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Legal Sidebar

How a Government Shutdown Affects Government Contracts

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On December 22, 2018, funding lapsed on annual appropriations for certain government agencies, causing a partial government shutdown. This has prompted questions about how the FY2019 partial government shutdown might affect, among other things, the government's ability to solicit and award new contracts and contractors' ability to perform and to be compensated under existing contracts. The effects that the funding lapse will have on federal contracts depend in large part upon the length of the shutdown, as well as the contract's type, terms, funding source, and similar factors. In general, however, during a lapse in funding, the Antideficiency Act significantly limits an affected agency's ability to solicit and award new contracts, to obligate new funds to existing contracts, and to perform essential contract administration functions. Consequently, the shutdown may affect even fully funded contracts to some degree.

This Sidebar examines possible effects that a government shutdown could have on new and existing federal contracts. It does not address particular agencies or specific contracts. While certain agencies have issued contingency plans that provide guidance about how the funding lapse affects their contracts and procurement programs, the detail of such guidance varies by agency and contract. In some instances, agencies might have provided only general guidance applicable to all contractors that might not clearly address all relevant issues associated with individual contracts. In other instances, agency contracting officers might have provided individualized guidance or formally exercised rights under specific contracts in advance of a funding lapse. However, given the uncertainties surrounding this partial shutdown, contracting officers might not have fully addressed every individual contract in advance of the funding lapse. As a result, contracting officers may need to modify contracts or take other actions to address the impact the shutdown had on individual contracts after funding is approved.

Potential Effects on New Contracts

The Antideficiency Act—a generally applicable appropriations statute—broadly forbids federal employees from obligating funds above or in advance of an appropriation or from volunteering services to the government. Employees who violate the Antideficiency Act could be subject to employment discipline and criminal penalties. Consequently, federal agencies whose annual appropriations have lapsed generally must furlough employees and halt all activities other than those that are "excepted" from the strictures of

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the Antideficiency Act because, for instance, they "involve[e] the safety of human life or the protection of property."

In the procurement context, a funding lapse typically significantly restricts an affected agency's ability to solicit and award new contracts. An agency could potentially utilize funds appropriated outside of the annual budget cycle, such as multiple year or no-year appropriations, that may still be legally obligated during a lapse in annual appropriations to solicit or award new contracts. However, even if an agency has such funds at its disposal, the Antideficiency Act generally bars procurement personnel—who are typically funded through annual appropriations—from performing contract solicitation and award activities for non-excepted functions during a shutdown.

Potential Effects on Existing Contracts

The Antideficiency Act also might restrict an agency's ability to obligate new funds under existing contracts. This stricture potentially could implicate an agency's ability: (i) to exercise options to purchase additional goods or services under existing contracts; (ii) to modify contracts in ways that would increase the government's cost under contracts; (iii) to allow performance on certain multiyear contracts, whose terms can span more than one year; and (iv) to obligate additional funds for cost-reimbursement contracts that are funded incrementally. Moreover, as noted above, the Antideficiency Act generally prohibits non-excepted personnel authorized to approve options, modifications, and similar actions from exercising those authorities during a funding lapse.

A government shutdown also could result in the termination of a contract under certain circumstances. For example, when additional funds are not obligated after a funding limit is reached under a cost-reimbursement contract, the contract potentially could be terminated. Additionally, under certain contracts, the government's authority to exercise options to purchase additional goods or services are subject to time limits, which could expire prior to annual appropriations being provided.

A lapse in funding also could affect existing contracts that are fully funded. For instance, the performance of certain fully funded contracts could be delayed by the inability of furloughed federal procurement officers to perform essential contract administration actions, such as mandatory performance inspections or formal acceptance of deliveries and services. Similarly, even if funds are available to pay for work under a contract, payment could still be delayed because agency personnel with authorization to approve the payments are furloughed. In addition, some contracts require performance on government property, which may not be possible because some government facilities are entirely closed or largely inaccessible during a shutdown.

Potential Legal Mechanisms Under Existing Contracts to Address the Effects of a Shutdown

In some instances, it may not make fiscal sense for a contractor to perform a contract as originally contemplated during a shutdown. For example, Department of Homeland Security guidance on funding lapses states that "it may be wasteful to have a contractor perform regular trash collection every day in the offices of a federal building that has closed due to the funding lapse." In such cases, government contracts and federal acquisition law provide mechanisms by which agencies can adapt to unexpected circumstances—like a shutdown—in ways that minimize costs to the government and further other federal procurement guiding principles.

The legal mechanisms available to agencies and the costs associated with exercising them vary from contract-to-contract. For example, in some instances, an agency might formally order a contractor in advance of an imminent funding lapse to suspend or delay performance on a specific contract in accordance with a Stop-Work Order clause. Stop-Work Order clauses, which are included in certain non-construction contracts, permit agency personnel to order a contractor to "stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree." When Stop-Work Order clauses are triggered, contractors generally have a right to an “equitable adjustment” of the contract to receive “reasonable costs” associated with halting and restarting the contract. These cost adjustments are typically reached through negotiations between the agency’s procurement personnel and the contractor based on relevant facts and circumstances. When implementing stop-work orders, contractors also are generally required to “take all reasonable steps to minimize the incurrence of costs” to the government, which could force contractors to reassign employees to other projects, place employees on unpaid leave, or terminate employees, at least temporarily.

In other instances, contracting officers might unilaterally issue a change order within the scope of the contract to address changes that need to occur as a result of the funding lapse. When changes are made, the parties can negotiate a cost adjustment to address the changes when warranted.

Contracting officers, under certain circumstances, also could exercise the right to terminate a contract for the government’s convenience, which would largely limit the government’s exposure under the contract to payment for the work performed prior to the termination. For example, a clause that is commonly included in fixed-price service contracts states, in its entirety:

> The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the Government shall be liable only for payment under the payment provisions of this contract for services rendered before the effective date of termination.

In sum, the impact that a government shutdown might have on contractors and their employees can vary considerably depending on, among other factors, the length of the funding lapse, contract terms, and agency contract administration decisions. Some contractors and their employees could be largely unaffected by a funding lapse. In other cases, contracts might be modified or even terminated, which could reduce the payment that the contractor would otherwise have received under the contract and could result in the contractor’s employees being furloughed without pay or laid off.

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