

How Contractors Can Mitigate Gov't Shutdown Risks

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On Oct. 1, 2013, the United States government shut down. This event — the first of its kind since the government shutdowns of 1995 and 1996 — has sparked a flurry of questions and concerns among federal contractors, subcontractors and grant recipients.

Even a brief shutdown has the potential to cause confusion and disruption to certain contracts and grants, and the longer the shutdown continues, the more disruptive it will become. Below, we provide a summary of how the shutdown came to be, what it actually means, and how contractors are likely to be impacted and what they can do about it.



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How it Came to Be: A Brief Background of the 2013 Government Shutdown

The immediate impetus for the government shutdown was the expiration at midnight on Oct. 1, 2013, of the continuing resolution funding many government activities. Congress funded fiscal 2013 through two consecutive six-month continuing resolutions.

The first continuing resolution, the Continuing Appropriations Resolution 2013 (Pub.L. 112-175), was signed by President Barack Obama on Sept. 28, 2012, and provided funding through March 27, 2013.

Its expiration and the resulting negotiations between the House, Senate and the president in March 2013 resulted in another continuing resolution, the Consolidated and Further Continuing Appropriations Act, 2013 (Pub.L. 113-6) ("CR 113-6"), which funded the government through Sept. 30, 2013 — the end of the government's fiscal year.

Negotiations in Congress to continue funding the government for fiscal 2014 failed to bear fruit before CR 113-6 expired. At that point, all unobligated funds appropriated to the government under CR 113-6 also expired, and federal agencies were left without funding for many functions.

What it Means: The Antideficiency Act and Agency Shutdown Plans

To paraphrase Mark Twain, reports of the total shutdown of the federal government are greatly exaggerated. The federal government has not completely shuttered its doors because exceptions under federal law allow important agency functions to continue despite the lack of a continuing resolution or other appropriation.

However, agency activity has been greatly curtailed, and the longer the partial shutdown goes on, the more broadly that shutdown will be felt by outside contractors or grant recipients.

The Antideficiency Act and Its Exceptions

The Antideficiency Act, 31 U.S.C. 1341 et seq., ultimately mandates a partial government shutdown when Congress fails to appropriate annual funds. With limited exceptions, the act prohibits agency officers and employees from “entering into obligations in advance of appropriations,” or from “employing federal personnel except in emergencies, unless otherwise authorized by law.”[1]

A federal employee who breaks the law has committed a federal offense punishable administratively or by fine and imprisonment. 31 U.S.C. 1349(a); 31 U.S.C. 1350.

Agency functions that fall into one of five statutory exceptions can generally continue even in the absence of appropriated funds. See 1995 DOJ Opinion, supra. These categories are:

- *Other funding sources besides 2014 annual appropriations* — Agency and government functions that are funded by something other than annual appropriations may continue. Such funds might come from multiyear appropriations, indefinite appropriations (such as Social Security), or already-obligated funds from the previous fiscal year.
- *Obligations for emergencies* — This exception allows agencies to incur obligations and order its employees to continue work, if those obligations or employees are necessary to deal with emergencies that “imminently threaten the safety of human life or the protection of property.” 31 U.S.C. 1342; 1995 DOJ Opinion, supra.
- *Express authorization* — To the extent that Congress has expressly authorized an agency by statute to obligate the government for a particular purpose, the agency can do so despite the lack of annual appropriated funds. An example of this is the Feed and Forage Act, which explicitly permits the U.S. Department of Defense to purchase certain supplies — such as clothing, food, etc. — despite the Antideficiency Act.
- *President’s constitutional duties* — This is a narrowly tailored exception allowing the executive to act despite the lack of annual appropriated funds if to do otherwise would “critically impair the exercise of constitutional functions assigned to the executive.” 1995 DOJ Opinion, supra.
- *Necessary by implication* — This is, in effect, the “elastic clause” of the Antideficiency Act. Agencies can generally continue any function implicitly necessary to enable one of the other activities allowed by the above exceptions. 1995 DOJ Opinion, supra. This exception is also used to justify the funding of certain government contracts required to support excepted activities.

Agency employees performing one of the above “excepted activities” need not be furloughed. Some agencies have taken to calling those individuals “essential employees,” though, as the undersecretary of defense noted, that is a misnomer.[2]

Agency Shutdown Contingency Plans

Each federal agency was required to submit to the Office of Management and Budget a shutdown contingency plan.[3] A list of those contingency plans is located on the OMB’s website here. Among other things, each plan provides information regarding what services will and will not be open, and

which of its employees fall into the Antideficiency Act exceptions listed above.

What to Do About It: Likely Impact on Contractors and How to Manage That Impact

Depending upon the length of the shutdown and the nature of a company's contracts with the government, impacts could vary from minimal to extreme. The least-impacted contracts or grants are likely to be those that are fully funded with 2013 appropriations and that require minimal government supervision.

The most-impacted contracts or grants are likely to be incrementally funded contracts for nonessential services, particularly where government personnel are necessary for the contractor to perform. While there is no one-size-fits-all approach, below are some of the most likely ways that contractors might be affected by the shutdown, as well as tips on how to mitigate the risk to your business.

Lack of Funding for Incrementally Funded Contracts, New Contracts and Options

Contracts and grants that are already fully funded with fiscal 2013 appropriated funds, or some other source of funds, are less likely to have to worry about the government shutdown. For example, as DOD states in its Shutdown Contingency Plan Guidance, "Contractors performing under a fully funded contract (or contract option) that was awarded prior to the expiration of appropriations may continue to provide contract services, whether in support of excepted activities or not." [4]

By contrast, however, "new contracts (including contract renewals or extensions, issuance of task orders, [or] exercise of options) may not be executed, nor may increments of funding be placed on incrementally funded contracts or to cover cost overruns, unless the contractor is supporting an excepted activity." Id.

