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A Contractor's Guide To Government Shutdowns

*By Jerome S. Gabig, Richard J.R. Raleigh, Jr., and Christopher L. Lockwood**

The continued operation of the U.S. Government depends on an annual cycle of the House, the Senate, and the President agreeing on spending.¹ The cycle typically begins in February when the President submits the annual budget request to Congress.² From there, the House and Senate each work separately to develop their own budget resolutions.³ These resolutions often differ from each other and from the President's request.⁴ Then begins the daunting process of attempting to resolve these differences. If the process breaks down and Congress fails to pass a budget, or if the President disapproves the budget passed by Congress, a Government shutdown may occur.

When the Government shuts down, the supposed norm is that federal civilian employees are told to stay home, and Government contractors are directed to stop work. But, shutting down the Government is not as easy as pressing the "off" button. Like a lumbering train, the Government slows to a halt through the so-called "orderly shutdown" process. And, when the shutdown inevitably ends (as they always do), the Government chugs back to life. Sadly, the process of shutting down the Government and starting it back up again happens to cost taxpayers a lot of money. For the numerous federal contractors required to disembark the train while the politicians sort out their differences, the question inevitably occurs: Who's going to pay for all this?

This BRIEFING PAPER discusses the legal principles involved with Federal Government shutdowns and provides federal contractors with suggested strategies for mitigating damages and recovering costs incurred as the result of a shutdown.

*Jerome Gabig, Richard Raleigh, and Christopher Lockwood are shareholders with Wilmer & Lee, P.A., practicing in the firm's Government Contracts Practice Group. Mr. Gabig is an NCMA Fellow, a retired USAF Judge Advocate, and a former CEO of a technology company, and has served on the Army Science Board. Mr. Raleigh is a member of the American Bar Association House of Delegates, a Past President of the Alabama State Bar, and previously served as a U.S. Army Judge Advocate.

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Foreboding Signs

In recent times, the primary cause of Government shutdowns has been the failure of the President and Congress to reach agreement of full-year or interim fund-

ing measures. The table below from the Congressional Research Service identifies the chronology of Government shutdowns that have occurred since 1977:⁵

Fiscal Year	Final Date of Budget Authority ^a	Full Day(s) of Gap ^b	Date Gap Terminated ^c
1977	Thursday, 09/30/76	10	Monday, 10/11/76
1978	Friday, 09/30/77	12	Thursday, 10/13/77
	Monday, 10/31/77	8	Wednesday, 11/09/77
	Wednesday, 11/30/77	8	Friday, 12/09/77
1979	Saturday, 09/30/78	17	Wednesday, 10/18/78
1980	Sunday, 09/30/79	11	Friday, 10/12/79
1982	Friday, 11/20/81	2	Monday, 11/23/81
	Thursday, 09/30/82	1	Saturday, 10/02/82
1983	Friday, 12/17/82	3	Tuesday, 12/21/82
	Thursday, 11/10/83	3	Monday, 11/14/83
1985	Sunday, 09/30/84	2	Wednesday, 10/03/84
	Wednesday, 10/03/84	1	Friday, 10/05/84
1987	Thursday, 10/16/86	1	Saturday, 10/18/86
1988	Friday, 12/18/87	1	Sunday, 12/20/87
1991	Friday, 10/05/90	3	Tuesday, 10/09/90
1996	Monday, 11/13/95	5	Sunday, 11/19/95
	Friday, 12/15/95	21	Saturday, 01/06/96
2014	Monday, 09/30/13	16	Thursday, 10/17/13
2018	Friday, 01/19/18	2	Monday, 1/22/18
2019	Friday, 12/21/18	34	Friday, 1/25/19

