



How Government Contractors Should Prepare for the Next Government Shutdown - A Five Point Plan

Tenley A.Carp

Congress has yet to pass a long-term spending bill for fiscal year 2018, relying instead on a series of short-term continuing resolutions to keep the Government open. Even after the most recent Government Shutdown which began on January 20, 2018, members of Congress are still saying that they need at least a month to write a spending bill. Therefore, the Government will likely shut down for a second time this year without passage of yet another short-term continuing resolution by February 8, 2018. Please read below to learn how government contractors should prepare for this potential outcome.

1. Review Each Government Contract

- Make sure that you understand how each of your government contracts is funded.
- Determine whether your government contracts are fully funded or incrementally funded. If they operate on multiyear or no-year appropriations, you can expect little interruption of work during the next Shutdown.
- Check to see if any of your government contracts are governed by an “availability of funds,” “limitation of funds” or “limitation of cost” clause. If so, make sure to discontinue any work that is not adequately funded to avoid working “at risk.”
- Remember that even without a Shutdown, the Government is not required to add funds to your government contracts retroactively to pay for work performed “at risk.”

2. Contact Each of Your Contracting Officers

- Call or email (which creates a paper trail) each of your Contracting Officers (“COs”) before the next Shutdown to discuss their Shutdown plans.
- Don’t forget that contracting personnel is typically sent home during a Shutdown and prohibited from using any government-issued electronics (phones and laptop computers, etc.) after a short wind-down period -- typically four hours after the Shutdown takes effect.
- ***Make every effort to confirm with each of your COs your understanding of how each of your government contracts is funded and, therefore, which government contracts your company can continue to perform during the next Shutdown.***
- Be direct. Ask each of your COs whether he or she is planning to issue your company a Change Order, Stop-Work Order or Termination for Convenience of the Government in the event of another Shutdown.
- If, in order to perform your government contracts, your employees need access to government equipment, classified information, or a certain government facility, ask how this will be handled during the next Shutdown.
- Find out whether you can continue to perform your government contracts without government supervision on site.

3. Develop an Internal Government Shutdown Contingency Plan

- Be ready and able to communicate quickly with all of your employees immediately after the next Shutdown takes effect.
- Make sure that every employee knows how to find out whether to report to work.

- Determine as quickly as possible whether employees who should not report to work on your government contracts can be reassigned to other work, may participate in company training, or will be required to use leave, take paid or unpaid time off or be furloughed.
- If a furlough is necessary, keep the Fair Labor Standards Act (“FLSA”) in mind. Consider a furlough of “nonexempt employees” on a partial day or single-day basis and a furlough of “exempt employees” on a weekly basis.
- Provide written notice to affected employees as soon as possible in an attempt to comply with the Worker Adjustment and Retraining Notification (“WARN”) Act or an equivalent state statute requiring advance notification to employees affected by a facility closing or layoff event.
- Know that while the U.S. Department of Labor (“DOL”) announced its position prior to the 2013 Shutdown that government contractors need not provide WARN Act notices, DOL may not take that same position during the next Shutdown.
- Keep in mind that furloughed employees may be eligible for unemployment benefits for the time that they are unpaid or on furlough; such unemployment eligibility is determined by state law.

4. Prepare to Notify Subcontractors and Vendors

- Create a list of current and accurate contact information for every subcontractor and vendor working on each of your company’s government contracts.
- In the event of receipt of a Change Order, Stop-Work Order or Termination for Convenience (“T/C”) of any of your government contracts, be prepared to notify your subcontractors and vendors immediately to stop work (or partially stop work, depending on the details of the Change Order, Stop Work Order or T/C).
- Document your company’s notification to its subcontractors and vendors to prove that your company has made every effort to mitigate its losses.

5. Document Costs of Shutdown and Restart Efforts

- Track the time, dates and costs of implementing any Shutdown and/or startup activities, including unabsorbed overhead and other such costs since such costs may be recoverable.
- Include emails from any of your COs as evidence of your company’s efficient implementation of Shutdown or startup activities.
- Seek any equitable adjustments within 30 days after the end of work stoppage.

Authors and Contributors

Tenley A. Carp

Partner, DC Office
202.677.4066
tenley.carp@agg.com

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Atlanta Office

171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office

1775 Pennsylvania Avenue, NW
Suite 1000
Washington, DC 20006

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