

With Short-Term Budget Deal Proposed, Risks of Government Shutdown Still Loom

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What: To avert the latest government “shutdown” threat, Congress announced Wednesday that it will move forward with a short-term spending plan through next Friday, May 5, to allow more time to negotiate an expected longer-term appropriations deal. As yet another shutdown threat appears to be avoided for at least a week, contractors should take this opportunity to refresh their shutdown contingency plans. Negotiations over tax reform, the debt ceiling, health care, immigration, and other major contentious issues could prompt a shutdown threat to return with some frequency—or even as soon as next Friday.

When: May 5 (or perhaps this week).

What Does It Mean for Industry: Unpredictability has been a hallmark of the Trump administration’s first 100 days, so any outcome has to remain in play even as news reports predict that budget deals will be reached this week and again by May 5. Thus, whether or not accustomed to budget brinksmanship and government-by-continuing-resolution, contractors should update their shutdown plans and consider the following five activities to prepare for future shutdown threats:

1. Inventory your contracts and understand how they are funded.

Recognize that the term “shutdown” can be a misnomer and that a funding lapse may halt performance under some contracts but not others. Although the Anti-Deficiency Act generally prohibits Government officials from making payments or incurring obligations in excess of available funds or before funds are appropriated, many contracts are “fully funded”—i.e., funds have already been obligated

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to cover the price of a fixed-price contract or the estimated cost of a cost-reimbursable contract. FAR 32.703-1. A lapse in funding on April 29th will not directly affect performance of these contracts. To be sure, myriad complications can arise if performance depends on Government employees that are furloughed, Government facilities that are closed, or other Government contracts that do require additional funding during the lapse. For these reasons, and others, the Government may stop work under contracts that are otherwise fully funded. Similarly, a funding lapse may affect fully funded contracts if performance is expected to exceed the estimated cost due to changes or delays or other events for which a cost adjustment is typically available.

A funding lapse will more likely have a direct effect on contracts that are incrementally funded or contracts that were awarded before funds became available and that were subject to FAR 52.232-18, the Availability of Funds clause. For these contracts, continued performance will very likely depend on the Government's ability to obligate funds after April 29.

But even for these contracts, the Anti-Deficiency Act may not require shutting down performance because the Act has long been interpreted to recognize several narrow exceptions that permit the Government to operate on a limited basis. These interpretations, contained in Attorney General Opinions from 1981 and 1995, indicate that the following obligations can be incurred during a funding lapse in annual funding:

- Obligations not affected by a lapse in annual appropriations, namely those funded by multi-year or indefinite ("no-year") appropriations—as opposed to annual appropriations—as well as obligations otherwise authorized outside of the annual appropriations bills;
- Obligations necessary to the discharge of the President's constitutional duties and powers, including certain national-security and foreign-relations functions;
- Government services "for emergencies involving the safety of human life or the protection of property"; and
- Obligations for limited support activities necessary for operations that will otherwise continue.

Making (or reviewing) an inventory of your Government contracts with these distinctions in mind will help you identify the contracts most likely to be affected by a funding lapse, and will permit you to have an informed dialogue with your contracting officers (COs).

2. Obtain written direction from your contracting officer regarding his/her expectations for performance under each contract.

For every contract, whether or not you expect it to be idled, communicate with your CO and ask for clear direction on which activities, if any, should continue during a funding lapse. The Office of Management and Budget (OMB) is responsible for issuing instructions to federal agencies about funding lapses, including direction as to which employees/activities will be continued. Agencies write internal plans based on those instructions, and COs in turn should instruct contractors based on their agencies' plans.

These instructions should address whether government personnel will work during the shutdown, as well as whether your contract's services will continue. Confirming these two points is important. For example, your contract might be funded through multi-year appropriations but require performance at a government facility that will close during a shutdown. These types of scenarios, along with varying terminology used to describe services that may continue during a shutdown ("essential," "excepted," "exempted," etc.), highlight the importance of communicating with your CO to understand exactly what your customer agency plans to do if a shutdown occurs.

