

Bracing for Impact: How Contractors Can Manage Their Risk During a Government Shutdown

Government Contracts Alert

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As the potential for a Government shutdown gets closer to reality with each passing minute, United States Government contractors and subcontractors may soon find themselves in a confusing position as to what actions they should take in light of their existing contract obligations. In an effort to resolve that confusion, the Department of Defense has released [guidance](#) to be used by its elements and contracts in the event of a Government shutdown tonight. While directly applicable to Defense activities and constituent contracts, the guidance may assist other non-Defense contractors in addressing some of their questions or concerns.

Noteworthy in this guidance is an attachment that contains a description of “essential operations” that may continue in the absence of appropriations. Although this guidance is specifically tailored to the Department of Defense, it will apply broadly across civilian agencies as well. Contractors should carefully check their specific contracts and confer with their contracting officers immediately to determine whether their Government customer’s funding source will be affected by the lapse in appropriations.

Here are some important excerpts from the guidance:

- “Contractors performing under a fully funded contract (or contract option) that was awarded prior to the expiration of appropriations may continue to provide contract services, whether in support of excepted activities [*i.e.*, essential operations] or not.”
- “[N]ew contracts (including contract renewals or extensions, issuance of task orders, exercise of options) may not be executed, nor may increments of funding be placed on incrementally funded contracts or to cover cost overruns, unless the contractor is supporting an excepted activity. No funds will be available to pay such new contract or place additional increments of funding on contracts until Congress appropriates additional funds.”
- “The expiration of an appropriation does not require the termination of contracts (or issuance of stop work orders) funded by that appropriation unless a new obligation of funds is required under the contract and the contract is not required to support an excepted activity.”
- “In cases where additional funding is required and/or oversight, engagement, or inspection by Federal employees who have been furloughed is critical to successful performance under the contract and the contract is not required to support an

excepted activity, the issuance of a stop work order or the termination of the contract may be required.”

- “The Department may continue to enter into new contracts, or place task orders under existing contracts, to obtain supplies and services necessary to carry out or support excepted activities even though there are no available appropriations. It is emphasized that this authority is to be exercised only when determined to be necessary – where delay in contracting would create an imminent risk to the safety of human life or the protection of property, including endangering national security.”

What to Remember During the Shutdown

With that guidance in mind, here are some key points that federal contractors need to consider in the event of a shutdown:

1. If you can, contact your contracting officer in writing immediately to confirm your obligations, as you understand them. Specifically ask the contracting officer to confirm – in writing – that the Government has funding available to meet your existing contract obligations.
2. Any guidance before or during the shutdown should come from the contracting officer. If another Government employee (e.g., the Contracting Officer’s Representative) contacts you to discuss your shutdown-related obligations, ensure that the Contracting Officer is immediately brought into the conversation.
3. Under no circumstances should you “work at risk” if your contracts are not funded.
4. Communicate your company’s position to all affected employees and understand where all affected employees are located.
5. Communicate your company’s position to all affected subcontractors and understand where all affected subcontractors are located.
6. Contractors on fully funded projects should not stop work until expressly told to do so unless (a) it requires engagement with a Government official for the work to be done or (b) the Government actually denies contractors appropriate physical access to facilities.
7. Contractors should be aware that Government employees who are furloughed (placed in a non-work, non-pay status) will be legally prohibited from performing any work and may not respond to inquiries.
8. Record and document everything – this includes every attempt to communicate with the Government during the shutdown and memorializing any actions that had to be taken when/if the contracting officer was unavailable.
9. Remember, unforeseen costs incurred because of the shutdown and/or the Government’s actions or inactions may be reimbursable through an equitable adjustment or a contract claim.
10. If you have any questions regarding your shutdown-related obligations, consult with legal counsel immediately.