The foremost cause of the FY 2019 shutdown was the failure of the President and Congress to agree on funding for the border wall.⁶ When that shutdown ended, President Trump made clear that he would not back down from another shutdown if he and Congress could not reach an agreement to fund the wall.⁷ With Congress and the President still at an impasse over funding for the border wall, and with the House passing two articles of impeachment against the President,⁸ it is not surprising that the Presi-

dent has refused to rule out the possibility of another shutdown.⁹

Legal Basics Of A Shutdown

The core legal principle for Government shutdowns is Article I, Section 9 of the U.S. Constitution: “No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law[.]” As an exercise of its

Editor: Valerie L. Gross

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authority over federal expenditures, Congress has enacted several statutes collectively referred to as the Antideficiency Act. These statutes restrict federal officials from:

- Making or authorizing an expenditure or obligation exceeding an amount available in an appropriation or fund;¹⁰
- Involving the Government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;¹¹
- Making or authorizing an expenditure or obligation exceeding an apportionment;¹²
- Accepting voluntary services or employing personal services exceeding that authorized by law “except for emergencies involving the safety of human life or the protection of property.”¹³

In summary, the Antideficiency Act generally prohibits federal officials from making obligations or expending federal funds in advance or in excess of an appropriation and from accepting voluntary services.

The definitive authority on federal fiscal law is *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW*, a multi-volume treatise promulgated by the General Accountability Office (GAO), more commonly known as the “Red Book.”¹⁴ The Red Book refers to a “funding gap” as “a period of time between the expiration of an appropriation and the enactment of a new one.”¹⁵ During a funding gap, the Antideficiency Act prohibits officials from obligating funds in advance of their availability, unless an exception applies.¹⁶

Failure to comply with the Antideficiency Act may result in criminal sanctions, fines, and administrative discipline including suspension without pay or removal from office.¹⁷ Reports of violations must be transmitted to the Comptroller General¹⁸ and must assign responsibility for the violation to “one or more individuals” so that “appropriate administrative or disciplinary action” may be imposed.¹⁹ The GAO has made clear that the person assigned responsibility for the violation must be “the highest ranking officer or employee in the Administrator’s office who was in a position to authorize the obligation and payment for the party.”²⁰

To agency officials, the consequences of violating the

Antideficiency Act may appear disturbingly harsh. However, prior to these strictures, some agencies would quickly exhaust their annual appropriations from Congress, continue to incur new obligations, and then return to Congress for appropriations to fund these “coercive deficiencies.”²¹ The Antideficiency Act holds agency officials personally accountable for adhering to an agency’s appropriations from Congress.

“Orderly Shutdown” And Excepted Activities

Office of Management and Budget Circular A-11, *Preparation, Submission, and Management of the Budget*, Section 124.1 is entitled “Agency Operations in the Absence of Appropriations.”²² Pursuant to this directive, agency heads “must decide what agency activities are excepted or otherwise legally authorized to continue during a lapse in appropriations.”²³ Additionally, agency heads “must develop and maintain plans for an *orderly shutdown* in the event of a lapse in appropriations.”²⁴ The orderly shutdown plan is to include a summary of the affected activities, an estimate of time (to the nearest half-day) needed to complete shutdown activities, the total number of employees to be retained under the plan, and procedures for resuming program activities, particularly related to grants and contracts.²⁵

Waiting until a shutdown is imminent is not good planning on the part of a Federal Government contractor. Early planning should begin with studying the agency’s shutdown plan. Copies of agency plans, including those of the Department of Defense (DoD) and the National Aeronautics and Space Administration (NASA), are available on the White House website.²⁶

According to the DoD’s orderly shutdown plan, when operating appropriations have lapsed, the Department may incur costs in advance of an appropriation only for activities that have been designated as “excepted.” Such situations include: “(1) statutes that expressly authorize incurring obligations in advance of appropriations, (2) emergencies involving the safety of human life or the protection of property, and (3) functions necessary to discharge the President’s constitutional duties.”²⁷

