

CLIENT ALERTS

What Happens to My Company's Federal Contracts During a Government Shutdown?: A Brief Overview

Client Alert

9.27.2023

As anybody who has even glanced at the news over the last week or so is well aware, it appears, given the lack of significant movement on Congressional passage of a continuing resolution by September 30, 2023, that another government shutdown is imminent. Accordingly, federal contractors should take this opportunity to remind themselves of some practical tips for ensuring that they are well situated to endure the impacts of an increasingly likely shutdown.

Review the funding levels of your contracts to determine the likely impact of a shutdown:

The Anti-Deficiency Act, 31 U.S.C. § 1341, prohibits any federal official from obligating federal funds to acquire goods or services, that were not appropriated by Congress. It follows that any contract without previously appropriated funding (absent certain exceptions) cannot support contract performance during a shutdown. The first recommendation here is to look to see whether your contract is "fully funded." See FAR 32.703-1(a). If so, there is a greater likelihood that performance will continue even in the event of a shutdown. On the other hand, "incrementally funded" contracts (see FAR 32.703-1(b)) will most likely not have enough funding for continued performance.

Further, contracting agencies will not be able to issue new awards, execute contract modifications, or exercise options where funding has not yet been appropriated. Thus, the shutdown will undoubtedly impact any proposals that your Company has in the pipeline and push back the issuance of new options, task orders, and modifications with respect to existing contracts.

Related People

Derek Mullins
Shareholder

Related Services

Aerospace & Defense Industry
Team

Aerospace and Defense
Governmental

CLIENT ALERTS

Additionally, contractors should also note that, regardless of funding levels, a contracting agency may be forced to order a work stoppage where contract performance requires access to federal government facilities that are closed or interfacing with government employees who have been furloughed. The bottom line is that contractors must make a case-by-case analysis to determine whether continued performance is required notwithstanding a shutdown.

Pay close attention to your contracts' Stop-Work Clauses:

There is a good chance that your contract includes FAR 52.242-15 Stop Work Order, which provides, in relevant part:

- The Contracting Officer may, at any time, by written order to the Contractor, require the 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. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either-
 - Cancel the stop-work order; or
 - Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.
- If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if-
 - The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and
 - The Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon the claim submitted at any time before final payment under this contract.
- If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.
- If a stop-work order is not canceled and the work covered by the order is terminated for default, the Contracting Officer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop-work order.

CLIENT ALERTS

If it does, and a shutdown prohibits your continued performance, your Contracting Officer may issue a stop-work order. If this happens, you should be prepared to act promptly. Upon issuance of a stop-work order, the contractor should promptly cease work on the effort, as it is not entitled to reimbursement for costs of additional work performed during a shutdown following receipt of the order. Notably, the clause calls for an equitable adjustment, following cancellation of the order and the resumption of contract performance, in the enumerated circumstances. Importantly, the contractor must seek any equitable adjustment within 30 days after the lifting of the stop-work order. Finally, in the event of a termination, costs incurred as a result of the stop-work order are reimbursable under the termination clause, i.e., for convenience or default, triggered by such termination.

Communicate with your COs and subcontractors and document everything:

As noted above, there is a great deal that hinges on whether a contractor must stop work or continue contract performance notwithstanding a shutdown. It follows that a contractor must tread carefully so as to avoid the situation where it continues to perform but is not compensated for the cost of doing so. The clearest way to head off such confusion, is to seek clear direction from your contracting officer about contract performance that is to continue during the government shutdown. As an initial matter, keep in mind that the CO's themselves may end up being furloughed, so it is prudent to have these conversations as early as possible. Similarly, it is imperative that you are aligned with your subcontractors and vendors and that there is absolute clarity regarding their obligations regarding the cessation or continuation of work during a shutdown. Contractors also want to avoid the situation where they pay their subcontractors for work done which they cannot, in turn, get reimbursement for by the Government.

Relatedly, any communications regarding these issues, particularly to and from agency contracting officials, should be carefully documented, in writing, so that there is a clear paper trail regarding expectations during a government shutdown. Additionally, as noted above, certain costs resulting from the work stoppage itself may be recoverable. As such, all activities related to a shutdown, including details relating to the costs of such efforts, must be thoroughly documented. This need to document includes any and all measures taken to mitigate the costs incurred as a result of the shutdown. Such documentation will support any request for equitable adjustment that needs to be made following the resumption of contract activities (or in the event of a contract termination).

In addition to the above, contractors should be mindful of the labor and employment-related impacts associated with a Government shutdown. For example, contractors should keep top-of-mind any legal obligations should it be necessary to lay off or furlough employees as a result of work stoppages to programs employing large numbers of contractor personnel.

The foregoing is intended to be a high-level overview of some of the key considerations to take stock of in light of the impending government shutdown. Members of Butzel's Aerospace and Defense Industry Group have significant experience counseling companies on all aspects of federal procurement law. Please feel free to contact the author of this Client Alert or your Butzel attorney for more information.

CLIENT ALERTS

Derek Mullins

313.983.6944

mullins@butzel.com