year funded compact programs.

MCC Personnel during a Lapse in Appropriations

1. Senate-confirmed Presidential appointees:
    1. MCC's Chief Executive Officer (CEO) (or acting designee)
    2. Private Sector Members of MCC's Board of Directors 2

Consistent with OMB and OLC guidance on excepted personnel, MCC's plan includes:

2. 15 personnel conducting the orderly shutdown of operations (temporarily excepted):
    1. Human Resources Managing Director to ensure proper communication to MCC's workforce and oversee subordinate personnel processing (estimated four hours) 3
    2. One Human Resources specialist to process personnel (furlough) actions and submit timekeeping records (estimated four hours and then on call for any subsequent actions changing personnel's furlough status)
    3. Contracts & Grants Management Managing Director and approximately 11 contracting personnel, including federal warranted contracting officers and contractor support staff, for the orderly suspension of non-excepted contracts (estimated four hours)
    4. Travel Manager to ensure the safe return of MCC personnel traveling abroad (until all such arrangements are complete) 4
3. 22 personnel excepted up to the duration of the shutdown, including 13 Resident Country Directors (RCDs), 3 Threshold program directors, 3 headquarters staff, and 3 more on-call personnel, responsible for public safety or the protection of property, including grant assets abroad, and to perform MCC's corollary responsibility to assist in diplomatic relations in those countries where multi-year funded compacts exist and are being developed (excepted up to the duration of the shutdown):
    1. Administration and Finance Senior Director/Budget Officer, Financial Management Division, in charge of shutdown plan development and implementation
    2. Domestic and International Security (DIS) Managing Director for staff security and public safety, as well as to assist with communications with furloughed staff
    3. Chief Information Officer to ensure continued operation of essential telecommunications systems and oversee excepted IT contractors
    4. All 13 RCDs, and 3 Threshold program directors, to help safeguard grant assets in their respective countries (pending State Department concurrence on excepted personnel at overseas missions)
    5. Overseas Administration Senior Program Officer on call for any issues related to overseas personnel 5
    6. Administrative Services (AS) Managing Director on call for any issues related to property in the headquarters buildings
    7. Travel Manager on call to ensure the safe return of MCC personnel abroad.
4. 32 employees responsible for the continued operation of multi-year funded programs (excepted up to the duration of the shutdown):
    1. Four Office of the CEO staff members critical to assist in the performance of the CEO's duties
    2. VP for Administration & Finance and two staff members for administrative guidance and support to multi-year funded programs
    3. Deputy Chief Financial Officer, Controller and two staff members for ongoing financial requirements including ensuring continuation of MCA disbursements.
    4. Contracts & Grants Management (CGM) Managing Director to oversee excepted contracts and two CGM contractors
    5. VP for Compact Operations and seven 6 staff members for the continued operation of multi-year funded compact programs
    6. General Counsel and two staff members to manage legal and regulatory issues (as well as

any Board communications) regarding multi-year funded programs
7. VP for Policy & Evaluation and three staff members to address international policy issues involving compact or threshold countries
8. VP for Congressional & Public Affairs and two staff members to manage congressional relations issues and press inquiries during this period

5. 13 personnel responsible for the continued operation of multi-year funded programs (excepted temporarily during the period required to complete review and approval of Quarterly Disbursement Request Package):

   All compact countries submit QDRPs (in the month preceding the start of the next quarter) for MCC's approval. In the event of a shutdown before MCC approves all QDRPs, a core group of temporarily excepted personnel would complete any pending QDRP approvals. MCC would consider these staff as part of the process to ensure no-year funded compact programs could continue despite the furlough of most MCC staff. Depending on the number of QDRPs remaining, this core group would comprise up to the following personnel:

   1. Regional Managing Directors (may already be excepted under 4.d.v.)
   2. Practice Leader/Senior Directors or designees for Infrastructure, Environment, Private Sector (5)
   3. Practice Leader/Senior Directors or designees for Sector Operations (5)
   4. Country team Point of Contact (POC) (1)(as necessary from any relevant compact country)
   5. One international operations attorney to review QDRPs as necessary (1)

   If all or most QDRPs are completed in advance of any shutdown, the number of these temporarily excepted personnel would be reduced accordingly.

Recall of Staff and Start-up Activities

In addition to the staff listed in this shutdown plan, MCC may recall additional employee(s) during the duration of the lapse in appropriations, as necessary, but for only the time required to address excepted processes described in this document. MCC anticipates limited use of such staff, but recognizes from prior experience that additional staffing (particularly in the HR area) may be required as the lapse in funding concludes in order to recall furloughed employees and resume normal agency operations.

Endnotes

1. See OMB Circular A-11, Section 124, Agency Operations in the Absence of Appropriations.
2. MCC's Public Sector Board Members will be covered by their agencies' plans. MCC will designate the private sector board members as excepted in the event the board is required to vote on a matter.
3. The HR Managing Director will also be on-call for "excepted" HR activities (as established by OMB or OPM guidance), as well as for "start-up" activities when the lapse in appropriations is expected to end.
4. MCC will consider all employees who are on official travel to be temporarily "excepted" for purposes of returning to their official duty station.
5. In addition to the Overseas Administration Senior Program Officer, the Executive Assistant or other staff person designated/trained to send overseas cables will also be "excepted" for the brief and exclusive purpose of transmitting cables over the restricted State Department network (typically less than 4 hours).
6. This number does not include staff that may be excepted to continue work on the previously funded MOU with the Office of Global AIDS Coordinator (OGAC) regarding the President's Emergency Plan for AIDS Relief (PEPFAR). Work on the PEPFAR MOU during a lapse in appropriations will be coordinated with OGAC.