The DoD plan specifies that contractors that were awarded a contract (or contract option) before the expira-

tion of appropriations may continue to provide services up to the limit of the funds obligated on the contract prior to the lapse in appropriations. However, where such work requires oversight, engagement, or inspection by federal employees who have been furloughed, the plan suggests issuance of a stop work order. Finally, the plan expressly confirms that DoD may continue to enter into new contracts (and place task orders against existing contracts) to support “excepted” activities, even if there are no available appropriations, where delay would create an “imminent risk to the safety of human life or the protection of property, including endangering national security.”²⁸

NASA’s orderly shutdown plan is similar to DoD’s. Under NASA’s plan, contractors are to continue supporting excepted activities. For example, with regard to emergency and installation security services, NASA’s plan

instructs that contractors may continue to “perform these excepted services, but only to the extent necessary.” Similarly, NASA’s plan states that when a contractor’s work reaches a point where continuation without civil servant participation would be imprudent, contractors will be instructed to suspend performance.²⁹

In addition to agency-specific shutdown plans, the Office of Personnel Management has issued guidance for agencies to use when determining whether federal personnel should be furloughed or whether they may be allowed or required to continue work during a lapse of appropriations. Although not directly applicable to contractors, this guidance may offer some insight as to how agencies might view the activities of contractor personnel.

Category	Explanation
“Excepted”	“In the context of shutdown furloughs, the term ‘excepted’ is used to refer to employees who are funded through annual appropriations who are nonetheless excepted from the furlough because they are performing work that, by law, may continue to be performed during a lapse in appropriations. Excepted employees include employees who are performing emergency work involving the safety of human life or the protection of property or performing certain other types of excepted work.” ³⁰
“Exempted”	“Employees are ‘exempt’ from furlough if they are not affected by a lapse in appropriations. This includes employees who are not funded by annually appropriated funds. Employees performing those functions will generally continue to be governed by the normal pay, leave, and other civil service rules.” ³¹
“Emergency”	“ ‘Emergency employees’ are those employees who must report for work in emergency situations—e.g., severe weather conditions, air pollution, power failures, interruption of public transportation, and other situations in which significant numbers of employees are prevented from reporting for work or which require agencies to close all or part of their activities. Emergency employees are not automatically deemed excepted employees for purposes of shutdown furloughs.” ³²
“Essential”	News media sometimes use the term “essential” instead of “excepted.” ³³

As a final observation concerning the disjointed federal guidance on shutdowns, the Trump Administration has issued guidance stating that “cybersecurity functions are excepted functions as these functions are necessary to avoid imminent threat to Federal property.”³⁴

Agency Experiences During The FY 2019 Shutdown

The FY 2019 shutdown was the longest Federal Government shutdown to date.³⁵ According to the U.S. Chamber of Commerce, as many as 41,000 small business were impacted with loss of approximately \$2.3 billion in revenue.³⁶ For the FY 2019 shutdown, the federal agencies did not have a uniform approach toward contract administration. Differences in the agencies’ approaches were sporadically captured by the Senate Committee on

Homeland Security and Governmental Affairs report, *The True Costs of Government Shutdowns*.³⁷

Glimpses into how various agencies administered contracts during the FY 2019 shutdown are useful in trying to determine ways that contractors can prepare themselves in the case of future shutdowns. This exercise, however, is limited because the DoD did not suffer any lapse of appropriations in FY 2019. Among the civilian agencies impacted by the FY 2019 shutdown, one of the more insightful observations as to the role of support contractors was made by the Department of Health and Human Services (HHS). HHS noted that there were many variables that affected the extent to which HSS contracts were impacted by the shutdown.³⁸ Factors included whether the contract was based on time and materials versus firm fixed price, whether the project was being

performed on-site versus off-site, and whether the contract was for advisory and assistance services.³⁹

