



# Lessons Learned from Federal Government Shutdowns



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**FEMA**



# Speakers



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# Agenda

- Shutdown basics
  - Why shutdowns occur
  - The scope of a shutdown
  - Preparing for a shutdown
- When it hits: triage
  - Stop work orders
  - Payment
- Communications plans
  - Internal
  - External
- Financial impacts
- Taking care of employees
- Subcontractors
- When it ends: recovering from a shutdown

# SHUTDOWN BASICS

# Appropriations – What Triggers a Shutdown?

- Funding lapse in annual appropriations
  - Government spending must be appropriated for a specific purpose by Congress
  - Operations and maintenance funds must be appropriated annually (other types of funds have different expiration periods)
  - Government fiscal year October 1 – September 30
- During a lapse in funding, the Anti-Deficiency Act significantly limits an affected agency from
  - Paying its employees
  - Awarding new contracts
  - Obligating new funds
  - Paying its contractors

# The Scope of a Shutdown

- All agencies may not be affected
  - Congress appropriates funds through 12 separate bills
- Affected agencies cannot incur obligations unless otherwise authorized by law
  - Can incur obligations necessary for
    - Orderly termination of an agency's functions
    - Performance of essential duties
      - Medical care
      - Continued public health and safety
      - Air traffic control
      - Border/coastal protection
      - Protection of federal property
      - Law enforcement
      - Emergency and disaster assistance
      - Preservation of money/banking systems
      - Basic utilities



# The Scope of a Shutdown (con't)

- What is not affected?
  - Funds that do not originate from annual appropriations
    - Examples: User fees that support the Postal Service and Patent and Trademark Office
  - Obligations from other fiscal year or multi-year dollars
    - Examples: Research, Development, Test and Evaluation (2 years); military construction (5 years); acquisition programs approved for production (3 years)
  - Obligations necessary to the discharge of the President's constitutional duties and powers
  - Limited support activities for essential services

# Preparing for a Shutdown

- As soon as possible, conduct a contract inventory to understand how your contract may be affected
  - Is your contract exempt?
    - Who is the customer?
    - What is the source and type of funding?
    - Is the contract “fully funded” or incrementally funded?
    - What is the period of performance?
    - What is required by the statement of work?
  - If your contract is exempt, will there be other effects?
    - Who will give you direction and supervision?
    - Who will you support?
    - Will you be able to access the place of performance?

# Preparing for a Shutdown (con't)

- As soon as possible, conduct a contract inventory to understand how your contract may be affected
  - Contract types
    - Contractors can continue performing fully-funded fixed-price contracts or T&M contracts and cost-type contracts with enough funds obligated to cover ongoing work
      - BUT possibility of no physical access to government job site or lack of funding for other, related contracts
      - Work must stop when funding ceiling or estimate is reached
      - Even if work continues, payment will be delayed
    - Agencies generally cannot issue new task orders under ID/IQ contracts
  - Severable or non-severable duties
    - Consider whether some CLINs are fully funded, even if some work must halt
- As soon as shutdown is a realistic possibility, contact Contracting Officer to discuss action plan



# **WHEN IT HITS: TRIAGE**

# Understanding the Stop Work

- Ask for written direction from your Contracting Officer
  - Status of each contract or task order and government POC
- It is critical to understand the scope of any stop work order received
  - Does it apply to all – or just some – CLINs?
  - Does it apply to onsite and offsite contractor personnel?
  - Is the contractor expected to perform “wind down” activities like government personnel?
- Identify and mitigate effects

# The Potential for Eventual Payment

- Every contract is unique
  - Funding type
    - Payment more likely if funded with RDT&E, MilCon or no-year funds; less likely if O&M (1year) funds
  - Payment terms
    - Payment more likely if FFP
    - For T&M and cost-type, payment only if work actually performed during shutdown
- Vehicles for payment
  - Contract provisions
    - Routine invoicing for FFP CLINs or reimbursement of specific costs incurred on cost-type contracts
  - Requests for equitable adjustment/claims
    - Stop work order (FAR 52.245-15) or suspension of work order (FAR 52.242-14): additional costs incurred because of the stop work
    - Other changes: schedule delays or other secondary effects after work resumes
- Understand when you are working “at risk”
  - No obligation to pay for work beyond Limitation of Funds or Limitation of Cost clauses unless specifically authorized **by the CO**
- General expectation: no work, no pay

# The Potential for Eventual Payment

- *Cortex III Service Corporation*, ASBCA No. 51744, 90-1 BCA ¶ 30342
  - Contractor provided support services, including security services, at NASA research center under cost-plus-fee contract
  - Contract incorporated collective bargaining agreement
  - Contractor ordered in arbitration to pay premium pay to security services professionals who worked during shutdown and to pay those who did not
  - ASBCA granted summary judgment to contractor, ordering Government to reimburse Contractor

# The Potential for Eventual Payment

- *Amaratek*, ASBCA Nos. 59149, 59395, 2015-1 BCA ¶ 35808
  - Contractor provided material analysis laboratory services for the Army at Yuma Proving Ground
  - Contract provided for “12 units of service at one month each, with each unit priced at \$58,947”
  - Government issued stop work for shutdown on October 1 – October 22
  - Amaratek submitted invoice for October with \$58,947 monthly charge
  - The Government asked Amaratek to resubmit an invoice with a monthly charge prorated to reflect only the days worked in October
  - “Because the Government ordered service for the month of October 2013, and received all the service it allowed appellant to provide during that month, it owes appellant the contract’s unit price for that service: \$58,947.”

