

Contractors Should Plan Now for Risk of Government Shutdown

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WHAT: To avert the latest government “shutdown” threat, Congress must pass an appropriations deal—or at least negotiate a continuing resolution—by Friday, December 8th. Some government agencies have initiated contingency planning for a possible shutdown, and contractors should do the same.

WHEN: Current government funding expires at midnight on December 8th.

WHAT DOES IT MEAN FOR INDUSTRY: Legislative negotiations on a spending bill have ratcheted up in recent days, presenting the opportunity for yet another budgetary stalemate that could increase the risk of a government shutdown in December 2018. Current government funding expires on December 8th, and several politically divisive issues could challenge negotiations—including the future status of the Deferred Action for Childhood Arrivals program, the Affordable Care Act and its cost-sharing-reduction payments, spending caps, and heightened partisan polarization, in general.

Given the unpredictability of negotiations, contractors should use this period to develop or revisit contingency plans in the event of a government shutdown. Five practical steps can help prepare your company for the potential disruption.

1. Inventory your contracts and understand how they are funded.

Recognize that the term “shutdown” can be a misnomer and that a funding lapse may halt performance under some contracts but not others. Although the Anti-Deficiency Act generally prohibits government officials from making payments or incurring obligations in

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excess of available funds or before funds are appropriated, many contracts are “fully funded”—*i.e.*, funds have already been obligated to cover the price of a fixed-price contract or the estimated cost of a cost-reimbursable contract. FAR 32.703-1. A lapse in funding on December 8th should not directly affect performance of these contracts. To be sure, myriad complications can arise if performance depends on government employees who are furloughed, government facilities that are closed, or other government contracts that do require additional funding during the lapse. For these reasons, and others, the Government may stop work even on contracts that are already funded. Similarly, a funding lapse may affect funded contracts if performance is expected to exceed the estimated cost due to changes, delays or other events for which a cost adjustment may be needed.

A shutdown will more likely have a direct effect on contracts that are incrementally funded or contracts that were awarded before funds became available and that were subject to FAR 52.232-18, the Availability of Funds clause. For these contracts, continued performance will very likely depend on the Government’s ability to obligate funds after December 8th.

But even for these contracts, the Anti-Deficiency Act may not require shutting down performance because the Act has long been interpreted to recognize several narrow exceptions that permit the Government to operate on a limited basis. These interpretations, contained in Attorney General Opinions from 1981 and 1995, indicate that the following obligations can be incurred during a lapse in annual funding:

- Obligations not affected by a lapse in annual appropriations, namely those funded by multi-year or indefinite (“no-year”) appropriations—as opposed to annual appropriations—as well as obligations otherwise authorized outside of the annual appropriations bills;
- Obligations necessary to the discharge of the President’s constitutional duties and powers, including certain national-security and foreign-relations functions;
- Government services “for emergencies involving the safety of human life or the protection of property”; and
- Obligations for limited support activities necessary for operations that will otherwise continue.

Making (or reviewing) an inventory of your government contracts with these distinctions in mind will help you identify the contracts most likely to be affected by a funding lapse, and will permit you to have an informed dialogue with your contracting officers (COs).

2. Obtain written direction from your contracting officer regarding his/her expectations for performance under each contract.

For every contract, whether or not you expect it to be idled, communicate with your CO and ask for clear direction on which activities, if any, should continue during a funding lapse. The Office of Management and Budget (OMB) is responsible for issuing instructions to federal agencies about funding lapses, including direction as to which employees/activities will be continued. Agencies write internal plans based on those instructions, and COs in turn should instruct contractors based on their agencies’ plans.

These instructions should address whether government personnel will work during the shutdown, as well as which services will continue under individual contracts. Confirming these two points is important. For example, your contract might be funded through multi-year appropriations but require performance at a government facility that will close during a shutdown. These types of scenarios, along with varying terminology used to describe services that may continue during a shutdown (“essential,” “excepted,” “exempted,” etc.), highlight the importance of communicating with your CO to understand exactly what your customer agency plans to do if a shutdown occurs.