The Department of the Treasury's approach to the FY 2019 shutdown was indicative of how many civilian agencies approached the problem.⁴⁰ Treasury's Internal Revenue Service (IRS) continued to process tax returns and issue refunds to taxpayers as originally scheduled despite the lapse in appropriations. In a report to Congress, the GAO took the view that, because the Antideficiency Act is central to Congress' constitutional power of the purse, any exceptions should be construed "narrowly and in a manner to protect congressional prerogative."⁴¹ After the GAO concluded that none of the exceptions to the Antideficiency Act applied, the IRS ceased processing tax returns for the duration of the FY 2019 shutdown.⁴²

The State Department's approach to the continued use of contractors during the shutdown was also typical of many agencies. As explained by the State Department, "contractors generally continued to work during the shutdowns under the terms of their contracts until obligations were liquidated so long as the Department could provide adequate supervision of the contractor projects."⁴³ Hence, it was a common practice during the FY 2019 shutdown that, as long as the money obligated against the contract had not been exhausted, and as long as the agency was able to adequately supervise the contractor, the contractor was allowed to continue performance.⁴⁴

Mission performance in the wake of the FY 2019 shutdown was a significant challenge for many agencies. One agency whose ingenuity went too far was the Department of the Interior's National Park Service (NPS). NPS sought to use its authority under the Federal Lands Recreation Enforcement Act (FLREA) to limit the impact of the shutdown. FLREA permits the collection of fees for specific purposes such as trash collection, maintenance of restrooms, and sanitation at national park sites. NPS took advantage of FLREA funds to pay for other park operations.⁴⁵ However, the GAO held that the NPS' use of FLREA fees for other park operations violated the Antideficiency Act because those fees were not available for that purpose.⁴⁶

Unsurprisingly, the unprecedented length of the FY 2019 shutdown prevented some agencies from paying contractor invoices in a timely manner. When federal

agencies fail to make timely payments on invoices, they are obligated to pay penalty interest under the Prompt Payment Act.⁴⁷ For the FY 2019 shutdown, agencies that reported incurring Prompt Payment Act interest included the Department of Education; NASA; Department of Housing and Urban Development; Environmental Protection Agency; Department of Homeland Security; and Department of Agriculture.⁴⁸

Concerning contractor claims for costs incurred as a result of the FY 2019 shutdown, the Senate Report revealed: "NASA did note that it typically receives claims after shutdowns from contractors if the agency's actions caused those contractors to incur additional costs beyond agreed funding."⁴⁹ Meanwhile, the Department of Education reported that "vendors seeking equitable adjustments for their stop work orders were generally denied."⁵⁰

Who's Going To Pay For All This?

Government shutdowns are expensive. Additionally, there is typically no advance plan on how shutdown costs will be allocated, and it can be difficult to obtain guidance when federal offices are closed. When the shutdown has ended, allocation of shutdown costs between the Government and the contractor becomes an issue of major concern.

For contractors, costs of the shutdown often include labor, incurred home office overhead, idle facility and equipment, expenses to implement stop work orders, unabsorbed overhead, and expenses related to recruiting and remobilization when work restarts. As mentioned above, agencies frequently receive claims for payment after shutdowns when contractors have incurred additional costs. These claims typically begin as a request for equitable adjustment, develop into a certified claim if the request is disapproved,⁵¹ and may progress into litigation under the Contract Disputes Act if the contractor's certified claim is denied.

During the FY 2019 shutdown, federal employees had a small comfort in that Congress had agreed to grant them backpay once the shutdown ended. Unfortunately, contractors had no such assurance.⁵² As a result, it is imperative that contractors be familiar with the rules that determine who will ultimately be responsible for shutdown costs and what they can do to protect themselves by limiting their damages and maximizing their recovery.

As discussed below, several Federal Acquisition Regulation (FAR) clauses provide contractors with avenues to recovery of costs incurred as a result of shutdown-related delays or work stoppages. Although there is a limited body of case law involving Government shutdowns, the existing cases provide a roadmap for contractors to build their case to obtain an equitable adjustment.

