

Alert

September 29, 2023



Government Shutdown Imminent: Are You Ready?

September 30 represents a number of things, the end of September, entry into autumn, and, most critically, the end of the federal government's fiscal year, to name a few. As such, the government must have a budget in place for its next fiscal year, FY2024. As has been reported broadly, at least as of the time of this article being published, no such budget and no temporary continuing budget resolution have been passed by a logjammed Congress. So what does this mean to government contractors? It is not the end of your contract, but it will likely have an impact on your efforts. There are critical steps that you should take now and over the coming weeks (depending upon how long a shutdown lasts) to preserve and protect your rights and make a proper record.

INITIAL QUESTIONS

Initially, you should have heard from your agency contracting personnel by now as to what the status of your contract is. Is it protected, funded, and continuing during a shutdown? If you have not heard anything, you need to confirm with the agency/contracting personnel you are performing work for whether there is money appropriated and available for the work to continue unabated and what the agency's plan is in this regard. Tied to this are questions such as:

1. Will the site be accessible – will security personnel and access be in place and allow your team/employees and subcontractors on site?
2. How will communications and directions with the agency be carried out?
3. How will direction from the agency occur during a shutdown?

AGENCY CONTINGENCY PLANS

Many executive agencies have contingency plans in place for the possibility of a government shutdown. Review those plans (available online) to determine if and how your projects are affected. Key to these plans and the overall impacts are not only how the relevant agency and contracting office will (or will not) operate during the shutdown but, more critically, how that will impact your teams and projects.

IMPACTS & NOTICE

Shutdowns inevitably have significant impacts on contractors. Schedules can be negatively impacted, as well as cost. Increased costs for storage of materials and equipment, delivery delays, processing of applications for payment, and receipt of payments are often delayed, and the contractor can rapidly become the "bank" having to advance monies to keep things progressing forward. Likewise, the need to carry payroll to keep personnel available can also occur.

Documenting, preferably using separate cost codes, and informing the contracting officer now that the shutdown will (or likely will) have an impact on schedule and costs is key. Do not wait for that notice. Even if done as a placeholder, with a follow-up or periodic updates to the government to allow you to make a record is critical. Notice is key, along with backup support, when the time to seek cost and schedule adjustments occurs.

CONTRACT CLAUSES



Lawrence M. Prosen

Member

lprosen@cozen.com
Phone: (202) 304-1449
Fax: (202) 861-1905

Related Practice Areas

- Construction Law
- Government Contracts

Tied to this is the need to review and understand your prime contract and FAR clauses. The last big impact on government contracting was COVID-19 (and before that, the 2019 shutdown). The difference between the two is that COVID-19 was a force majeure issue, meaning that it was not the fault of anyone (an act of God), and, for the most part, recovery was limited to a non-compensable time extension. In contrast, shutdowns are government-caused, and recovery of time and cost are real possibilities. Recognizing and understanding that even if your project is not shut down, you can still be impacted negatively is critical, as is identifying what those impacts may be.

Much of the work is performed by subcontractors. Keeping them in the loop and on notice of events and impacts and also making sure that the subcontractors supply you with the necessary notices and support to pass through any resulting damages and relief requests is equally important. Making sure you are also aware of the relevant terms of your subcontracts (items such as no damage for delay, disputes, claims, changes, notice, and the like) and following those requirements can play a key role in not only protecting your team but also the project and any resulting claims or litigation that may ensue.

PERSONNEL ISSUES

Equally important is understanding what your personnel needs and what personnel decisions, such as reductions in force or furloughs, may be needed. Following applicable labor and employment laws and providing any necessary notices plays a critical role in mitigating and reducing effects on you and the project.

CONCLUSION

It is everyone's hope that a shutdown is avoided. That being said, given Congress's current communication problems and infighting, as of now, it appears unlikely that one will be avoided. In contrast, full and proper communication is critical to government contractors to control risk and maximize an ability to recover any resulting losses. The key to all of this is notice and communication. Communicating with the agency and your employees and understanding what each needs and expects will help your efforts to mitigate impacts on your work. That communication should include notices, reservations of rights, and verification of oral discussions.

Please contact Larry Prosen or any member of Cozen O'Connor's Construction Law Group with questions or assistance navigating these issues.