

Government Contractors: Advice for the Imminent Government Shutdown

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The federal government will officially shut down at 12:01 a.m. on Sunday, October 1, unless Congress agrees to pass a spending bill or a continuing resolution. The Biden administration yesterday began notifying federal employees that a shutdown is likely. This would be the fourth government shutdown in the past ten years, the longest of which lasted 34 days. A government shutdown inevitably causes a great deal of uncertainty and can leave contractors unclear on their obligations both to the government and to their own employees. As the deadline approaches, and the likelihood of a Congressional stalemate increases, contractors should understand and plan for the effect that a shutdown may have on their businesses.

EFFECTS OF A GOVERNMENT SHUTDOWN ON CONTRACT FUNDING

A government shutdown is caused by a lapse in the government's appropriated funding. This lapse causes wide-ranging problems with contract performance, progress on rulemaking, access to federal facilities, payment schedules, and more. While a shutdown halts new appropriations, generally, it does not affect past or continuing appropriations, and thus will not halt the performance of all contracts. Contracts that are adequately funded before the shutdown may be allowed to continue unaffected, while contracts that are incrementally funded may need to be stopped. Government contracts that are negatively affected by the government shutdown will be issued stop-work orders, and prime contractors will subsequently need to pass on the stop-work orders to their subcontractors.

A federal shutdown also will cause many government employees to be furloughed and will restrict access to some government facilities. Given that some of the furloughed employees may be those responsible for processing payments to federal contractors, affected contractors should prepare for a delay in payment for work performed prior to and during the shutdown. Additionally, contractors that perform work at federal facilities may not have access to those facilities, meaning that even some fully funded contracts may be impossible to perform.

The Office of Management and Budget (OMB) is responsible for informing agencies which employees will be furloughed and which facilities will be closed during a shutdown. Many agencies have updated their contingency plans in the event of a furlough. These plans contain general information about how the agency will or will not continue to function in the event of a shutdown; however, contractor obligations will vary and should be evaluated on a case-by-case basis.

EMPLOYEE AND PAYROLL ISSUES

As a result of the shutdown, contractors may receive stop-work orders, instructing them to halt performance of all or a portion of active government contracts. While certain contract employees may be instructed to continue performance as essential personnel, others will not be permitted to perform any contract-related services during the shutdown.

During this time, contractors still have the obligation to continue to comply with state and federal employment laws, as well as all contract and solicitation requirements. When a contractor is issued a government stop-work order, it has several options on how to proceed.

First, contractors can continue to pay company employees at their normal rate of pay, despite not working. While this may be preferable for keeping up employee morale, this could become unsustainable if the shutdown lasts for an extended period of time. Second, to the extent permitted by applicable state laws, contractors can mandate that employees use PTO to make up for all or a portion of their wages.

Third, the contractor's employees can be furloughed or laid off, so long as the contractor complies with applicable state employment laws. If employees are furloughed, employers should be careful to make sure that if employee benefits are suspended, employees receive the legally required notice of that suspension.² While employees are furloughed, contractors must ensure that their employees are not performing *any* contract work from home. According to the Department of Labor, the FLSA requires that "[a]n employer must pay an exempt employee the full predetermined salary amount 'free and clear' for any week in which the employee performs any work without regard to the number of days or hours worked. However, there is no requirement that the predetermined salary be paid if the employee performs no work for an entire workweek." Given that the shutdown may begin on a Sunday, it is essential that if contractors choose to furlough employees, notices of the furlough must go out prior to any work being performed during the period covered by the furlough.

Employers should pay particular attention to employee morale during a shutdown and should craft messaging that maintains goodwill to the best extent possible. Messaging should be clear and communicate as much information to employees about the status of contracts and plans for the future as possible.

RECOMMENDATIONS

- Understand the status of funding for all your company's current contracts, including whether contracts are fully funded or, if incrementally funded, when funding will run out and the ability of the government to obligate funds despite the shutdown.³
- Plan for the issuance of stop-work orders to subcontractors.
- Communicate with contracting officers (COs) and ask for specific guidance on what specific work should and should not be performed in the event of a shutdown. Ensure that all such communications are in writing.
- Ask COs to provide a list of agency employees who will and will not be furloughed and a list of all government facilities that will be closed.
- Review the contracting agency's shutdown contingency plan.
- Carefully track any and all cost increases and schedule delays resulting from a shutdown. This includes costs incurred slowing work down and costs of ramping up post-shutdown, as they may be reimbursable by the government. Note that not all costs will be reimbursable.
- Forecast costs and create a plan for how to handle employee payroll. If choosing to furlough employees, prepare an appropriate notice to go out immediately after the shutdown begins.

² Even during a shutdown, contractors generally have an obligation to continue performance under the federal disputes clause which obligates contractors to "proceed diligently with performance of this contract, pending final resolution of any request of relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer." see FAR 52.233-1.

Such notice would need to include, among other things, consideration of the implications of rules relating to mass layoffs, such as the WARN Act, see [20 C.F.R. Part 639](#), as well as any applicable state law requirements.

The government has a limited ability to continue incurring obligations during a shutdown, such as to maintain national security, or that relates to certain obligations that are sourced by other-than annual appropriations, to address emergencies, and the like.

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