Applicable FAR Clauses

The FAR contains a number of clauses that, although not specific to a Government shutdown, may affect the allocation of shutdown costs:

- FAR 52.242-14, “Suspension of Work”
- FAR 52.242-15, “Stop Work Order”
- FAR 52.242-17, “Government Delay of Work”
- FAR 52.243-1, “Changes—Fixed Price”
- FAR 52.243-2, “Changes—Cost Reimbursement”
- FAR 52.243-3, “Changes—Time & Materials or Labor-Hours”
- FAR 52.243-4, “Changes”
- FAR 52.232-20, “Limitation of Costs”
- FAR 52.232-22, “Limitation of Funds”

The inclusion and applicability of these clauses may vary depending upon the type of contract at issue.

The “Stop Work Order” clause authorizes the Contracting Officer (CO) to require the contractor to stop work for a period of up to 90 days. Upon receipt of a stop work order, the contractor is to take all steps to minimize the incurrence of costs allocable to the work covered by the order.⁵³ Similarly, the “Suspension of Work” clause (used in fixed-price construction contracts) authorizes the CO to order the contractor to suspend, delay, or interrupt all of part of the work being performed for a period of time that the CO determines appropriate for the convenience of the Government.⁵⁴ Thus, when a Government shutdown necessitates a suspension or stoppage of work, contractors may find themselves in receipt of an order from the CO pursuant to one of these clauses.

Both clauses provide for equitable adjustments. The

“Stop Work Order” clause provides for equitable adjustments to contract price, delivery schedule, or both, if the work stoppage results in an increase in the contractor’s cost of performance or the time to perform. Under the “Stop Work Order” clause, a contractor must assert its right to an equitable adjustment within 30 days of the end of the stoppage.⁵⁵ If a contractor does not timely comply with a notice provision and a CO declines to pay an equitable adjustment because of the lack of notice, the contractor may still be able to prevail if there has been no prejudice to the Government.⁵⁶

Equitable adjustments are more limited under the “Suspension of Work” clause. Under FAR 52.242-14, the CO may make an equitable adjustment for any increase in the cost of performance (excluding profit) only if the work is suspended, delayed, or interrupted “for an unreasonable period of time.”⁵⁷ This is similar to the “Government Delay of Work” clause (used in fixed-price contracts for supplies and services), which provides for an adjustment (excluding profit) for the increased cost of performance, as well as an adjustment in delivery and performance dates, when work is delayed or interrupted by an act or failure to act of the CO.⁵⁸ Both clauses require that the claim must be asserted in writing to the CO as soon as practicable after the termination of the suspension, delay, or interruption and not later than the final payment under the contract. The notice period required by these clauses is 20 days.⁵⁹

The various “Changes” clauses may also become important when allocating costs following a shutdown. These clauses provide for an equitable adjustment in various circumstances, such as when the Government changes the time or place of performance, the place of delivery, delivery schedule, the method or manner of performance of the work, the provision of Government-furnished property or services, acceleration of work, and other items that may be impacted during a Government shutdown. Depending upon which clause is included in the contract, the contractor must submit its request for an equitable adjustment within 20 or 30 days.

When a contractor is impacted by a shutdown, generally the contractor is performing less work than the contract originally anticipated. Thus, a contractor’s dilemma resulting from a shutdown is analogous to a deductive change under one of the “Changes” clauses

discussed above. There is a wealth of case law on deductive changes.⁶⁰ It is also noteworthy that the common law of Federal Government contracts recognizes an overlap between deductive changes and partial terminations for convenience.⁶¹ The significance of this overlap is that it allows a contractor to argue by analogy the large expanse of case law involving partial terminations for convenience.⁶²

