

AN ALERT FROM THE BDO GOVERNMENT CONTRACTING PRACTICE

# BDO KNOWS: GOVERNMENT CONTRACTING



## ► SUBJECT

# MANAGING A CONTRACT THROUGH A GOVERNMENT SHUTDOWN

## ► BACKGROUND

The U.S. Constitution requires that all expenditures of federal funds be authorized by Congress with the approval of the president of the United States. Since the U.S. federal government operates on a fiscal year of Oct. 1 – midnight Sept. 30, a government shutdown occurs if Congress fails to pass the budget or if the president fails to sign off on the budget by midnight Sept. 30. The president also has the power to veto the budget.

In a government shutdown, the government stops providing all services except those deemed "essential" or necessary for emergencies. All non-essential government workers are furloughed without pay and all government facilities are closed.

If you are a contractor to the government, you are a service provider and you have contractual obligations to provide deliverables according to a predetermined schedule and budget. Therefore, a government shutdown can have adverse consequences to your project if not managed properly. It is imperative to understand your role as a contractor in order to minimize the impact on your customer (i.e., the government), personnel, projects and organization.

How will your contracts be affected by the shutdown? The first step in a government shutdown is to evaluate the current status of all contract work, taking into consideration funding source, the contracting agency, the nature of the effort being performed and the environment in which the work is taking place.

This typically entails taking a proactive look at your project, forecasting what activities may be affected, formulating a contingency plan to minimize impact and reaching an agreement with your contracting officer. Due to the varying nature of a government shutdown contingency plan, contractors should consider appointing a shutdown project manager to supervise the implementation of the contingency plan. While there is no "one-size-fits-all" course of action that can be implemented by all contractors, these general steps are helpful and applicable in most situations to serve as a solid foundation for successfully managing a contract through a shutdown.

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## Key Considerations and Questions When Facing a Government Shutdown

### 1. Communicate and evaluate with contracting officer(s) (CO).

When faced with a government shutdown it is imperative to communicate effectively with your contracting officer before, during and after the shutdown. Focus on evaluating activities on the critical path of your project timeline and provide your CO with a written list of these activities that will be impacted by a government shutdown. These activities are most likely impacted because they have not yet received the contracting officer's approval (COA) for funding to initiate the work. If possible, discuss obtaining approval with the CO so these activities can be initiated. If the CO does not provide COA, document the impact to the project so your performance is not negatively impacted if the delayed work becomes a significant issue or increases risk to the success of the project.

Ask specific questions and for detailed guidelines while maintaining records of all communication and instructions received from the contracting officer. For example, verify with the CO that you are going to be receiving funds for your contract performance. Keep in mind that the CO will probably not have any previous experience working through a government shutdown. If necessary, request a "stop-work order" if you will not receive enough funding for your work. Communicate with the CO and document how the shutdown will affect your ability to work and mention any increased costs due to the shutdown that you will need to recover later. Examples of key questions include the following:

- Can you complete your work during a government shutdown?

**Funding:** Fully funded contracts are least affected by the shutdown because the government should continue to pay invoices as these projects are reimbursed through revolving or multiyear appropriated funding. However, even fully funded contracts can be impacted if their ability to perform depends on access to government facilities/personnel. Incrementally funded contracts will face a lapse in receiving money, unless their services are considered necessary/emergency or their contract stipulates that funding is based on multiyear or nonannual appropriations.

**Place of contract:** Work done at a contractor's own facility is least likely to be affected, unless the work relies upon government resources that will not be available during a shutdown. In contrast, work contracted to be performed at a government facility will be unable to continue since most, if not all, facilities will be closed for the duration of the shutdown.

**Access:** All nonessential access to government facilities, personnel, and information (including classified information) will be denied in a shutdown. Even if contracting work is completed at your own facility, you must consider if the work requires government personnel to approve payments or accept deliveries of goods or services. Make sure the CO verifies which facilities will remain open, which employees should continue to work and whether contract performance should continue despite funding issues.

- If I have not received one, should I request a "stop-work order?"

Depending on your own evaluation of funding and ability to perform the contract work based on the considerations above, you can request a "stop-work order" if you conclude that you cannot complete your work in a government shutdown. If a stop-work order or suspension of work order is issued, you are entitled to a price adjustment to compensate for costs incurred due to the order. If no such order is issued, the financial impact on your contract should immediately be conveyed to the CO. The CO should be notified that you will be pursuing recovery of these costs by exercising the appropriate contract clauses such as request for equitable adjustment (REA).

**DO NOT** depend upon a CO's suggestion to "keep working, and we will work it out later" as verification that you will receive funds. Be 100 percent sure.

**DO NOT** continue working after receiving a stop-work order. The government has enacted harsh penalties via the Anti-Deficiency Act.

