

Preparing for a Government Shutdown

How Government Contractors Should Prepare and What Remedies are Available

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Co-Presented by



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Current Funding (CR) Status

- We are currently operating under a 14-day CR that reduces spending by \$4.0 billion from current (FY 2010) levels that will expire at midnight, March 18.
- On March 9, the Senate voted on both the House-passed 7-month CR that cut \$61 billion from current levels and contained numerous policy riders and the Senate alternative that cut \$6.1 billion from current levels and was purged of all policy riders. By unanimous consent agreement, both votes required 60 votes to pass the Senate and neither bill met the threshold.
- Negotiations are reported to be continuing with the White House and congressional leaders participating in the hopes of coming up with an agreement for the remainder of FY 2011.
- The House is scheduled to vote this week on the sixth CR for FY 2011 to allow funding for three more weeks (April 5) including reductions of an additional \$6.0 billion from current levels to allow time for the budget talks to continue.

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Current Funding Status

- Beyond the three week extension, there is currently no clear game plan in the House or the Senate.
- The longer the situation progresses without a game plan, the more likely it is that a shutdown of some form will occur.
- Numerous programs are being targeted for reduction/elimination, including:
 - Construction projects;
 - Research and development programs; and
 - State and local law enforcement projects.

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General Considerations

- For government contractors, a government shutdown will be inconvenient at best, catastrophic at worst. Without proper planning, even contractors on exempt contracts will be adversely affected.
- A government shutdown \neq a government *contractor* shutdown. Don't stop working until a stop-work order is received; however, without a stop-work order, contractors may need to consider stopping work if incremental funding is exhausted.
- There is no "one size fits all" approach, and every contractor must individually assess each contract. Contractors should consider appointing a "shutdown" project manager to supervise their contingency planning.

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General Considerations (cont'd)

- A shutdown will affect different types of contractors differently. Contingency planning should not be the same for contractors providing labor or equipment versus those providing technology or other services.
 - For example, how broadly the government defines “exempt” programs might unevenly impact technology contractors that support back-office functions, essential functions, and back-office functions that support essential functions.
- Four overriding, contract-by-contract considerations will dominate contingency planning for individual contracts:
 - The amount and type of contract funding
 - The place of contract performance
 - The period of contract performance
 - The contract statement of work

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What to Expect?

- Some specific consequences of a government shutdown include the following:
 - No incremental funding for incrementally funded contracts
 - No new contracts or modifications to existing contracts
 - Unexercised and deferred contract options
 - Closed, inaccessible government facilities
 - Furloughed government contracting officers and acquisition personnel, delaying ongoing procurements and existing contracts
 - Furloughed government finance employees, delaying payment
 - Continuing and increasing indirect expenditures

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What to Do: A Six-Step Action Plan

1. Inventory and evaluate your contracts
2. Contact the contracting officer
3. Prepare employees and subcontractors
4. Protect your business
5. Document all expenses, actions, and correspondence
6. Don't forget deadlines

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Step 1: Inventory and Evaluate Contracts

- Contingency planning for a contract “inventory” should account for the four “overriding” considerations we previously discussed.
 - Consideration #1: The amount and type of contract funding
 - Fully funded contracts will be the least affected, although furloughed employees, facility closures, delayed performance, and unexpected costs might lead to a stop-work order or lapse
 - Continued funding for incrementally funded contracts likely will lapse, although there may be exceptions for necessary or emergency operations, or for multi-year or non-annual appropriations
 - Consideration #2: The place of contract performance
 - Work performed at a contractor facility is less likely to be affected; work performed at a government facility may be affected if the facility is shutdown or the government employees are furloughed

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Step 1: Inventory and Evaluate Contracts (Cont'd)

- Contract considerations (cont'd)
 - Consideration #3: The period of contract performance
 - Options and contract extensions cannot be exercised during the shutdown, but could be obtained early, pre-shutdown
 - Consideration #4: The statement of work
 - Funding likely will continue for necessary or emergency contracts
 - Still, any contract will be affected if its statement of work requires otherwise routine interaction with soon-to-be furloughed government employees
- Ultimately, in advance of contacting contracting officers, contractors should independently assess whether contracts are likely to be exempt from the shutdown and, regardless of status, if it will be possible or impossible to perform the contracts, respectively.

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Step 2: Contact the Contracting Officer

- Coordinate with the contracting officer for each contract. Ask specific questions, seek specific directions, and maintain a comprehensive record of all communication and instructions.
- Verify which facilities will be open, which employees should continue working, and whether contract performance should continue, notwithstanding a lapse in funding or increased performance costs.
- If necessary, request a stop-work order. Do not rely on a contracting officer's advice to "keep working, and we will work it out later."
- Advise the contracting officer of how the shutdown will impact existing and future work, and if you later will request a recovery of any increased expenses owing to the shutdown by exercising a contract changes clause or termination clause.

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Step 3: Prepare Employees and Subcontractors

- A proper contingency plan will both mitigate and document costs.
- Employees
 - Reassign idle employees to exempt or unaffected programs, training sessions, or vacation
 - Employees should be furloughed only after consultation with HR departments
- Subcontractors
 - Direction to subcontractors should come from the prime contractor, not the contracting officer
 - Determine whether subcontracts have pertinent provisions like a Limitation of Funds clause

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Step 4: Protect Your Business

- The 1995 shutdown lasted three weeks, and subsequent payment delays lasted for 1 to 2 months. Contractors should prepare for a lengthy period without payment on non-exempt contracts.
- If possible, collect government receivables before the shutdown arrives.
- Contact and advise creditors, evaluate cash reserves, and consider increasing lines of credit.
- Consider which subcontractors and vendors will be paid, and in what order.
- Reallocate business development and advertising budgets, as necessary, and consider private-sector business options.

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Step 5: Document All Expenses, Actions, and Correspondence

- Consider creating new accounting codes to track shutdown-related costs.
 - These may include material/vendor costs, the time spent winding-down or ramping-up contracts, certain employee costs, ‘unabsorbed’ overhead, and government-ratified intervening contractual actions, among others
 - Track all costs diligently and comprehensively
- Document all correspondence with the contracting officer, including instructions or directions for contract performance and assurances of payment.
- Record any actions taken to mitigate costs to the government.

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Step 6: Don't Forget Deadlines

- Although the government might shut down, assume that government-related deadlines remain unaffected.
- Unless otherwise advised by a responsible party, comply with the necessary deadlines for:
 - Solicitation deadlines;
 - Bid protests;
 - Claims;
 - Appeals of contracting officers' final decisions; and
 - Other litigation deadlines.

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Additional Key Points

- Some federal agencies are going to be better equipped to manage a shutdown than others.
- The Department of Homeland Security (DHS) is likely to have administrative problems resulting from a shutdown:
 - DHS has relatively few seasoned procurement officials
 - DHS did not exist at the time of the last shutdown, so it has no institutional memory of how to deal with a shutdown
 - The relationship between DHS and the private sector could suffer even more if neither side takes steps to mitigate the impact of a shutdown
- Service providers generally are going to be cost savings targets, so companies should be well prepared.

Questions?



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