There will be no funding for new contracts, options, incremental funding or modifications that do not relate to "excepted activities" until Congress appropriates funds.

In the short term, this is unlikely to cause problems for most contractors. If the shutdown drags on, however, it could start to have a major effect, as option periods could lapse, incremental funding could run out, or requested modifications could go unexecuted.

Practical tips:

- If you are not sure if your contracts are fully funded, ask your contracting officer. If that is not an option because he/she is furloughed, examine your contracts carefully — incrementally funded contracts should contain either the Limitation of Funds Clause, FAR 52.232-22, or the Limitation of Cost clause, FAR 52.232-20. Contracts contingent on future fiscal year funding should contain the Availability of Funds clause, FAR 52.232-18.
- Contractors are not advised to perform unfunded work since that work would be at risk. Instead, contractors are advised to seek approval of their contracting officer and further legal advice where appropriate.

Suspensions of Work or Stop-Work Orders

The government may determine that it is necessary or advantageous to suspend work on a contract or grant during the period of the shutdown. OMB has advised agencies to consider suspending work on contracts or grants for either of two reasons: (1) the lack of supervisory personnel or facilities critical for performance or (2) the performance of the contract would be wasteful during the period of the shutdown (such as performance of services for empty government facilities).[5]

Furthermore, OMB has determined that contracts can proceed even absent government employees or use of government facilities if those employees or facilities are not “critical to the contractor’s or grantee’s continued performance during the period.” Id. at 9.

Practical tips:

- Continue to perform until you receive a written stop-work order. Do not assume that your performance is stayed or you risk breaching your contract.
- If your work is stayed or delayed by the government, you may be able to recover costs of the delay. Track all of your costs, including the costs of winding down and ramping back up contract activities.
- Be aware that there are strict notice provisions and deadlines for filing claims for costs, so you should act quickly even before the government reopens to get any claims in order.

Government Payment May Be Delayed

Even if a contract is fully funded and the contractor continues to lawfully perform under that contract, it is possible that the government’s payment of the contractor’s invoices will be delayed. OMB has determined that the “activity of making contract and grant payments on a timely basis does not, by itself, qualify as [an excepted activity] under the Antideficiency Act.” Id. at 10.

Therefore, even though the contractor or grant recipient is entitled to payment, there may not be anyone resident at the government to cut the checks. A longer government shutdown could thus delay payments.

Practical tip:

- Keep track of late invoices. You may be entitled to ask for interest from the government under the Prompt Payment Act.

Furloughed Contracting Officers and Procurement Personnel Could Cause Delays

Contracting Officers and other procurement personnel have been furloughed unless they are themselves operating in support of exempted activities. See, e.g., DoD Contingency Plan, *supra* at page 6. Furloughed employees are generally not allowed to do any work remotely — not even check work-related emails on a mobile device.

Practical tips:

- If your contract is in support of exempted activities, someone should be handling it. If it is not your regular contracting officer, then the obligation may have been consolidated with another contracting officer.
- If your contract is fully funded but not in support of some exempted activity under the Antideficiency Act, it is possible your contracting officer has been furloughed. Be conservative in determining what you do absent a contracting officer's approval; the contracting officer's absence is unlikely to be a valid excuse.

Courts and Agency Boards May or May Not Be Open

If you are currently in litigation or plan to file litigation, look carefully at the website for your court or board to determine how they are handling the shutdown regarding filing deadlines and tolling. The handling of these situations is not consistent and must be determined on a case-by-case basis.

Practical tips:

- The U.S. Government Accountability Office, including its bid protest office, as of this writing, is closed due to the shutdown. Shutdown days are treated as weekend days for purposes of filing deadlines — the protest filing is due on the first day GAO resumes operation. GAO deadlines may be extended for one day for each day of the shutdown upon request.
- The U.S. Court of Federal Claims, as of this writing, is open and conducting business as normal.

Conclusion

The impact of the government shutdown on industry will depend on its duration and the types of contracts or grants involved. Remember, unless informed otherwise by the contracting officer or grant administrator, a company should make certain to meet all deadlines set in the contract and request written stop-work orders, change orders, etc., from the contracting officer.

Furthermore, document all communications with the government regarding the shutdown for your files. Contractors and grant recipients are advised to tread carefully to minimize their risk until the government reopens.

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[1] Government Operations in the Event of a Lapse in Appropriations, Department of Justice (Aug. 16, 1995), available at <http://www.justice.gov/olc/appropriations2.htm> (last accessed 10/2/2013) ("1995

DOJ Opinion”); 31 U.S.C. 1341(a)(1)(A), (B).

[2] Under Secretary of Defense Robert F. Hale, News Transcript (Sept. 27, 2013) (“[I]t’s not whether you’re essential. It’s whether the law says you’re doing an excepted activity. There are lots of essential items to keep this military going that don’t deal directly with excepted activities.”), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5308> (last accessed 10/2/2013).

[3] See OMB Circular A-11, Section 124, available at http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s124.pdf (last accessed 10/2/2013).

[4] Contingency Plan Guidance for Continuation of Essential Operations in the Absence of Available Appropriations, Dept. of Defense, at 3 (Sept. 2013) (DoD Contingency Plan), available at http://www.defense.gov/home/features/2013/0913_govtshutdown/Contingency-Plan-Guidance-Attachment.pdf (last accessed 10/2/2013).

[5] See OMB, Planning for Agency Operations during a Potential Lapse in Appropriations at 8-9 (dated September 17, 2013), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-22.pdf> (last accessed 10/2/2013).