



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR
M-07-10

February 15, 2007

MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES

FROM: Rob Portman

PURPOSE: To provide guidance to Departments and Agencies about obligating FY 2007 funds under a full-year Continuing Resolution (CR) with no Congressional earmarks.

BACKGROUND

On February 15, 2007, the President signed H.J.Res. 20, a joint resolution passed by the Congress, that provides appropriations for FY 2007, with a moratorium on earmarks. Section 112 of this joint resolution states that any "language specifying an earmark in a committee report or statement of managers accompanying an appropriations Act for FY 2006 shall have no legal effect with respect to funds appropriated" under the joint resolution. The joint resolution provides appropriations as a full-year CR, replacing the three CRs that have been enacted thus far during the current fiscal year.

GUIDANCE

Agencies whose funding is provided by the CRs should adhere to the following:

I. The "Authority and Conditions Provided" and "Projects and Activities" referenced in H.J.Res. 20 refer to prior statutory language only, and not to committee reports or other non-statutory earmarks. In implementing this Memorandum, agencies shall adhere to all applicable laws. With regard to the CR's own statutory language, OMB's General Counsel has determined that the phrase "under the authority and conditions provided," which appears in Section 101(a) of the CR, only refers to items provided in prior *statutes* that were enacted into law. To the extent that the language in Section 101(a) of the CR provides funding for "projects or activities," this phrase likewise applies only to prior statutory language that was enacted into law. Section 112 of H.J.Res. 20 explicitly affirms this, noting that any "language specifying an earmark in a committee report or statement of managers accompanying an appropriations Act for fiscal year 2006 shall have no legal effect with respect to funds appropriated" under the joint resolution. For agencies funded by the CR, this means that unless a project or activity is specifically identified in statutory text, agencies should not obligate funds on the basis of earmarks contained in Congressional reports or documents, or other written or oral communications regarding earmarks. While the Administration welcomes input to help make informed decisions, no oral or written communication concerning earmarks shall supersede statutory criteria, competitive awards, or merit-based decision-making, as set forth in Section II below.

II. Agencies shall fund activities based on authorized, transparent, statutory criteria and merit-based decision-making (including competitive awards). Federal funds shall be expended only for purposes where the CR grants authority in law for this spending or where there are other authorities in statutes to provide this funding. In particular, agencies subject to the CR are advised to fund activities within each account in accordance with authorizing law, using statutory criteria, such as funding formulas, eligibility standards, and merit-based decision-making. In the application of authorized discretion, each agency shall use transparent and merit-based determinations to achieve program objectives, consistent with the purpose of the statute and Administration policy (including the President's Budget). Government-wide and agency regulations and policy governing the selection of grant recipients or contractors will be in effect.

Agencies shall pay particular heed to existing statutes, regulations, and Administration policy with respect to promoting and providing for competition in soliciting offers and awarding contracts and competitive grants. Note, in particular, that 10 U.S.C. 2304, 41 U.S.C. 253, and the Federal Acquisition Regulation require, with certain limited exceptions, that contracting officers promote and provide for full and open competition in soliciting offers and awarding Government contracts. OMB circular A-110 further affirms this requirement: "All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition." With respect to grants, agencies should take note of language from the Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. §§ 6301-6308) and its implementing regulations 43 FR 36860, which were enacted and issued to "promote increased discipline in selecting and using procurement contracts, grant agreements, and cooperative agreements, maximize competition in making procurement contracts, and encourage competition in making grants and cooperative agreements." In short, funding decisions should be based on the merits, in accordance with the law.

This memorandum applies to budgetary resources provided under continuing resolutions for FY 2007, including: Public Laws 109-289 (division B), 109-369, 109-383, and H.J. Res. 20; unless and until modified or superseded by a subsequent memorandum.

Questions about this memorandum may be directed to OMB's Associate Directors or to OMB's General Counsel.