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INTRODUCTION

Whether or not you follow politics, you have probably heard by now that there is a real possibility of a federal government shutdown beginning on March 4, 2011 without a continuing resolution or new budget. At Centre, we have been receiving a voluminous number of inquiries about this contingency seeking general guidance. While only our attorneys can give you legal advice after speaking with you about your specific situation, we are releasing this White Paper to provide a general understanding as to what happens in the event of a government shutdown. We can also provide attachments which allow for further reading at your request.¹ Of course, after reading this, please feel free to contact us (our contact information is at the end) for further information about this or any other issues you may have.

Initially, we cannot emphasize enough the importance of being in contact with your Contracting Officer (“CO”) as the chance of a government shutdown becomes more real. Hopefully your CO can provide you guidance as to whether your contract would be affected by a shutdown and if it is, what actions you should take – such as the proper protocol for winding down and receiving reimbursements for doing so.

A BRIEF HISTORY

There have been few occasions that the federal government (the “Government”) has been shut down for more than a few days.² Further, the last time that the Government was shut down

¹ These additional attachments, which will be referenced in this Memorandum, include OMB Memorandum 95-18 (the “Dellinger Memorandum”), 31 U.S.C. §1341 (also known as the Antideficiency Act), 31 U.S.C. §1342, and Harvard Law School’s Federal Budget Policy Seminar Briefing Paper No. 10 entitled *Government Shutdowns* by Puja Seam and Brad Shron last updated on May 4, 2005 (the “Harvard Briefing Paper”). There is also an Opinion of Attorney General Civiletti from 1981 that is widely cited. The contents of that 1981 Memorandum were large wrapped into the Dellinger Memorandum.

² We should note at the outset that a Government shutdown does not mean the entire federal government shuts down. Essential services necessary for the safety, health, and welfare of the American people (such as law enforcement or air traffic control – while airplanes are still in the air) do continue.

for an extended period in December 1995 and January 1996, the Government was far less reliant on contractors. As such, what would happen in the event of a lengthy shutdown to contractors today is largely unknown. To make matters more difficult for contractors, there are few laws, rules, regulations that govern this contingency. The few there are, are discussed here.

The most infamous shutdown occurred during Bill Clinton's first administration. As you probably know, just as it does now, the Government's budgetary year began on October 1. Unable to agree on a budget in 1995, Congress passed and President Clinton signed a "continuing resolution" to continue funding the Government until midnight on November 13, 1995. In his memoir, *My Life*, President Clinton details a meeting between Al Gore, Dick Armey, and Bob Dole that resulted in an impasse when the parties could not agree on a level for Medicare funding. On Tuesday, November 14, 1995, the Government began the process of shutting down and remained so until November 19, 1995 when the parties agreed to a continuing resolution through December 15, 1995. During this period, nearly 800,000 non-essential workers were furloughed.

On December 15, 1995, the parties could still not agree on a funding bill for the Government resulting in a funding lapse and a Government shutdown. While both sides dug in, Newt Gingrich had his own view of the cause of the shutdown (as told by Tom Delay in his book *No Retreat, No Surrender: One American's Fight*):

[Newt Gingrich] told a room full of reporters that he forced the shutdown because Clinton had rudely made him and Bob Dole sit at the back of Air Force One... Newt had been careless to say such a thing, and now the whole moral tone of the shutdown had been lost. What had been a noble battle for fiscal sanity began to look like the tirade of a spoiled child. The revolution, I can tell you, was never the same.



Without apportioning blame or a "scorecard" as to who won, the parties did come to an agreement and the shutdown ended 21 days later – on January 6, 1996.

WHAT CAUSES A GOVERNMENT SHUTDOWN?

In short, government shutdowns are caused by funding lapses.³ In general, the Government is funded through appropriations from Congress. Article 1, Section 9, clause 7 of

³ A second way the government could be shut down is if the debt ceiling is not raised and the Government runs out of money. This contingency is not addressed in this White Paper.

the United States Constitution provides that “[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law.” For that reason, no one is permitted to obligate the Government unless an appropriation has been made to fund that obligation. This clause in the Constitution is echoed by Title 31 of the United States Code. More specifically, 31 U.S.C. § 1341 (commonly known as the “Antideficiency Act”) provides in relevant part that:

- (a)(1) An officer or employee of the United States Government...may not-
 - (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
 - (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law...

Consequently, the Government cannot operate without the appropriate funding in place. Though there are some exceptions, without funding, work must cease.