The “Limitation of Cost (APR 1984)” (LOC) clause at FAR 52.232-20 and the “Limitation of Funds (APR 1984)” (LOF) clause at FAR 52.232-22 govern the funding and payment process on cost-reimbursement contracts. The LOC clause is used when the agency intends to fund the entire value of the contract at the time of award.⁶³ The LOF clause applies to incrementally funded cost-reimbursement contracts.⁶⁴ When either of these clauses is applicable to a contract during a shutdown, the contractor must be especially vigilant to track costs and provide the Government with the requisite notices. These clauses have a history of being strictly interpreted to prevent contractors from recovering from overruns.⁶⁵

For defense contractors, one of the most important contract clauses applicable to preparation for a shutdown is Defense FAR Supplement (DFARS) 252.237-7023, “Continuation of Essential Contractor Services (OCT 2010).” This clause addresses the provision of essential services during a shutdown as determined by the requiring activity. The clause defines “essential contractor services” as:

[A] service provided by a firm or individual under contract to DoD to support mission-essential functions, such as support of vital systems, including ships owned, leased, or operated in support of military missions or roles at sea; associated support activities, including installation, garrison, and base support services; and similar services provided to foreign military sales customers under the Security Assistance Program. Services are essential if the effectiveness of defense systems or operations has the potential to be seriously impaired by the interruption of these services, as determined by the appropriate functional commander or civilian equivalent.⁶⁶

The DoD clause requires the contractor to submit a Mission-Essential Contractor Services Plan and obligates the contractor to continue providing essential contractor services during crisis situations as directed by the CO in accordance with that plan.⁶⁷ Prime contractors have an

obligation to flow this clause down to any subcontractors that are expected to provide essential services.⁶⁸

The “Continuation of Essential Contractor Services” clause expressly authorizes an equitable adjustment.⁶⁹ However, the clause also imposes on the contractor an obligation to “segregate and separately identify all costs incurred in continuing performance of essential services in a crisis situation.”⁷⁰ Additionally, for any increased costs, the clause has a notice requirement of 90 days commencing on the contractor’s receipt of instructions from the CO.⁷¹ Although it does not appear that the “Continuation of Essential Contractor Services” has ever been litigated, the plain language in the clause strongly suggests that the designation of services as “essential contractor services” does not apply to the entire contract but instead is limited to the services identified in the approved Mission-Essential Contractor Services Plan.

There is no civilian counterpart to DFARS 252.237-7023. However, it is always prudent to examine the entire contract, including Section H clauses, to determine whether there might be a useful provision. As an example of a potentially useful clause, NASA FAR Supplement 1852.242-72, “Denied Access to NASA Facilities (OCT 2015),” provides that NASA has a contractual right to deny contractors access to NASA facilities resulting from “non-appropriation of funds by Congress.”⁷² This clause expressly authorizes an equitable adjustment.⁷³

Case Law On Allocation Of Shutdown Costs

Case law from previous shutdowns can help guide contractors that are considering what to do with their idle workforce, such as deciding whether they should require employees to use paid time off or whether to instead furlough employees. Actual costs for idled employees’ wages and overhead incurred during stop work periods may be recoverable.⁷⁴ Understanding past decisions can help businesses navigate difficult labor issues and posture for equitable adjustments.

Where a work stoppage is a result of the Government’s failure to pass funding measures, courts have expressed reluctance “to throw all the cost and loss necessarily incident to such a decision on the contractor, and none of it on the party whose decision caused the loss, unless clauses of the contract require that result without ambiguity.”⁷⁵ However, for a firm-fixed-price contract,

the Government is likely to assert that the contractor bears the risk of the unanticipated and is obligated to pay unforeseen costs related to Government shutdowns.

For example, *Cleveland Telecommunications Corp. v. United States*⁷⁶ arose out of the 1995 shutdown. The contractor was performing a firm-fixed-price contract for steam plant services at NASA's Lewis Research Center, and its personnel were deemed "essential workers" by NASA. Although NASA's facilities were technically closed during the shutdown, the contractor's employees, as essential workers, continued to work their regular hours. The workers (who were unionized) initiated an arbitration against the contractor claiming that they were entitled to "holiday wages" under their collective bargaining agreement for being required to work through the shutdown. The arbitrator ruled in favor of the workers, requiring the contractor to pay a higher wage for the work performed during the shutdown period.

