



Government Contracts Update

September 2023

Threat of Another Government Shutdown: What Contractors Need to Know and Do Now

Key Notes:

As another government funding deadline approaches, we recommend that contractors take these steps to ensure they are prepared for the possibility of a government shutdown:

- Analyze your contracts and communicate with your contracting officers in advance of any possible government shutdown.
- Develop contingency plans for actions necessary in a shutdown.
- Keep meticulous records to document a shutdown's impact on your contracts, including costs incurred.

Another potential government shutdown looms as Congress debates spending legislation necessary for government operations to continue past September 30. The Office of Management and Budget has published guidance on its [website](#) to agencies on issues related to appropriations lapses that may be useful to contractors. The Department of Defense similarly has published [guidance](#) on contingency operations that contractors performing DOD contracts should review.

We last reported on this issue in [September 2021](#) and prior to that date, in December 2018, when another government shutdown was threatened. Although such threats and actual shutdowns are not new (with the last one occurring in late 2018 and extending into early 2019) and not all contracts will be affected by the potential partial shutdown (e.g., contracts for activities considered essential to the protection of life and property), government contractors should plan and prepare for potential stop work orders or terminations of their affected contracts. We are again

providing some tips and guidance to lessen, avoid or mitigate the potential impact of a pause in funding and a government shutdown.

Analyze Your Contracts

First, as mentioned above, some contracts may not be affected by a partial government shutdown because they are affiliated with federal agencies for which Congress has already provided funding. Additionally, contracts for activities that are otherwise authorized by law will not be affected (for example, 41 U.S.C. § 11 allows the Defense Department to continue buying food, fuel, medical supplies, etc., to sustain its operations during a funding gap), nor will contracts for activities that protect life and property (protection of federal buildings, emergency and disaster services, for example). The same goes for contracts that are not funded through annual appropriations. In other words, you may be permitted or required to continue to perform some of your contracts but not others. How will you know?

Talk to Your Contracting Officers

Reach out to the contracting officer on each contract now to establish or enhance a line of communication so that when decisions are made regarding which contracts and/or tasks under them will continue and which will be halted, the contracting officer will be able to provide you with timely information. You can then take appropriate actions regarding your affected employees and vendors and address the mitigation and documentation of costs.

However, keep in mind that the contracting officer may not have much information or guidance for you before a shutdown occurs because each agency will (or should) have its own shutdown implementation plan and will only execute it based on direction from the president and the OMB. What he or she does tell you may depend upon, among other things, how long the shutdown is anticipated to last.

Finally, if you wait to contact your contracting officer until after the shutdown occurs, it may be too late because government contracting personnel are often deemed “non-essential” and they may not be around to take your call.

Develop Flexible Contingency Plans

Next, you should have or develop contingency plans and be prepared to execute them based on the direction you receive from contracting officers. These should include, among other things, arrangements for employees who are working on a contract affected by a stop work order or termination; a procedure to notify affected employees of the shutdown (and what to do during the shutdown and when to come back to work); a plan to ensure access to government facilities during the shutdown (or, if access is denied, how to document that); and a strategy for dealing with your subcontractors and vendors.

In the event that the government stops or delays paying invoices, cash flow issues should also be addressed. Because no one can accurately predict how the administration will implement a shutdown, you should plan for multiple contingencies and be flexible enough to handle the unexpected.

Keep Good Records

Fourth, meticulously document the effect of any shutdown on each of your contracts, including costs incurred, so the contract price can then be adjusted accordingly, if necessary, to account for any increased costs thereafter. For example, these costs may include contract shutdown and startup costs once the shutdown is over, the costs of stopped or terminated subcontracts, or even the increased

costs of performing contracts not stopped or terminated by the shutdown.

In addition, make sure that any direction you receive from the government comes from someone with the proper authority under your contract to provide that direction; otherwise, you might end up working “at risk” and not be able to recoup your additional shutdown-related costs. Also, simple contract administration matters like the exercise of contract options may normally be affected, giving you certain additional rights in dealing with these matters.

The Bottom Line

Before, during and after this pending partial government shutdown, it is not likely to be “business as usual,” and taking a proactive approach to anticipating and handling the potential shutdown’s effects on your contracts will make life easier for you and your company. The attorneys in our [Government Contracts](#) practice group can assist with planning for and resolving any specific or unusual issues.

FOR MORE INFORMATION

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