The next question is usually, what happens if a contractor continues to work during a shutdown even though their contract is not funded? Can the contractor get paid later? We’ll detail this more later on, but in a word, the answer is “no.” The basis for this is 31 U.S.C. § 1342, which provides in relevant part that:

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.

Essentially, if a contractor continued to provide goods and/or services gratis with the expectation of future payment, they do so at their own peril because statutorily, the Government is prevented from accepting voluntary services.

To complicate matters further, there are essentially two types of shutdowns. One is a “hard” shutdown (which is being discussed in this White Paper) which implicates all non-essential and non-exempt government employees and contracts. Occasionally there are “soft” shutdowns where the expectation is the shutdown will last for a very short period of time (less than a day or so) and work mostly continues on as normal. While this kind of shutdown would create a whole different set of problems/issues, it is not addressed here.

WHAT KINDS OF CONTRACTS ARE AFFECTED BY A SHUTDOWN?⁴

There are numerous types of contracts that would be exempted from a Government shutdown. As detailed in the Dellinger Memorandum, they include:

⁴ *The information provided herein is not legal advice and should not be construed and relied on as such. Moreover, each situation is different. For each of the general rules outlined here, there are exceptions. Should you wish for a legal opinion, we advise to contact us or another attorney with expertise in this area who can guide you based on your particular situation.*

1. Contracts Not Funded by 2011 Annual Appropriations: contracts that are obligated on an indefinite or multi-year basis and contracts that are for a fixed price where the funds were already obligated at the time of contract execution will probably not be affected by a shutdown since those contracts do not rely on new funding upon expiration of the continuing resolution.
2. Express Authorization from Congress: one example detailed in the Dellinger Memorandum is the “food and forage” authority given to DoD to authorize contracting for troop clothing, food, and supplies without an appropriation from Congress.
3. Implied Authorization such as supplies necessary to continue allowable emergency services or other approved activities such as the ink or paper for processing outgoing social security checks.
4. Obligations Necessary to Discharge the President’s Constitutional Duties: though this is as limited as possible and depends on the underlying set of facts.
5. Personal or Voluntary Services for Emergencies as defined in 31 U.S.C. §1342. As will be detailed below, this is a highly discretionary category that requires consultation with your CO.

For ease of reference, we’ll refer to these types of contracts detailed above as the “Unaffected Contracts.”

On the other hand, with some exceptions, (1) Cost-Type contracts (because of the Anti-Deficiency Act), (2) time and materials (“T & M”) contracts (because of the Anti-Deficiency Act), and (3) Indefinite Delivery – Indefinite Quantity (“IDIQ”) contracts (the Government would not be able to place new orders) will be affected by a Government shutdown. For ease of reference, we’ll refer to these types of contracts as the “Affected Contracts.”

If you have an Affected Contract, it is important to do a number of things immediately, including:

1. Take an inventory of your contracts and contact your CO – do not wait for the Government to contact you. Your CO will probably be overwhelmed with inquiries and will probably not seek you out;
2. Determine whether your Affected Contract falls under an exception noted above;
3. Document all wind-down costs; and
4. Create separate billing categories in conjunction with your accounting department for wind-down, wind-up and contingency costs.

The above are general rules to which there are always exceptions. Based on past experience, the kinds of services that are exempt is determined by the agency. However, it is

inevitable that whether some contracts continue during a shutdown or not will be determined on a case-by-case basis.

The area which allows for the largest amount of discretion is the exception “for emergencies involving the safety of human life or the protection of property.” While every contract is important to the Government (otherwise there would never have been a procurement), only a narrow category of contracts fall within this exception.

Unfortunately, while this exception was discussed in detail in the Dellinger Memorandum few answers were offered. Some calls are much easier than others. For instance, if a company has a contract to provide security for Capitol Hill, that contract will be exempt from a shutdown. However, what about meat inspectors? What about air traffic controllers? It is clear that air traffic controllers would be exempt while airplanes were still airborne, but what about once they all landed? A lack of air traffic controllers would surely disrupt the private economy, but not necessarily result in the imminent risk to human life or property. When Congress amended 31 U.S.C. §1342 in 1990, it added the following sentence at the end:

As used in this section, the term “emergencies involving the safety of human life or the protection of property” does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

While this language did not change the meaning of the statute (because that language was essentially already employed in the statute), it had the effect of emphasizing Congress’ narrow view of this exception.

All this means is that we will probably not know how the close calls fall until a Government shutdown occurs. Thus, it is doubly important for contractors that have close call contracts to contact their CO and at least open a dialogue (if not push up the chain of command), or obtain a determination of some kind.