Communication with the CO is particularly important for incrementally funded contracts subject to the Limitation of Funds clause, FAR 52.232-22, and for cost-reimbursable contracts subject to the Limitation of Cost clause, FAR 52.232-20. Under these clauses, the Government generally is not obligated to pay more than the funding currently allotted to incrementally funded contracts (or the estimated cost of fully funded contracts). The contractor must notify the CO in advance if it expects performance to cost more than has been allotted, and the CO must then notify the contractor that additional funds have been allotted to cover the increased cost of performance.

Absent notice from the CO, the Government generally is not obligated to reimburse a contractor for any increased costs it may incur. In the event of a funding lapse, the Government may not be able to obligate additional funds and provide the necessary notice to the contractor. Without that notice, the contractor faces the prospect of continuing its work at risk, a decision often complicated by informal pressure from the Government—typically from officials other than the CO—to continue performance notwithstanding the clauses. This in turn can lead to disputes over whether the Government bears liability for continued performance. Contractors can limit this risk and deflect informal pressure, though, by getting explicit written instructions from the CO about whether to continue performance.

Communication with the CO is also important because the effect of a funding lapse on Government operations may indirectly affect your contract performance in many ways. Both parties should attempt to predict and estimate these impacts as best they can so that clear direction can be provided that will minimize later disputes. For example, for a contract that is otherwise adequately funded, continued performance may prove impractical or undesirable because the Government has furloughed employees or closed facilities that are needed for performance.

In such a situation, it may be appropriate for the Government to issue a stop-work order under FAR 52.242-15 or, for construction contracts, a suspension-of-work order under FAR 52.242-14. Other challenges can be addressed through formal change orders under the contract's Changes or Government Delay of Work clauses. Following the processes set out in these clauses will help to avoid unnecessary costs fighting over the scope of liability for "constructive" suspensions and changes.

3. Record everything.

Start by documenting the communications with the CO discussed above, as well as any instructions or guidance provided by the Government about the availability of Government personnel, facilities, and other resources that you need to perform your contracts. Then, if a funding lapse does occur, keep detailed records of all work your employees perform under all your contracts. Where feasible, consider creating new accounting codes for these periods—especially to capture time spent winding down idled contracts and starting them back up. Track other costs as well, such as expenses incurred to bring home idled employees from remote locations.

Also record your efforts to minimize any increased costs incurred as a result of a funding lapse. For example, although you may re-deploy or furlough some idled employees, re-deploying other employees—and then deploying them back to their original workstation—may be prohibitively expensive. To the extent practical, the rationale for these tradeoffs should be documented. By keeping these records, your organization will be prepared to support your requests for compensation after the Government has resumed normal operations.

4. Plan for delayed competition and award of contracts in your pipeline.

Your planning should consider future contract awards. During a funding lapse, the Government cannot obligate annual funds to commence performance on new contracts. As a result, new contracts may not be awarded and options may not be exercised without the sort of disclaimer found at FAR 52.232-18, Availability of Funds. Yet even where funding is available under one of the exceptions listed above, it is possible that agencies may furlough some or all of the employees who issue solicitations, evaluate proposals, and make award decisions. As a result, some proposals that your organization has submitted may not be reviewed during a shutdown and may be awarded much later than you anticipate.

5. Comply with proposal and litigation deadlines.

Even though contract awards may be delayed, Government officials furloughed, and Government facilities closed, assume that deadlines remain unchanged, especially with respect to the time periods for filing bid protests and appealing CO final decisions. Plan on meeting all solicitation deadlines for bid and proposal submissions, and inquire with the contracting agency for further instructions. Although some litigation deadlines may be tolled in limited circumstances, these rules vary by forum and by deadline. The safest approach is to assume that all deadlines remain unchanged.

Wiley Rein has experience counseling clients before and after shutdowns and will be ready to help your organization navigate the brinksmanship and aftermath.