

Client Alert: Here We Go Again – Working Through a Government Shutdown

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The government shutdown clock strikes “zero hour” on September 30, and government contractors and federal fund recipients are once again left wondering what will happen. We have been writing these alerts and client updates for years now, and the government is no better at managing its budget. So here we go again.

Why is a shutdown relevant for government contractors? The government will not be able to award new contracts, issue modifications, or exercise options that are dependent on funding that has not been appropriated. Additionally, the government may not be able to administer existing contracts, including for example inspecting and accepting goods, or even making contract payments. Yet, defying all logic, a government shutdown generally does not allow the contractor to stop work unilaterally. Government contractors must continue performance and seek to mitigate the damage.

Jenner & Block’s “top ten” list of methods for mitigating the impacts of a shutdown:

1. **Know Your Funding Source:** Take stock of your contract portfolio, including the type of contract and the funding profile. If your contract is fully funded under existing appropriations, you may not experience significant impacts from a government shutdown. If your contract is incrementally funded or may exceed a limitation of cost based on the delay, consider whether you will be working at risk during shutdown. Examine FAR 52.232-18 or -19, to understand your risks.
2. **Communicate:** Communicate with your contracting officers for each current contract to determine what are considered essential operations and what activities should cease. Proactive and clear communication up front can avoid confusion and disagreement down the line regarding which party bears the risk for continued performance.
3. **Take Stock of Contract Administration Challenges:** Who are your primary government points of contact? Will they be available? Do you have personnel that work at government sites? Communicate with your contracting officer about this issue and seek direction for how to proceed.

4. **Be Alert for Stop Work Related Issues:** The government may proactively order contractors to stop work during a shutdown. Be on the alert for any stop-work notices from the government and comply with them. If the shutdown interferes with performance of an ongoing contract, and the shutdown is lengthy, consider whether a constructive stop-work claim may exist.
5. **Manage Payments Proactively:** Recognize that your payments may be delayed and make sure you are preserving your right to recover under the Prompt Payment Act. Consider financing receivables if necessary.
6. **Segregate and Track Costs:** Track additional costs that result from the shutdown. To improve your chance of recovery, you should document areas of disruption and other effects of the shutdown. Additionally, segregate costs incurred during the shutdown into its own billing code and have your schedule team put down a marker for the start of shutdown so they can demonstrate slippage during this window. Being organized throughout the shutdown will be helpful in putting together a request for equitable adjustment, among other relief.
7. **Employee Communication Matters:** Have a plan to communicate with your employees. With the fiscal year ending on a Saturday, you may need to provide notice as to whether they should show up to work on Monday. Employees will want to know how the company is managing the shutdown.
8. **Don't Forget Your Subcontractors:** Analyze your subcontracts and provide direction. Remember, your subcontractors are just as anxious and unsure as you are.
9. **Adjust Pipeline Expectations:** Be prepared for pending procurements to be delayed. If contracting personnel are furloughed, they are not available to participate in all the effort required to award new contracts. Nonetheless, contractors should stay on top of their proposal activities as things may move quickly once the shutdown ends.
10. **Remember What Doesn't Change:** Consider litigation, protest, or other procedural deadlines, as statutory deadlines which are not extended because of the shutdown.

Jenner & Block lawyers are ready to assist you with managing the impacts of a potential government shutdown.

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