Even if you have an Unaffected Contract, a contractor may be forced to stop working in the event of a shutdown because the contract requires guidance/approval from government employees or access to a government building that would not be accessible.

Of course, you can contact us and we can look at your contract and provide further guidance.

HOW WORK STOPS

Once again, if a shutdown occurs, everyone will be in uncharted waters. It is much less complicated for the Government to shut itself down than shutting down contractor work with all the legal, regulatory, and cost implications involved.

The cleanest and easiest way for a CO to stop work in the event of a shutdown would be to issue a stop work order pursuant to FAR §52.242-15. However, the more likely scenario would be that instead of individual stop work orders, broad guidance would be issued for all

contractors to follow. Of course, if it is not specific enough, such guidance can easily raise more questions than answer.

The CO has a wide range of discretion and by contacting her or him ahead of time, contractors can possibly work out a stop plan prior to a shutdown.

Moreover, it is important for contractors to do the following while shutting down: (1) mitigate any damages/losses/expenses; (2) document every cost or expense; and (3) account and document everything that is done. By following these steps, contractors will have a greater chance of recovering the costs associated with shutting down.

Further, it is also important for contractors to know where their employees are. The Government shutdown would be worldwide, so for contractors overseas, determinations have to be made with what to do with overseas employees to mitigate costs. In some instances it may make monetary sense to keep those employees overseas for a short period of time instead of bringing them home on the next available flight without regard to expense.

RAMIFICATIONS FOR EMPLOYEES AND EMPLOYERS

In the past, Government shutdowns have resulted in back pay for furloughed federal employees. However, contractors will likely not be compensated for lost time requiring the contractor to pay their employees' salaries without the benefit of the income used to support their salaries.

The following are some additional options for employers:

1. Reassign employees to other contracts/projects that are still ongoing;
2. Ask employees to take outstanding vacation/leave time;
3. Require employees to take overdue or needed training; and
4. As a last resort, furlough affected employees.

Each situation will, of course, be different depending on each contractor's business situation and the best guess on how long a shutdown will last.

Some additional considerations for employers will be whether other operations supported by the Affected Contract will be able to continue such as bid and proposal costs or general office overhead and operations and if not – at what cost?

WHAT IS RECOVERABLE?

All is not lost – expenses incurred because of a shutdown are usually recoverable (when the shutdown ends). Normal winding down expenses such as unabsorbed overhead, material cost, employee costs (including costs of extending employment contracts) can be recovered. However, back pay and consequential damages will not be recoverable.

There may be some flexibility in obtaining shutdown or startup costs using equitable adjustments or ratification of intervening contractual activities.

SOME SPECIFIC ISSUES

IT/Internet contracts pose a specific problem. For instance, if a government agency hosts a website that has some unaffected services and some affected services, is the website still hosted or does it go offline if it can not be separated out?

Also, some subcontractors working on multiple programs have to ensure they continue working on the correct contracts and prime contractors need to ensure the proper flow down clauses are in the subcontracts.

Further, because new funds cannot be obligated, contracts which would be affected by a shutdown cannot be executed because the government can not obligate new funds without funding. Of course, if a procurement is still in the bidding process, it is important to contact the CO to see what would happen in the event of a shutdown. It may be best to request a modification extending the closing date for a period of time if it is close to March 4, 2011.

It is important to note that court/protest deadlines are likely to be unaffected by a shutdown although it is unknown at this time what happens to a protest if there is no one there to receive it.

The Congressional Research Service also released some guidance last month. Though helpful, it mostly focuses on the government and barely mentions contractors. It is available here: <http://www.fas.org/sgp/crs/misc/RL34680.pdf>.

[Next Page]

CONCLUSION

The possible Government shutdown has raised a lot of unresolved issues. Unfortunately, there is no bright line rule (each case is different) and no provision of the FAR that deals with this.

If you are a contractor, it is important to:

- ✓ Take an inventory of your current contracts;
- ✓ Contact your CO to get an understanding if and how your contract will be affected. If the CO does not know or is unwilling to help, push your request up the chain of command;
- ✓ Stay in constant communication with all parties;
- ✓ Document everything you do and save all evidence of payments;
- ✓ Account for everything you do in winding down and starting up.
- ✓ Mitigate your costs whenever possible; and
- ✓ Seek recovery of your expenses as soon as possible.

What happens to each particular contract depends on the type of contract, how it is funded and whether it falls under an exception noted above. If you are still unsure what to do, we invite you to contact us for further information.

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