The contractor sought an equitable adjustment for the higher wages it was required to pay during the shutdown period. The CO rejected the request, finding that the Government shutdown did not constitute a "holiday" as defined in the contract. The Court of Federal Claims affirmed the denial, finding that, in a firm-fixed-price contract, the contractor normally bears the risk that it may have to pay unforeseen wages. For this particular contractor, the unforeseen risk was that an arbitrator would find the shutdown to be a "holiday," even though it was not listed as a holiday in the contract between NASA and the contractor.⁷⁷

One lesson learned from *Cleveland Telecommunications* is that it is more difficult to recover an equitable adjustment arising from a shutdown when the underlying contract is firm fixed price. However, perhaps the contractor would have been in a better position if it had sought earlier clarification from the CO regarding the fact that it was at risk of having to pay holiday wages.⁷⁸ So, another takeaway is to know the anticipated costs and seek guidance from the CO if there are questions before submitting a request for an equitable adjustment.

While not a shutdown case, *Advanced Global Resources*⁷⁹ involved direct labor costs and extended home office overhead costs incurred by a contractor following a stop work order issued after a protest was filed. The contractor paid a key employee to remain idle in order to

retain him during the work stoppage. When the contractor sought to recover this cost, the Armed Services Board of Contract Appeals (ASBCA) found that the stop work order did not direct employees to be on standby and the contractor had not taken reasonable steps to minimize costs. *Advanced Global Resources* teaches that it is important to understand whether the Government is requiring employees to be on standby so they can quickly return to work when the shutdown is over.

The decision in *Advanced Global Resources* also highlights the importance of taking steps to mitigate costs. The ASBCA noted the contractor continued to pay the idle employee's salary during the work stoppage rather than furloughing him, putting him on unpaid leave, or releasing him from employment. The ASBCA compared this to the approach used by the contractor in *Phoenix Data Solutions*,⁸⁰ where the contractor established that terminating the employment would have resulted in the contractor incurring other costs such as severance payments. Also, the contractor in *Phoenix Data Solutions* had documented its efforts to minimize cost by canceling travel and other avoidable expenses and keeping employees working on other matters where possible. The comparison is helpful. Contractors should mitigate losses, by cutting expenses where possible, by having employees engage in other work if available, and by documenting all mitigation efforts.

In *Amaratek*,⁸¹ the contractor was performing services at Yuma Proving Ground. The contract price was \$58,947 per month, and no daily rate was specified. In October 2013, the contractor worked only six days due to a Government shutdown. When the contractor submitted an invoice for a full month of work, the Government rejected the invoice and directed the contractor to resubmit an invoice for a prorated amount based upon the six days actually worked. The contractor appealed to the ASBCA. The board ruled that the contractor was entitled to payment for the full month of October despite the fact that only six days were worked. The ASBCA's decision turned on the fact that contract specified the units of work in months, rather than days. Because the Government had ordered services during the month of October, and because the contractor had provided all of the services it was allowed to perform, the ASBCA held that the contractor was entitled to payment for the full month of work.

The decision in *Amaratek* illustrates the importance of

understanding the terms of the contract. Although the Government's position was not entirely unreasonable, it was inconsistent with the contract terms. When dealing with items such as period of performance, the units specified in the contract are likely to be important. Additionally, the Government may have also made a procedural blunder. The ASBCA noted that the appeal was from a contractor's claim for services rendered and the Government had not asserted that it was entitled to a deductive change. Had the Government asserted the right to a deductive change, the result might have been different.