### 2. Cash planning

During a government shutdown, contractors need to effectively manage operating without receiving payments from the government, especially if they are incrementally funded. To best prepare for a shutdown, contractors should evaluate cash flow and find effective means to compensate and budget for their lack of funds. Methods include increasing lines of credit, contacting and informing their creditors on the situation, re-allocating business development and/or advertising budgets, and exploring other business opportunities or options in the private sector that will be unaffected by a government shutdown. Examples of key questions include the following:

- How much cash will it take to continue the business during a shutdown? Is cash sufficient to accommodate a delay in payments?
- Can you afford to pay your employees and not be reimbursed?
- Which subcontractors and vendors need to be paid and which ones can be postponed for payment?

### 3. Human resources

The impact to employees' and subcontractors' human resources needs to be considered. Employees are a valuable resource to a company, but during a shutdown, it's possible that a contractor will not have work for them, especially if a stop-work order is issued. Ideally, if the company has work outside of government contracting or multiple projects that are unaffected by the shutdown, workers can be reassigned. The key is to optimize the use of human resources during the shutdown to lower the risk that valuable employees will leave. The course of action also needs to consider the strategy for covering salaries for both the contractor's and subcontractor's workers during an unknown period of time in which the government may not be reimbursing contractors. During this downtime, rather than furloughing idle employees, it may be an ideal time to conduct mandatory training or reassign resources to complete other projects that benefit the company's organization. Examples of key questions include the following:

- Where are your employees located?

If employees are on official travel, a decision should be made on whether employees should return immediately or continue and wait out the shutdown. Consider which alternative is most suitable or cost-effective for the project.

For employees working at a government facility (off-site personnel), they also need to be considered and notified. As soon as there is knowledge of a potential shutdown, this needs to be communicated to all offsite personnel to ensure they are aware that access to the government's facilities will be denied in the event of a shutdown. If the shutdown occurs, communicate this immediately with your off-site employees.

- How to best utilize your employees if there is a shutdown?

Options include reassignment, training, vacation, furlough (last resort). Any employees already on leave, vacation or sick leave should continue in that status if they cannot be reassigned to other work.

### 4. Document

It is highly recommended that contractors document all costs and any correspondence with their contracting officer during the government shutdown. Some of these costs may be recoverable once the shutdown ends. To be more diligent and transparent in documenting costs, it is highly recommended that a contractor immediately create a separate accounting code to keep track of all shutdown-related costs. The segregation and accumulation of costs incurred due to the shut down must be well-documented along with all efforts to mitigate the incursion of such costs. No cost recovery can be made by the contractor without demonstrating that effort was made to mitigate those costs and providing extensive documentation. Documentation of the effects of schedule delays is another crucial element of successfully weathering a government shutdown. FAR 52.249-14 (a)(2) provides for the excuse of delays when caused by "acts of the government in either its sovereign or contractual capacity," which would include a government shutdown. This allows the contractor to be entitled to a schedule extension. In the event of an excusable delay, the contractor cannot be terminated for default due to failure to perform within the scheduled timeframe if the failure is caused by an excusable delay. Equitable adjustments can be made to the contracts in the event that the government seeks for the contractor to make up for lost time caused by the shutdown. Some examples of key questions include the following:

- What costs could be recoverable?

Material/vendor costs, certain employee costs, time spent winding down or ramping up contracts, unabsorbed overhead and government-ratified intervening contractual actions

- Is it beneficial to create a new accounting code to track all shutdown-related costs?
- Am I keeping record of all communication and instruction from my contracting officer?

An important document trail to keep is the communication to the CO on the impact of the government shutdown and the critical path schedule. This needs to be documented so the government agency cannot hold the contractor responsible for delays to the project timeline.

## 5. Stay punctual with deadlines.

While the government might be shutting down, many deadlines still do exist. There are many things you can do before, during and after the shutdown to keep your business on top. Examples of key questions include the following:

- How can you be proactive before a shutdown?
  - a. **Government Receivables:** Collect all government receivables before the shutdown. This is a straightforward way to be prepared for a lapse in funding.
  - b. **Options & Contract Extensions:** While they cannot be exercised during the shutdown, they can be obtained before, so look ahead to see if they would benefit your business.
  - c. **Project Manager:** If not already in place, appoint a project manager immediately to supervise the contingency planning process.
  - d. **Federal Budget Process:** Stay up-to-date and alert every year. Early warning signs of a government shutdown can be apparent starting June 30 when Congress is required to have a budget approved.
- Are you keeping up with deadlines?

Not only will staying on top of deadlines assist you during a shutdown, it will better equip you to make a quick and easy transition out of the shutdown, giving you an advantage over competition that did not adhere to the deadlines. Deadlines to consider include bid protests, claims, appeals of contracting officer's final decisions and other litigation deadlines.

A government shutdown is certainly a difficult and unfortunate event for all government contractors, but the effective and efficient management of contracts through the shutdown can provide an advantage over competition when government work is resumed. Consider the aforementioned issues and tactics during a government shutdown to ease the burden on your employees, your contracts and your organization.

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