Communication with the CO is particularly important for incrementally funded contracts subject to the Limitation of Funds clause, FAR 52.232-22, and for cost-reimbursable contracts subject to the Limitation of Cost clause, FAR 52.232-20. Under these clauses, the Government generally is not obligated to pay more than the funding currently allotted to incrementally funded contracts (or the estimated cost of fully funded contracts). The contractor must notify the CO in advance if it expects performance to cost more than has been allotted, and the CO must then notify the contractor that additional funds have been allotted to cover the increased cost of performance.

Absent notice from the CO, the Government generally is not obligated to reimburse a contractor for any increased costs it may incur. In the event of a funding lapse, the Government may not be able to obligate additional funds and provide the necessary notice to the contractor. Without that notice, the contractor faces the prospect of continuing its work “at risk,” a decision often complicated by informal pressure from the Government—typically from officials other than the CO—to continue performance notwithstanding the clauses. This in turn can lead to disputes over whether the Government bears liability for continued performance. Contractors can limit this risk and deflect informal pressure, though, by getting explicit written instructions from the CO about whether to continue performance.

Communication with the CO is also important because the effect of a funding lapse on government operations may indirectly affect your contract performance in many ways. Both parties should attempt to predict and estimate these impacts as best they can so that clear direction can be provided that will minimize later disputes. For example, for a contract that is otherwise adequately funded, continued performance may prove impractical or undesirable because the Government has furloughed employees or closed facilities that are needed for performance.

In such a situation, it may be appropriate for the Government to issue a stop-work order under FAR 52.242-15 or, for construction contracts, a suspension-of-work order under FAR 52.242-14. Other challenges can be addressed through formal change orders under the contract’s Changes or Government Delay of Work clauses. Following the processes set out in these clauses will help to avoid unnecessary costs fighting over the scope of liability for “constructive” suspensions and changes.

3. Record everything.

Document all communications with the CO, as well as any instructions or guidance provided by the Government about the availability of government personnel, facilities, and other resources that you need to perform your contracts. If any funding lapse does occur, keep detailed records of all work your employees perform under all your contracts. Where feasible, consider creating new accounting/time-charging codes for these periods—especially to capture time spent winding down idled contracts and starting them back up. Track other costs as well, such as expenses incurred to bring home idled employees from remote locations.

Also record your efforts to minimize any costs incurred as a result of a funding lapse. For example, although you may re-deploy or furlough some idled employees, re-deploying other employees—and then deploying them back to their original workstation—may be prohibitively expensive. To the extent practical, the rationale for these tradeoffs should be documented. By keeping these records, you will be prepared to support your organization's requests for compensation after the Government has resumed normal operations.

4. Plan for delayed competition and award of contracts in your pipeline.

Your planning should consider future contract awards. During a funding lapse, the Government cannot obligate annual funds to commence performance on new contracts. As a result, new contracts may not be awarded and options may not be exercised without the sort of disclaimer found at FAR 52.232-18, Availability of Funds. Yet even where funding is available under one of the exceptions listed above, it is possible that agencies may furlough some or all of the employees who issue solicitations, evaluate proposals, and make award decisions. As a result, some proposals that your organization has submitted may not be reviewed during a shutdown and may be awarded much later than you anticipate.

5. Comply with proposal and litigation deadlines.

Even though contract awards may be delayed, government officials furloughed, and government facilities closed, assume (unless officially notified otherwise) that deadlines remain unchanged, especially with respect to the time periods for submitting proposals, filing bid protests and appealing CO final decisions. Plan on meeting all solicitation deadlines for bid and proposal submissions, and inquire with the contracting agency for further instructions. Although some litigation deadlines may be tolled in limited circumstances, these rules vary by forum and by deadline. The safest approach is to assume that all deadlines remain unchanged.

Wiley Rein has experience counseling clients before and after shutdowns and will be ready to help your organization navigate this brinksmanship and its aftermath.