



Government Contracts Advisory

FEBRUARY 22, 2011

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Implications of a Government Shutdown for Government Contracts

The federal government is currently operating under a continuing appropriations resolution, which funds Executive Branch programs and activities through March 4, 2011.¹ If another appropriations act is not signed into law on or before that date--either a continuing resolution or a regular appropriation bill that covers part or all of fiscal year 2011--federal government operations will literally shut down.² Absent appropriations to fund their operations, federal agencies simply may not operate. Unfortunately, the political rhetoric on both sides of the Capitol has become increasingly strident, and it seems more likely that the President and Congress will not be able to agree on federal funding in a timely fashion.³ The consequences for government contractors that flow from a government shutdown can be significant. Several key points bear mention.

It is initially important to understand the effect of a shutdown on government employees and facilities. First, The Office of Management and Budget (OMB) provides agencies with guidance regarding how to proceed during a shutdown in OMB Circular No. A-11. In brief, agencies may not incur any obligations unless authorized by law. Agencies may incur obligations "as necessary for orderly termination of an agency's functions," but no disbursements may be made. During an absence of appropriations, agency heads must limit obligations to those needed to maintain the minimum level of essential activities necessary to protect life and property. Agency heads are required to develop and keep on hand shutdown plans, which are approved and monitored by OMB.

For federal employees, an immediate shutdown effect is the "shutdown furlough." Generally only those employees who are performing emergency work involving the safety of human life or the protection of property, those who are involved in suspending agency operations, or who fall in other specified categories (such as members of Congress and the President) are not subject to furlough.

Despite the foregoing guidance, a government shutdown is likely to create a host of unanswered questions and issues for contractors. How shall a contractor proceed if the Contracting Officer has been furloughed and no stop work order has been issued? What happens in the case of delays caused by the furlough of inspectors who are required to inspect a work site before further work can continue? What if a contractor's employees are denied access to a government facility because the facility has been shut down? Should contractors continue to perform work at a government facility where such performance is possible or where the service provided under the contract is, in the view of some officials, "essential?" Should contractors lay off employees? How can a contractor recover the costs associated with delays or increased expenses that flow from a government shutdown? How should contractors address

subcontractor issues? The OMB guidance and agency shutdown plans are not going to address these kinds of questions, and there is no one set of answers or template that applies in every circumstance.

Nevertheless, there are steps that contractors can take now to position themselves to weather the storm and survive a shutdown with minimum risk of uncompensated performance, inadvertent overbilling, or performance default. Among the key factors for contractors to consider in developing a shutdown contingency plan are:

- The nature of the product or service that is the subject of the government contract and the place of performance;
- The type of contract at issue--fixed price or cost reimbursement;
- Contract funding--is the contract incrementally funded or fully funded;
- Contract clauses--does the contract include clauses such as limitation of cost or funds;
- What additional expenses will be occasioned by the government shutdown;
- What subcontractors will be affected by a government shutdown.

The bottom line is that a government shutdown of even relatively brief duration can have significant consequences for contractors if they have not anticipated the ways in which contract performance may be disrupted and considered how to best protect themselves. The shutdown process is complex, but with prudent planning, affirmative steps can be taken to create the greatest likelihood that a contractor will be made whole once Congress gets its act together and government funding is resumed.

For additional detail on the impact of Continuing Resolutions, **click here** to read MLA's recently published article in BNA's *Federal Contracts Report* titled, "Government Contract Funding Under Continuing Resolutions.

¹ Continuing Appropriations and Surface Transportation Extensions Act, 2011, Pub. L. 111-322 (Dec. 22, 2010).

² The last shutdown of the federal government occurred from December 16, 1995 to January 6 1996.

³ Paul Kane and Shailagh Murray, *House and Senate May Not Agree on Government Funding Bill In Time*, Wash Post, Jan. 18, 2011, at A5, "House Speaker John A. Boehner (R-Ohio) acknowledged that Congress might not reach agreement over spending cuts before the government runs out of money next month."

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