



Preparing For a Federal Government Shutdown

The continuing resolution currently funding government operations, including many federal contracts, will expire on March 4, 2011. Even with a two week extension, a failure by lawmakers to pass another resolution or reach an agreement on funding for the remainder of the fiscal year will result in a federal government shutdown. The possibility of a shutdown has left contractors wondering how or even if they can continue to perform their federal contracts.

Funding gaps and corresponding government shutdowns occur when Congress and the President fail to enact regular appropriations bills at the beginning of the fiscal year or fail to come to an agreement on stop-gap funding through a continuing resolution. The last notable shutdown occurred in December 1995 and was not resolved until January 6, 1996. During the '95-'96 shutdown, nearly \$3.7 Billion in federal contracts in the Washington, D.C. area alone were adversely affected by the funding lapse. The impending shutdown will likely have an even larger impact as the government is now far more reliant upon contractors.

Construction contracts awarded on a fixed-price basis will be substantially unaffected by the shutdown. However, for most cost-type contracts, time and materials contracts, IDIQ contracts, and those contracts that have yet to be awarded, the shutdown will likely suspend operations completely. Therefore, it is important for contractors to prepare for the consequences of a government shutdown.

BACKGROUND

The inability to obligate or spend funds comes from the limitations set forth in the Constitution. Article I, Section 9 provides that "no money shall be drawn from the treasury but in consequence of appropriations made by law." This provision limits the government's ability to pay federal employees and contractors if funds have not been appropriated.

However, this provision on its own does not prohibit federal officials from entering into agreements obligating the government to pay contractors at some later point. The government's ability to obligate funds in the absence of appropriations is thus limited by the Anti-Deficiency Act, 31 U.S.C. § 1341, which prohibits federal officials from obligating funds before such funds have been appropriated, subject to some limited exceptions. Together, these provisions prohibit continued operations of federal agencies where funds have not been appropriated.

EXEMPT CONTRACTS

It is difficult to determine with certainty which contracts will be exempt from the shutdown because previous determinations of exempt activities are not binding on future shutdowns. Federal contracts that are not funded by FY 2011 appropriations will be largely unaffected by the shutdown because they will not require new funding once the continuing resolution expires. Most federal construction contracts are included within this category because they are awarded on a fixed-price basis, and funding was appropriated at the time of award. Accordingly, most federal construction projects will not be substantially affected by the government shutdown.

Other exempt activities include:

- Activities with express authorization from Congress: Examples include the food and forage authority given to the DoD to authorize contracting for food, clothing, and other supplies for troops.
- Activities with implied authorization from Congress: Providing supplies or other services to ensure authorized activities, including emergency services, can continue.
- Funding obligations necessary to discharge the President's constitutional duties: The scope of such obligations is narrow and will often depend upon the presence or absence of certain factual circumstances.
- Activities essential to the safety of human life or the protection of property: The determination of which activities fall within this category is highly discretionary. It is therefore difficult to determine which contracts will fall into this category, and how those contracts will be treated, until the shutdown actually occurs.

PREPARING FOR A SHUTDOWN

Even where a contract does not require new funding, performance may still be affected by the shutdown. For instance, a federal construction project may require access to federal facilities in order to perform the contract work. If those facilities are locked or otherwise unavailable because of the shutdown, contract performance may be impossible. Moreover, even if contract work can continue, contracting officers and other contract administrators will likely be furloughed and thus unavailable to provide guidance or issue necessary changes or contract modifications during the shutdown.

It is also unclear how the government will actually implement the shutdown. Contracting officers will likely issue individual stop work orders, or agencies will issue broad guidance to all contractors. To prepare for this disruption in operations, contractors should establish a protocol to track and account for all costs incurred because of the shutdown.

In the event of a shutdown, contractors should:

1. Determine Which Federal Contracts are Affected by the Shutdown: Contractors should consider whether their contract is fully funded or whether continued performance relies upon incremental funding that may be unavailable. Contractors should also determine whether contract performance depends upon access to federal facilities and whether such access will be available during the shutdown.
2. Seek Guidance from the Contracting Officer: For affected contracts, contractors should determine whether the contracting officer intends to issue a stop-work order or provide some other guidance for stopping work.
3. Document All Costs Associated with the Shutdown: Keep all costs associated with the shutdown separate from normal project expenses. Contractors should also document the reason each cost was incurred in the event their records are audited after a claim is submitted. Contractors should also make every effort to mitigate costs and damages and document all efforts to do so.
4. Complete All Outstanding Action Items Before the Shutdown: Before the shutdown begins, contractors should determine what, if any, action items can be resolved prior to the shutdown. For instance, if a contract requires a modification be issued, the contractor should work with the contracting officer to obtain the modification before the shutdown occurs. During the shutdown, it is unlikely a contractor will have access to the contracting officer.

5. Notify the Contracting Officer of All Actions Taken in Response to the Shutdown: Contractors should routinely notify the contracting officer in writing of all actions taken to continue performance during the shutdown and any costs incurred because of the shutdown.

RECOVERING COSTS ASSOCIATED WITH THE SHUTDOWN

Contractors may recover some, but not all costs once the shutdown ends. For fixed price contracts, recovery will depend upon whether the contractor is entitled to an equitable adjustment. For cost reimbursement contracts, costs associated with the shutdown can likely be recovered. It is therefore important to keep all costs associated with the shutdown separate from normal project costs in order to quickly identify and claim such costs once the shutdown ends. It is also important to note that, once the shutdown is over, contractors will likely experience a delay in receiving payment from the government due to the backlog of work for federal administrative personnel.

OTHER ISSUES

For contracts that have not been awarded, contractors should consult the contracting officer before the shutdown to determine how the agency intends to handle the contract award once the shutdown is over. It is also important to note that court and protest deadlines remain in effect regardless of a shutdown. However, it is unclear how long it will take to resolve such claims if federal court and GAO employees are furloughed.

CONCLUSION

Although the impending shutdown will not substantially affect fixed-price federal construction contracts, a shutdown may make performance more challenging because of the lack of support from agency personnel. Contractors should therefore work with their contracting officer and legal counsel to develop a protocol to determine which contracts will be affected, track costs associated with the shutdown, and recover such costs once the shutdown ends.

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