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## In the Event of a Government Shutdown: Preparation Pointers for Federal Contractors

By Daniel S. Herzfeld

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*With the U.S. Congress unable to reach an agreement on a continuing resolution, the U.S. federal government shut down all non-essential services on October 1, 2013. The shutdown will remain in effect until Congress passes appropriations legislation for fiscal year 2014. This Pillsbury client alert, which originally was published in March 2011, provides guidance on how a shutdown affects federal contractors and what they can do to prepare for and react to the shutdown.*

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Contractors should be aware of several points to help prepare for and react to any shutdown:

- Keep working until the contracting officer or other authorized agent of the government issues a written stop-work order.
- Have an alternative plan in case a particular contract is stopped, such as conducting training or encouraging employees to take any vacation or leave.
- Keep track of the costs to implement the stop-work order and during any stopped work, because some of the costs might be recoverable.

### **Don't Stop Working Until You Receive A Written Stop-Work Order**

A government "shutdown" does not necessarily mean that every part of the government shuts down and it does not necessarily mean that your contract will lack appropriations. A government shutdown, at least as understood during the last 1995-96 shutdown during the Clinton Administration and today, refers to the failure of Congress to pass and the President to sign appropriations legislation funding the government. The Constitution requires that Congress appropriate money before the Executive branch spends it.<sup>1</sup> Congress has enforced this constitutional requirement through the Anti-Deficiency Act, which makes an executive branch employee liable for a fine of up to \$5000 per incident and up to 2 years in jail for

<sup>1</sup> U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .").

authorizing spending money beyond what Congress has appropriated.<sup>2</sup> So, contracting officials have a strong incentive to get this right.

There are circumstances where certain governmental programs do not shut down, because they constitute exceptions to the Anti-Deficiency Act:

- *Multiple-Year Appropriations and Indefinite Appropriations*: If a contract is not subject to the annual appropriations process or is paid out of an agency revolving fund, then it is less likely to be affected by any shutdown.
- *Express Authorizations*: Congress has provided statutory contracting authority and borrowing authority to assure that certain activities for some agencies continue – e.g., “food and forage” authority for the Department of Defense.
- *Implied Authorization*: There are a limited number of functions that are not funded that are deemed necessary to assure that the functions that are funded may be done – e.g., incurring costs to implement an orderly shut down or paying for check writing and distribution of benefit checks under the Social Security program (which operates out of multi-year appropriations).
- *Obligations Necessary for President to Discharge Constitutional Duties and Powers*: This authority is narrowly drawn and would not likely affect many procurement contracts.
- *Personal or Voluntary Services in Emergency*: Normally the Anti-Deficiency Act prohibits the government from accepting free or voluntary services. So, contractors cannot simply volunteer to work during a government shutdown. However, the Anti-Deficiency Act includes an exception allowing acceptance of (and future reimbursement for) voluntary services rendered where there is an imminent threat to the safety of human life or destruction of property.<sup>3</sup>

Some contracts may identify whether a contract is fully funded, but many do not. For example, many fixed-price contracts have already been funded and may indicate this in the contract or a modification. Also, for cost reimbursement contracts with Limitation of Funds or Limitations of Cost clauses, the contractor should take advantage of these clauses’ notification requirements to inform the contracting officer if the contractor expects there to be a funding lapse. That might help trigger communication about whether funding is likely to continue through any shutdown. However, even if funding is available, there is no guarantee that a contractor can continue to work. If the government officials administering a contract are furloughed and they must approve actions under the contract, or the contractor has employees that work at a government site that shuts down, then continued performance may be difficult even with a funded contract.

Ultimately, communication with the contracting officer is essential, but a contractor should accept nothing less than a written communication ordering it to stop work from the authorized contracting officer under the contract. This will not likely arrive until the eleventh hour. The Office of Management and Budget (through its Circular A-11) has instructed all agencies to come up with a “shutdown plan” to identify which activities might be subject to the exceptions above and which are not. As contractors have found, however, agencies have not been forthcoming in releasing those plans; contracting officers and general counsel at agencies often do not know specifically if a contract will continue to be funded or is subject to an exception. Therefore, contractors should continue communications with agency contracting officers, but also must

<sup>2</sup> 31 U.S.C. §§ 1341 & 1350.

<sup>3</sup> 31 U.S.C. § 1342.

plan to work absent a written stop-work order (or other written communication identifying that a contract is to be stopped).

### Alternative Plans If a Contract Is Not Funded During the Government Shutdown

While a contractor should be prepared to have its employees ready to work, if a stop-work order is issued then the contractor should mitigate its possible damages (some of which may be recoverable) by finding other useful pursuits for its employees. Some ways to do this include:

- Conduct training during the shutdown
- Have employees take earned vacation or leave during the shutdown
- Shift employees to contracts that are funded during the shutdown
- Furlough employees (or unpaid leave)

Notably, while a contractor should take actions to minimize its costs from a government shutdown, the contractor should not allow deadlines to pass. For example, any statutory deadlines for filing a protest or claim should be followed. These timelines might be tolled if the forum where you need to file is affected by the shutdown. But, there should be no such assumption. Additionally, if there are any deadlines for submitting proposals or revisions in any outstanding procurement, then contractors should presume those deadlines are still in existence (absent some contrary written indication from the contracting officer).

### Track and Account for Costs Because Some May Be Recoverable

The contractor should track the costs incurred in winding down its performance in response to a stop-work order from a government shutdown. Additionally, a contractor should also track the costs of salaries of any employees that it must keep on stand-by because it will be required to immediately commence performance at the end of the government shutdown. Such costs may be recoverable. See *Raytheon STX Corp. v. Dep't of Commerce*, GSBICA No. 14296-COM, 00-1 BCA ¶ 30,632 (awarding stand-by costs incurred during 1995-96 government shutdown). Ultimately, an equitable adjustment should be submitted for any incurred costs that are directly related to a contract and were caused by the government shutdown including demobilization, stand-by, re-mobilization, and other costs. These costs may be recoverable.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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