

What Contractors Need to Know About a Government Shutdown

September 25, 2023

WHAT: The odds of a federal government shutdown occurring increased significantly last week. Congressional gridlock is preventing even a continuing resolution to advance that would allow negotiations on a broader funding bill to continue. With less than a week remaining in the fiscal year, it looks more and more likely that the federal government will experience its third shutdown in five years.

WHAT DOES IT MEAN FOR INDUSTRY: Though the impact of a shutdown on federal workers and the economy receives significant attention, the impact on the federal contractors who help the government carry out its day-to-day missions is often overlooked. Although contractors are becoming increasingly familiar with how to navigate the disruption caused by a shutdown, now is a good time for contractors to make sure they are taking the right steps to put themselves in the best position to weather this increasingly likely storm. This alert provides some practical advice for contractors to consider as the shutdown approaches.

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

A “shutdown” does not necessarily shut everything down: a shutdown may halt performance under some contracts but not others. 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. In theory, a shutdown should not affect performance of these contracts. But 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

Authors

Paul F. Khoury
Partner
202.719.7346
pkhoury@wiley.law

Kara M. Sacilotto
Partner
202.719.7107
ksacilotto@wiley.law

J. Ryan Frazee
Of Counsel
202.719.3751
jfrazee@wiley.law

Practice Areas

Government Contracts
Requests for Equitable Adjustment, Claims,
and Terminations

lapse. For these reasons, and others, the Government may stop work even on contracts that are already funded. Similarly, a shutdown 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 the beginning of the shutdown.

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 shutdown and will permit you to have an informed dialogue with your contracting officers (COs).

2. Communication with contracting partners is key.

Communicate with your CO and ask for clear direction on which activities, if any, should continue during a shutdown. The Office of Management and Budget (OMB) is responsible for issuing instructions to federal agencies, including direction as to which employees/activities will be continued. Agencies develop internal plans based on those instructions, and COs should in turn 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. As noted above, regardless of contract type, confirming these two points is important because even if your contract is funded through multi-year appropriations, your performance may be halted if it is conducted at a (shut down) government facility. 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.

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 shutdown, 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,” often accompanied by informal pressure from the Government—typically from officials other than the CO—to continue performance notwithstanding the clauses. This can lead to disputes over whether the Government bears liability for continued performance. Contractors can limit this risk, though, by getting explicit written instructions from the CO about whether to continue performance. Similarly, communication with subcontractors is critical. You should review your subcontracts to determine your ability to instruct them to stop work and give appropriate direction.

3. Document 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 a shutdown does occur, keep detailed records of all work your employees perform under all your contracts as well as the impacts on the schedule for performance. 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.

It is also important to document your efforts to *minimize* any costs incurred due to the shutdown. For example, although you may re-deploy or furlough some idled employees, re-deploying other employees may be prohibitively expensive. To the extent practical, the rationale for these tradeoffs should be documented. By keeping these records, you will have support for requests for equitable adjustment after the Government resumes normal operations.

4. Plan for delayed competition and award of contracts.

Your planning should consider future contract awards. During a shutdown, 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 that deadlines remain unchanged unless officially notified otherwise—especially deadlines for submitting proposals, filing bid protests, and appealing CO final decisions. Plan on meeting all solicitation deadlines for bid and proposal submissions and get further instructions from the contracting agency. Although some 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.