



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

SEP 28 2012

Lieutenant General Lawrence P. Farrell, Jr., USAF (Ret)
President and CEO
National Defense Industrial Association
2111 Wilson Boulevard, Suite 400
Arlington, VA 22201

Dear General Farrell:

I am replying on behalf of the Deputy Secretary of Defense to your September 13, 2012, inquiry about applicability of the Worker Adjustment and Retraining Notification (WARN) Act and the extent to which the Department of Defense will cover WARN Act-related compliance costs.

Secretary Panetta and Deputy Secretary Carter have been clear in their public statements before the Congress and others that sequestration would have a devastating effect on the Department and that Congress should avoid sequestration by enacting a balanced deficit reduction package. As you know, the Department of Labor (DoL) issued Advisory Guidance Letter No. 3-12 on July 30, 2012, regarding the applicability of the WARN Act to layoffs that may occur among federal contractors as a result of the potential sequestration. According to the DoL guidance, and based on applicable case law, the unforeseeable business circumstances exception to the WARN Act would apply to plant closings or mass layoffs resulting from contract terminations or modifications occurring in the wake of the potential sequestration of January 2, 2013. DoL's guidance concludes that WARN Act notice to employees of Federal contractors, including in the defense industry, is not required 60 days in advance of that date, and would be inappropriate, given the possibility that the sequester will be avoided and the lack of certainty about how the reductions would be implemented, among other factors.


The Department does not anticipate having to terminate or significantly modify any contracts on or about January 2, 2013, as a result of sequestration. As you know, sequestration reduces budget authority for the Department's unobligated funds for fiscal year (FY) 2012 and prior years and for all non-exempt appropriated funds for FY 2013. Most department contracts are fully funded; because they are obligated from FY 2012 and prior year funding, they would not be affected by sequestration. For contracts in place that are incrementally funded, any action to adjust funding levels would likely occur, if it occurred at all, several months after sequestration. Further, contracting officers will have some latitude to determine reduced funding requirements, and the Department will have the ability to reprogram dollars if warranted.

With regard to covering WARN Act-related costs, the Department takes a fair and reasonable approach to these situations and, consistent with the Federal Acquisition Regulation

(FAR), will recognize costs to the extent they are allowable, allocable, and reasonable under the circumstances. (See FAR Subpart 31.2 for guidance.) As OMB noted in government-wide guidance issued earlier today (a copy of which is enclosed), if the Department terminates or modifies a contract as a result of sequestration, and as a result of such termination or modification, a contractor orders plant closures or mass layoffs and is later sued for alleged WARN Act violations despite following DoL's guidance, then certain liability and litigation costs (excluding costs explicitly prohibited by FAR cost principles) arising from suits under the WARN Act would be allowable and be covered by the Department, if otherwise reasonable and allocable, in the event that sequestration occurs. Additional costs associated with sequestration, including WARN Act-related costs, could also be covered in other circumstances to the extent fair and reasonable, consistent with the FAR and pertinent contract terms. With sequestration, as with other events that might lead to contract termination or modification, the contracting officer will apply these cost principles in light of the contract's unique circumstances.

As always, your members' support of the Warfighter and concern for national security is appreciated.

Sincerely,



Richard Ginman
Director, Defense Procurement
and Acquisition Policy



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

September 28, 2012

M-12-19

MEMORANDUM FOR THE CHIEF FINANCIAL OFFICERS AND SENIOR
PROCUREMENT EXECUTIVES OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: DANIEL I. WERFEL 
CONTROLLER, OFFICE OF FEDERAL FINANCIAL MANAGEMENT

JOSEPH G. JORDAN 
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY

SUBJECT: Guidance on Allowable Contracting Costs Associated with the Worker
Adjustment and Retraining Notification (WARN) Act

The Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-2109, generally requires employers with at least 100 employees to provide written notice to affected employees 60 days before ordering certain plant closings or mass layoffs if they are reasonably foreseeable. On July 30, 2012, the Department of Labor (DOL), which is the Federal agency responsible for administering the WARN Act, issued Training and Employment Guidance Letter No. 3-12 addressing the WARN Act's requirements in the context of the potential across-the-board budget cuts (known as sequestration) scheduled to occur on January 2, 2013 if Congress fails to act. DOL concluded that it is neither necessary nor appropriate for Federal contractors to provide WARN Act notice to employees 60 days in advance of the potential sequestration because of uncertainty about whether sequestration will occur and, if it did, what effect it would have on particular contracts, among other factors. In reaching this conclusion, DOL explained that giving notice in these circumstances would waste States' resources in undertaking employment assistance activities where none are needed and create unnecessary anxiety and uncertainty for workers.

Despite DOL's guidance, some contractors have indicated they are still considering issuing WARN Act notices, and some have inquired about whether Federal contracting agencies would cover WARN Act-related costs in connection with the potential sequestration. To further minimize the potential for waste and disruption associated with the issuance of unwarranted layoff notices, this memorandum provides guidance regarding the allowability of certain liability and litigation costs associated with WARN Act compliance. Specifically, if (1) sequestration occurs and an agency terminates or modifies a contract that necessitates that the contractor order

a plant closing or mass layoff of a type subject to WARN Act requirements, and (2) that contractor has followed a course of action consistent with DOL guidance; then any resulting employee compensation costs for WARN Act liability as determined by a court, as well as attorneys' fees and other litigation costs (irrespective of litigation outcome), would qualify as allowable costs and be covered by the contracting agency, if otherwise reasonable and allocable.

This guidance does not alter existing rights, responsibilities, obligations, or limitations under individual contract provisions or the governing cost principles set forth in the Federal Acquisition Regulation (FAR) and other applicable law. Thus, agencies may treat as allowable other costs potentially associated with sequestration, including WARN Act-related costs arising under circumstances not specified in this guidance, based on the usual cost principles of allocability, allowability, and reasonableness as set forth in the FAR.