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Contractors in the Crosshairs – Weathering the 2019 Government Shutdown

By Alexander Major & Franklin Turner

Here we are again. Large swaths of the federal government have been closed since December 22 because Congress and the president cannot agree on legislation to fund the government. Nearly a million federal employees are not receiving their paychecks. Even larger numbers of government contractors are – as is often the case – left squarely at the bottom of the hill, dodging the boulders of political mismanagement that are raining down in a landslide of “stop-work” orders. For example, as has been reported, the Department of Homeland Security’s Federal Emergency Management Agency (FEMA) took affirmative steps to publicize and issue a “blanket” stop-work order on December 26 – *the day after Christmas* – giving many affected contractors a post-holiday cocktail of uncertainty and dread. Other agencies have followed suit, with the Departments of Justice, Agriculture, Commerce, Housing and Urban Development, Interior, State, Transportation, and Treasury issuing such orders over the past few weeks.

From a legal perspective, the government has the authority to require a contractor to stop all or any part of the work at the government’s convenience. This authority takes various forms and is distilled in numerous federal acquisition regulation (FAR) clauses. Without question, the most prominent FAR clause utilized by the government in these situations is FAR 52.242-15, Stop-Work Order. As a general matter, the clause permits the government to stop work on the contract for a term of up to 90 days and allows the period to be extended by mutual agreement of the parties. As is typical in our heavily regulated world, the devil is in the details – and contractors who overlook the details will find themselves dancing with a very unfriendly devil. Accordingly, we offer the following guidance for your consideration as you lace up your dancing shoes in the pale moonlight:

1. Oral stop-work orders do not suffice. If you have been told to stop work on a contract, insist that the contracting officer – and only the contracting officer – produce the order in writing and transmit it to your company.
2. Once your company receives the stop-work order, contact the contracting officer - in writing - to confirm your obligations as you understand them. In particular, you are required to comply with the precise terms of the order – *i.e.*, you must immediately stop work as specified in the order – and you must also minimize the incurrence of costs allocable to the work covered by the order.
3. Specifically ask the contracting officer to confirm – in writing – that the government has funding available to meet all existing contract obligations. Under no circumstances should you work “at risk” if your contract is not funded.
4. Instruct all affected employees and subcontractors to immediately refrain from working on the contract at issue.
5. Carefully track the cost and schedule impacts of the stop-work order. FAR 52.242-15 allows the contractor to request an equitable adjustment to extend the delivery schedule and/or increase the contract price to account for the impacts of the government’s demand.
6. If your project is fully funded, you should not stop work until expressly told to do so unless (a) the project requires engagement with an absent government official or (b) the government denies your company appropriate physical access to facilities.
7. Understand that Government employees who are furloughed – *i.e.*, placed in a non-work, non-pay status – will be legally prohibited from performing any work on the contract and may not respond to inquiries.
8. Document *everything*. Every attempt to communicate with the Government during the shutdown should be reduced to writing, and you should memorialize any actions that had to be taken in the contracting officer’s absence.

9. If the stop-work order is cancelled or if the period covered by the order expires, you are permitted to resume work. That said, you should receive the contracting officer's written authorization to continue work before you instruct any employees and/or subcontractors to reengage.
10. If you have any questions regarding your shutdown-related obligations, the clauses in your contract, the status of your employees, or the allowability of costs you may be incurring during the shutdown, consult with legal counsel immediately.

In light of the Beltway rhetoric growing increasingly intractable, we sadly suspect that the Government will find itself at an impasse for at least a few additional weeks. The upside, of course, is that this won't go on forever and the Government will again reopen their doors and coffers. The McCarter and English Government Contracts and Export Controls team is here to assist you during this uneasy period to ensure that your company appropriately mitigates all risks and that it receives all compensation to which you are entitled.



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