

How Federal Contractors Can Prepare For An Oct. 1 Shutdown

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Government funding for a wide range of agencies is scheduled to run out by Oct. 1, which would cause a general federal government shutdown. Congress may finalize a funding bill before then, but according to media reports the White House has already told agencies to begin planning for a possible shutdown.

Federal contractors would be prudent to do the same, because shutdowns can have significant financial and legal impacts. At the same time, the risks can be managed by understanding the legal landscape of a shutdown, including a contractor's potential rights and remedies.

This article addresses four key points that contractors should consider as the potential shutdown approaches.

1. What is a government shutdown, and how does one affect federal agency operations?

Government shutdowns occur when agencies run out of congressionally appropriated funding. Since the 1880s, a federal law known as the Anti-Deficiency Act has prohibited agency officials from making or authorizing an expenditure or authorization without sufficient appropriations.[1] In other words, before a government official can enter into a new contract or agree to pay an employee, that official must have funding that covers whatever payment will be owed to the contractor or employee in the future.

So, if an agency's appropriation lapses or is exhausted before Congress can appropriate more money, the agency can no longer pay employees or take on new debts. This forces the agency to shut down operations and furlough employees.

The precise impact of a shutdown varies from agency to agency, and certain agency personnel may be allowed to keep working if they are performing essential functions, including services for "emergencies involving the safety of human life or the protection of property." [2]

To understand the potential impacts to a particular agency, a good starting point is



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to review the agency's shutdown contingency plan, which should be available online.[3] The plans may help explain what operations are likely to be shuttered, and may help a contractor discuss contingency planning with agency procurement officials. For example, the U.S. Department of Justice issued an updated plan on Sept. 24, which estimates that 85% of the agency's employees would be excepted from a furlough.

2. What impact does a shutdown have on federal contractors?

Government shutdowns can affect contractors in many ways, but here are two key impacts to watch for.

First, if an agency needs to furlough employees, it may also need to shut down government work sites, cease communications with federal contractors, stop awarding contracts or even stop performing contractually specified obligations. This can prevent a contractor from making deliveries or getting to a government work site.

Second, an affected agency will typically be unable to provide new funding for existing contracts, which prevents it from executing contract modifications or options.

A lack of appropriations may also affect a contractor's ability to perform incrementally funded contracts, which include many cost-reimbursable contracts, where the government funds work as it progresses. Incrementally funded contracts usually have some version of Federal Acquisition Regulation 52.232-22, which states that the "Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to this contract." [4]

Thus, depending on the circumstances, contractors may need to stop work if the government cannot provide additional funding, or else proceed at their own risk. On this point, FAR 52.232-22(f)(2) gives the contractor a unilateral right to stop work in most cases.

Of course, if a contract is already fully funded, then the lapse of appropriations should not directly affect the funding for that contract, at least not without some further government action such as an attempt to deobligate funding.

3. Can a contractor seek reimbursement from the government for unexpected costs caused by a shutdown?

All the above issues can cause a contractor's cost of business to rise above original expectations. Contractors may need to keep an idle workforce or equipment on standby, waiting for the shutdown to be lifted. They may also need to come up with unexpected ways to continue performance, such as by changing job sites.

A contractor's ability to recover these increased costs will depend on a variety of factors, but there is an initial hurdle: The government will likely assert that a shutdown qualifies as a sovereign act for which it has no contractual liability. Under long-standing precedent, courts have held that public and general acts of Congress may qualify as sovereign acts, meaning an act of the government not in its capacity as a contracting party.[5]

If a sovereign legislative act impedes a contractor's ability to perform, and if the government took no adverse actions in its contracting capacity, the government can often claim immunity from a contractor's cost claims.

The government has previously argued that shutdowns are sovereign acts, and in 1999 the former General Services Board of Contract Appeals agreed with that position in *Raytheon STX Corp. v. Department of Commerce*, at least as it applied to a 1995 government shutdown.[6]

But even if a shutdown qualifies as a sovereign act, case law recognizes that a contractor may still be able to assert claims to recover losses. As *Raytheon* held, "the Government can enter into an express or implied agreement to pay a contractor the amount by which its costs are increased by a sovereign act."

The case law reveals several ways that the government might become liable for a sovereign act, which we list here.

