How Government Contractors Can Prepare For The Next Shutdown

Stuart Turner & Josh Alloy
Arnold & Porter

USGIF Geospatial Law Working Group
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• Shutdown politics and short-term continuing resolutions funding the government a few weeks at a time have become common in Congress.

• The just-announced 2-year budget deal sets topline priorities, but only funds the government until the end of March, pending specific budget bills that are under negotiation now.

• This process may resolve the instant shutdown threat, but it is doubtful we have seen the end of shutdown politics, in this administration or going forward.

• Participants in the federal market would be wise to review the issues and challenges presented by shutdowns in order to remain prepared for what may come.
What Activities Can Continue During a Shutdown?

• A government shutdown is not a self-executing stop-work order; a shutdown itself does not suspend a company's obligations to perform or the government's obligation to pay for performance.

• What matters is:

  1) Whether a contractor's work requires any new appropriation or authorization of spending

  2) Whether critical government personnel, facilities, and resources are available.
Is Your Contract Required to Support Activities Exempt From the Anti-Deficiency Act?

The Anti-Deficiency Act contains four narrow exceptions:

• Obligations not impacted by annual appropriations (multi-year appropriations, indefinite ("no-year") appropriations, or obligations authorized outside of annual appropriations bills. (e.g. Social Security).

• Obligations in advance of appropriations permitted by statute.

• Activities "necessarily implied" by the duties of a given agency during a shutdown (distributing Social Security checks, contracting for emergency services, closing impacted functions).

• Constitutional duties, including certain foreign relations and national security functions.
If you do not receive a stop-work order and do not perform a contract required to support an excepted activity, than the principal question is **how your contract is funded**.

- If your contract is fully funded, then continue to perform unless and until your contracting officer directs otherwise.

- If your contract is incrementally funded and subject to the "availability of funds," "limitation of funds" or "limitation of cost" clauses, the government has no obligation to pay for work performed or costs incurred until funds are properly allocated and obligated to the contract.

- If a contract's funding runs out during a shutdown, the contractor may face the threat of performing "at risk," meaning the government will have no legal obligation to pay for the work performed or costs incurred.
Impacts on Litigation and Administrative Deadlines

• Contractors and their counsel should not assume that any deadline is waived or tolled due to a shutdown.

• DOD will continue to support "imminent or ongoing legal action”

• Activity will be limited by the status of the fora:
  o The federal judiciary (including COFC) announced during the last brief shutdown that it could (and would) continue to operate as normal for 3 weeks with funding on hand.
  o GAO has treated shutdown days like holidays, extending all filing deadlines until the next day the GAO is open.
  o The Civilian BCA stayed open to accept filings and left its judges free to modify schedules

Contractors should consult the guidance of the specific forum and, absent clear guidance to the contrary, assume that all deadlines continue to apply.
Other Shutdown-Related Complications

• Many federal facilities are closed and employees furloughed. Even a fully funded services contract may be suspended if there is no one to serve.

• Government personnel may not be available to accept contract deliverables.

• If contract requires inspection or approval from federal personnel, work must await the return of federal inspectors.

• Contractors should not expect or assume that any communication with a furloughed federal employee has been received, read or acted upon.

The key to managing all of these scenarios is engaging with your contracting officer as much as possible.

Consult OMB’s guidance and your customer agency's shutdown contingency plan, which may state in advance what services will be open and which employees will be working.
Reimbursement For Work Performed During A Shutdown - Recovering Costs Incurred Under a Stop-Work Order

• Once a stop-work order is issued, the terms of the "stop-work order" clause apply. For most contracts, that is FAR 52.242-15.

• Contractors must stop work and "take all reasonable steps to minimize incurrence of costs allocable to the work covered by the order during the period of work stoppage."

• If only a portion of a single contract is subject to a stop-work order, it may be feasible to shift personnel and resources to other projects.

• Paragraph (b) of the standard clause requires the government to provide an equitable adjustment if:

  (1) the stop-work order results in an increase in the time required for, or in the Contractor’s cost properly allocable to, the performance of any part of this contract; and

  (2) the Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage.
Alternative language applicable to cost reimbursement contracts provides for an equitable adjustment to "the delivery schedule, the estimated cost, the fee, or a combination thereof."