# Implications Beyond Contract Performance

- Failure to fund incrementally funded contracts
  - Schedule extensions may be required
  - Resources may no longer be available
- Failure to exercise options
  - Possibility of break in work, creating employee retention issues
- Revenue pipeline
  - Delays in award of task orders and modifications
    - May also delay needed changes to scope of work
  - Delays in solicitations and contract awards
  - Delays in payments for work performed



# COMMUNICATIONS PLANS

# External Communications

- Customer
  - Communication – in writing – with your Contracting Officer is essential
  - Be cognizant of who has authority if the Contracting Officer is unavailable or overwhelmed
    - BUT be careful not to take direction from personnel who are not authorized to bind the gov't
  - Continue to meet reporting deadlines for limitations of funds/cost terms and performance requirements
- Subcontractors
  - Flow down stop work orders and other instructions
  - Keep up communications on impacts of shutdown and the importance of documentation



# Internal Communications to Employees

- Preparation in advance of shutdown
- Manage expectations
  - Factors that could change those expectations
  - Avoiding unrealistic promises
- Available support
- Return to action



# **FINANCIAL IMPACTS**

# Direct Impacts

- Be prepared for major revenue lags
  - Establish alternative business streams
  - Reserves
- To manage risk, if possible, diversify contracts to maximize the potential for continuing funds
  - Agencies, types of contracts, types of funding
- Keep written records of increased costs, mitigation efforts, rationale for decisions
  - Consider creating separate accounting/time-charging codes to capture wind down and restart, costs to bring home and re-deploy employees, etc.



# Indirect Impacts

- Actual indirect rates will exceed provisional rates
  - Lower base to allocate costs
- Extension of incumbent efforts
  - Potential for additional time to complete projects
  - May require re-work of employee assignments
- Impacts on litigation and administrative deadlines
  - DOJ, agency counsel, courts and/or fact witnesses may be furloughed
  - Continue to meet all deadlines, including Contract Disputes Act claim and appeal deadlines



# TAKING CARE OF EMPLOYEES

# Retaining Talent

- Contingency planning is essential
  - Consider creative arrangements to keep employees
  - Be especially wary of losing cleared staff
- Overarching employee retention program
  - Work to overcome the risk of shutdown

# Employment Law Obligations

- Furlough
- Reduction in hours
- Reduction in pay
- Required leave
- Voluntary leave without pay
- Temporary reassignment
- Layoffs



# SUBCONTRACTORS

# Subcontractors

- Working as a subcontractor
  - Proactively seek guidance from the prime contractor
  - Assist with prime mitigation efforts
    - Same documentation requirements as prime
  - Unique subcontract terms
    - May not mirror standard FAR/DFARS terms
    - May provide broader basis to seek payment
- Managing subcontractors
  - Provide clear direction on stop work and any changes
  - Ensure frequent updates and communication (even if nothing to report)
  - Confirm requests for payment are consistent with subcontract terms
    - Is government payment to prime a prerequisite?
    - Will prime need to “sponsor” a pass-through claim to the government?



# **WHEN IT ENDS: RECOVERING FROM A SHUTDOWN**



# Lasting Impacts

- Schedule delays
- Increased costs
- Deliverables backlog
- Acceleration of performance
- Employee attrition
- Performance challenges

# Legislative Fixes?

- S. 198 / H.R. 1177 – Stop the Shutdowns Transferring Unnecessary Pain and Inflicting Damage in the Coming Years (Stop STUPIDITY) Act
  - Would automatically renew funding for federal departments and agencies at the previous year's funding levels if lapse in appropriations (except legislative branch and Executive Office of the President)
- S. 104 / H.R. 797 – End Government Shutdowns Act
  - Would provide continuing appropriations to prevent shutdown if appropriations bills or continuing resolution not enacted; reduce appropriations 1% after 120 days and additional 1% each 90 days without appropriations
- See also S. 147 / H.R. 622 – Government Shutdown Prevention Act; H.R. 696 / H.R. 809 - Ban Government Shutdowns Act; H.R. 834 – The Shutdown to End All Shutdowns Act; H.R. 1124 – Preventing Future Shutdowns Act; H.R. 1280 – No More Shutdowns Act
- Contractor back pay for certain low-wage employees
  - H.R. 339 – Low-Wage Federal Contractor Employee Back Pay Act
  - H.R. 678 / S. 162 – Fair Compensation for Low-Wage Contractor Employees Act
  - H.R. 824 – Fairness for Federal Contractors Act



# Questions?

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