Did the government issue a formal stop-work order or ratify a work stoppage?

If the contracting officer issues a stop-work order or ratifies the consequences of a sovereign act, then the agency may be liable. For example, in *Raytheon STX*, the contracting officer issued a formal stop-work order after a government shutdown, thus giving the contractor a right to seek an equitable adjustment.

Did the government provide any contractual guarantees or warranties that were breached by the shutdown?

Government shutdowns do not necessarily immunize agencies from performing contractually stated guarantees. For example, if a contract contains a warranty of access to a military base, then the procuring agency may be liable for a base closure, even if the closure is caused by a sovereign act.[7]

Did the government issue any orders under the contract's changes clause because of the shutdown?

If a contracting officer directs a contractor to perform in new or modified ways because of a shutdown, then the agency may be liable for cost impacts under the changes clause at FAR 52.243-1 and its variants.[8]

4. What can a contractor do to help preserve its rights?

Carefully document the cost impacts.

Contractors should document all the costs that they would not have incurred in the absence of a shutdown. The courts and boards of contract appeals prefer actual cost documentation, which can be difficult to piece together after a shutdown is over.

In some cases, it may be difficult to document precisely what costs are caused by a shutdown, for example where employees have multiple roles or responsibilities that are affected. To help address that situation, contractors can have personnel provide written contemporaneous summaries or estimates of the impact.

Be reasonable.

When seeking an equitable adjustment under the changes clause or stop-work clause, contractors may be required to show that their costs are reasonable. Contractors with cost-reimbursable contracts will

be familiar with this concept, which is grounded in the cost principles of FAR, Part 31.

According to FAR 31.201-3, a cost is reasonable "if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business."

Whether a cost is reasonable depends on a variety of factors, including whether the cost is necessary for the conduct of the contract's business, whether it is the product of arm's-length bargaining and whether it is consistent with a contractor's established practices.

The government may question whether a contractor's costs during a shutdown are reasonable under the circumstances. For example, in Raytheon, the government challenged the contractor's decision to maintain an idle work force during a shutdown, rather than laying off personnel.

The General Services Board of Contract Appeals found that the contractor acted reasonably in deciding to pay its personnel because, under the circumstances, the contractor had a reasonable expectation that they would be needed to begin work immediately after the shutdown ended.[9] Moreover, the contractor took steps to mitigate its costs, including by having employees work on other projects or take vacation time.

Monitor funding clauses.

As discussed above, contractors working under incrementally funded agreements may need to stop work if they run out of funding.[10] Contractors should carefully monitor their incurred costs and closely communicate with their contracting officer about what might happen if the agency is unable to provide more funding.

Under the standard FAR clause, contractors should provide notice of an overrun before it occurs. Even if a contractor believes it has sufficient funding for the time being, however, it may make sense to discuss funding concerns with a contracting officer before a shutdown, rather than afterward when agency employees might be furloughed.

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[1] 31 U.S.C. § 1341.

[2] 31 U.S.C. §1342.

[3] <https://www.whitehouse.gov/omb/information-for-agencies/agency-contingency-plans/>.

[4] FAR 52.232-22(f)(1) (emphasis added).

[5] United States v. Winstar Corp., 518 U.S. 839, 895 (1996); Conner Bros. Constr. Co. v. Geren, 550 F.3d 1368, 1371 (Fed. Cir. 2008).

[6] GSBCA No. 14296-COM, 00-1 BCA ¶30632 (Oct. 28, 1999).

[7] See Henderson Inc., DOTCAB No. 2423, 94-2 BCA ¶ 26728 (Feb. 22, 1994) (Coast Guard warranted access to work area, and thus suspension of work caused by sovereign act was compensable); D&L Constr. Co. & Assocs. v. U.S., 402 F.2d 990, 999 (Ct. Cl. 1968).

[8] ANHAM FZCO LLC, ASBCA No. 58999, 20-1 BCA ¶37745 (Nov. 13, 2018) (concluding that the government's closure of a border crossing was a sovereign act, but the contracting officer then constructively changed the contract by ordering the contractor to develop a transition plan).

[9] Raytheon STX, 00-1 BCA ¶30632.

[10] FAR 52.232-22(f).