In order to obtain any such adjustment in delivery schedule or price, it is important that contractors document all costs incurred, delays suffered, and actions taken when the stop-work order is in place.
Working "At Risk"

• For contracts subject to a "limitation of funds" or similar provision, the government is not required to pay for work performed or costs incurred beyond the limit already obligated to that contract.
  
  o Any work performed or costs incurred after that point are accordingly performed/incurred "at risk."

• Unlike working under a stop-work order, there is no contractual right to an equitable adjustment resulting from insufficient government funding.
Working "At Risk"

• If you must perform work at risk:
  o **Document everything**, and begin working with your contracting officer and counsel as soon as possible.
  o Consider submitting an invoice for work performed during a shutdown and request a letter modification acknowledging that the invoice covers work performed during a shutdown and waiving any government claim that the contractor is not entitled to payment for that work.
Employment Law Issues

• Government contractors considering employee cost-savings measures during a shutdown must ensure that they comply with the Fair Labor Standards Act, state law, and the US Dep’t of Labor's regulations regarding employee furloughs and pay reductions. Potential measures could include:
  o Furloughs
  o Reduction in pay/hours
  o Required use of leave
  o Voluntary leave
  o Temporary reassignment
  o Layoffs
Furloughs

• Employers can furlough nonexempt employees (i.e., employees who are classified as nonexempt and entitled to overtime under the FLSA) on a partial-day or single-day basis, and only pay for those days worked.

• Employees who are classified as exempt under the FLSA must be paid their regular weekly salary for any week in which they perform any work.

• Employers should avoid partial- or single-day furloughs of exempt employees and implement furloughs in full-week increments.
  - A mid-week furlough is possible where the employee uses vacation or other paid time off to cover the nonworking days (or if they are paid for the entire week).

• Furloughed employees may be eligible for unemployment benefits for the time they are unpaid or on furlough; eligibility is determined by state law.
Reduction in Pay and/ or Hours

• Subject to any employment agreements that provide otherwise, rather than furlough employees, employers can prospectively reduce salaries or the rate of pay for nonexempt employees, and in certain circumstances, exempt employees.

• The FLSA does not preclude an employer from reducing the number of hours that an hourly employee is scheduled to work, and employers are not required to pay non-exempt employees for hours that they do not work.

• With respect to exempt employees, reductions in salary — either alone or in connection with a reduction in work hours — can be permissible during a business or economic slowdown provided that the employee is paid at least $455 per week on a salary basis, and provided that the reduction is prospective in nature, bona fide, not sporadic, and not intended to evade the FLSA's salary requirements.
Required Use of Leave

- In many states, and depending on the company's leave policies, employers can require employees to use any accrued paid-leave.

- Although this measure may delay the need for furloughs, it is not actually a significant cost-saving measure, as employers will still be paying employees for time off from work. Employers should also consider the impact on employee morale.

- May be used in conjunction with a midweek furlough for exempt employees.
Voluntary Leave Without Pay

• Some employers seek volunteers to take unpaid time off due to insufficient work, even potentially with exempt employees.

• When an exempt employee volunteers to take time off from work without pay for personal reasons other than sickness or disability, salary reductions may be made for one or more full days of missed work without risking the employee's exempt status.

• The employee's decision must be completely voluntary – consider having the employee sign a voluntary leave without pay agreement.
Temporary Reassignment of Employees

- To the extent feasible, government contractors may consider mitigating the loss of revenue by temporarily reassigning employees to other work that is not affected by a shutdown.
Layoffs

- Should a shutdown last long enough that employers find it necessary to lay-off personnel, they must comply with the Worker Adjustment And Retraining Notice (WARN) Act and similar state laws.
- The WARN Act requires covered employers to provide written notice to employees who suffer an employment loss at least 60 calendar days in advance of covered mass layoffs (and some states have longer notice requirements).
- A temporary furlough or reduction in hours is unlikely to be considered an employment loss unless it lasts for six months.
Key Takeaways

- Given the short duration of the new continuing resolution, contractors should educate themselves as to the implications of shutdowns and how they can prepare in advance to reduce confusion and minimize potential costs.
- Be aware of how your contracts are funded.
- Review what Federal resources, facilities, or personnel are needed for performance.
- Maintain communication with your contracting officers.
- Review employee exempt/non-exempt status and consider legal restrictions on furloughs and pay.
- Document everything thoroughly.
- Obtain legal counsel as needed.
Questions?

Stuart W. Turner
202.942.5759
stuart.turner@arnoldporter.com

Joshua F. Alloy
202.942.5895
josh.alloy@arnoldporter.com