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Government Contracts Advisory

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Recurring Appropriations Issues Affecting Contractors--The Implications of Continuing Resolutions

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Most of the operations of federal departments and agencies are funded annually through the enactment of regular appropriations acts. Since these bills are yearly, expiring at the end of the fiscal year, regular bills for the subsequent fiscal year must be enacted by October 1. At the end of fiscal year 2010 (Sept. 30, 2010), Congress had not passed a single appropriations bill to fund the federal government for fiscal year 2011. In order to keep the government operating, Congress passed a short-term continuing resolution ("CR") that funds the Executive Branch through December 3, 2010.[1] As a result of the mid-term elections, it now seems likely that Congress may need to pass a longer term CR to fund government agencies through early next year or even through the entirety of fiscal year 2011. It is therefore important for government contractors to understand the implications of CRs for the funding of existing and new acquisition programs.

Continuing temporary appropriations acts, commonly known as continuing resolutions, have been a frequent component of the annual congressional appropriations process for decades. Each year, Congress is supposed to pass 12 separate appropriation bills (corresponding to the major functional areas of the government) which, once enacted into law, ensure operation of the federal government. If Congress fails to pass one or more such bills, or if the President fails to sign them into law, then non-essential functions of the government that are funded with "annual appropriations" will cease unless some stop-gap measure--a continuing resolution--is enacted. With the exception of three fiscal years,[2] at least one continuing resolution has been enacted for each fiscal year since fiscal year 1954. Conflicts between the President and Congress over major budget priorities, usually triggered by growing deficits, have increased the difficulty of reaching agreement on regular appropriations acts, causing delay in their enactment. The frequent result has been the passage of separate or omnibus continuing appropriations acts in order to fund government operations, either on an interim or a full-year basis.

A CR appropriates funds for Executive Branch departments at levels (rates of expenditure) commensurate with the level of the preceding year's appropriations act. CRs may have a relatively short duration in the expectation that action on regular appropriations bills will be concluded within days or weeks of the beginning of the new fiscal year or may last the whole fiscal year. CRs fund continuing spending only at the rate of expenditure of the preceding year and only for the period stated. In contrast to regular and supplemental appropriations acts, continuing resolutions do not generally provide specific amounts for each budget account. Instead, these bills provide the proportionate amounts from the months or weeks of the preceding year and with the further limitation that the rate of expenditure not exceed that of the preceding year. Full year continuing resolutions effectively become regular appropriations acts for that fiscal year.

The CR under which the federal government is now operating gives each of the federal departments and agencies "authority" (Continuing Resolution Authority ("CRA")) to spend during the term of the CR at the same rate as in the fiscal year just expired. CRA authority expires with the term of the resolution (here, December 3, 2010) and does **NOT** entitle a department or agency to (a) increase the rate of spending on objectives that have been authorized; (b) make expenditures on new objectives that have been authorized but for which appropriations have not been passed in the preceding year, (c) exercise options or other privileges of contracts, grants or other obligation objectives which are of a stated duration **LONGER** then the CR/CRA, or (d) commit the government to spending for the full fiscal year. (*See*, Anti-Deficiency Act, 31 U.S.C. 1341 et. seq.). Only the proportionate amount spent in the first two months of the last fiscal year may be spent under this CR.

This last limitation is of considerable importance because it means, for example, that contract options which are stated to be of a duration **LONGER** than the CRA cannot be exercised. Options which are stated in fiscal year terms expire under a CRA and cannot be renewed or restored unilaterally by the government. Moreover, the CRA may create a funding "gap" which, as a matter of constitutional and statutory law, cannot be filled by voluntary expenditures or performance by government contractors. 31 U.S.C. 1301; GAO, *Principles of Federal Appropriations Law* (Red Book), Vol. 2, ch. 6 at 6-160-163 (3 d Ed. 2006); *see also*, FAR 32.703-2.

As a practical matter, government contractors caught in a continuing resolution funding squeeze usually will want to continue or undertake performance. They are likely to do so either at the instance of government officials (that is, contractors would perform work on the assumption that appropriations for the full year will eventually be passed and they will be reimbursed) or because they fear losing the particular contract or grant opportunity by abandoning the work, even temporarily. In most instances in the past, this practice has borne the anticipated fruit. It is important to realize, however, that there exists no obligation on the part of the government to later fund an expired funding provision. Moreover, there may be instances in which a contractor does not want the government to exercise an option (because it would create or exacerbate a loss). In such cases, contractors should be aware that, as noted above, an "option" exercisable for a year cannot be exercised using CR funding.

[1] H.R. 3081, Pub. L. 111-242, 124 Stat. 2607 (Sept. 30, 2010).

[2] Fiscal years 1989, 1995, and 1997.