On the subject of labor costs, *Raytheon STX Corp.*,⁸² is highly instructive. Raytheon submitted a request for equitable adjustment for \$196,994, including a 7% fee, for wages paid to employees during a partial Government shutdown in December 1995. Upon receipt of the Government's stop work order, Raytheon first attempted to locate alternative assignments for its employees, such as bid and proposal efforts. Some employees were permitted to take vacation days. Others were temporarily laid off with severance pay pursuant to a written policy. Additionally, some of Raytheon's subcontractors continued to pay their employees to retain them during the shutdown period and (wisely) set up special stop-work order accounts to capture these personnel costs.

The General Services Administration Board of Contract Appeals (GSBCA) granted \$166,944 of the requested \$196,944 by Raytheon. The allowance of a lesser amount was because Raytheon failed to mitigate certain costs. Nevertheless, the GSBCA held that the CO's denial of a substantial portion of the request was improper. Where the subcontractors "paid affected employees during the shutdown to retain them and maintain the necessary capability to perform the contracts immediately after the shutdown ended," the GSBCA found that Raytheon was entitled to reimbursement. The GSBCA did not allow Raytheon to recover any additional fee. Additional fee under the "Changes" clause is only authorized if the amount of work increased, which was not the case for Raytheon.

An important takeaway is that Raytheon did not obtain reimbursement for un-incurred costs where one of the subcontractors did not actually pay its employees during the shutdown period but merely reserved the right to do so in the event Raytheon prevailed on the claim. As a

practical matter, to recover labor costs related to Government shutdown work stoppages, the contractor must have paid the employees for the period in question. Forms of payment include furlough costs, paid time off, or other paid leave.⁸³ Written company policies on furloughs and accrued paid time off during Government shutdowns provide a strong foundation.⁸⁴ However, a request for equitable adjustment seeking money to pay employees who would have worked but for the shutdown, yet who were not actually paid for the shutdown period, is unlikely to be successful.⁸⁵

In *Raytheon STX Corp.*, the GSBCA said that "maintaining skilled scientists and computer technicians capable of performing these contracts did benefit the Government by ensuring that these individuals remained available under the contracts after the shutdown was over."⁸⁶ In requesting reimbursement, contractors should emphasize that, throughout the shutdown period, they cannot predict when the Government might reopen. Contractors should also cite any requests for support during the shutdown and point to the clear expectation to resume full contract performance immediately upon reopening of the Government. When applicable, contractors should argue that, in order to meet these requirements, they had to sustain an "on-call" workforce ready to execute excepted services as requested and also be ready, upon the reopening, to immediately return to work.

In past Government shutdowns, many contractors received stop work orders. Although not a shutdown case, *Dynamics Research Corp.*⁸⁷ involved a claim for labor costs caused by an unplanned work stoppage. In that case, the contractor (DRC) was providing data entry support at Wright Patterson Air Force Base using computers furnished by the Air Force. When Air Force's computers crashed and data entry could not be performed, the Air Force directed the contractor's employees to be sent home until the computers were available. DRC and its subcontractor paid their employees for their scheduled hours even though they performed no work.

DRC submitted a certified claim for \$168,493 that included indirect costs and profit. Since the CO did not issue a timely decision, DRC appealed to the ASBCA asserting that the claim had been deemed denied. In support of the claim, the administrative record contained a declaration from DRC stating:

The decision to pay the employees was a business decision that such payments were a necessary cost of continuing to perform the contract. Neither DRC nor its subcontractors would have been able to attract and retain qualified personnel willing to work multiple shifts if their policy were to furlough employees without pay whenever the employees were prevented from working due to actions completely out of their control.

The ASBCA began its analysis by observing the contract was for time and materials (T&M). The board observed: “A contractor may not recover separately for stand-by or idle hours, absent some change or other compensable event, since stand-by or idle time is not time worked.” Nevertheless, DRC was able to recover under a constructive stop-work theory since the contract contained the FAR 52.242-15 “Stop Work” clause. Because the decision was limited to deciding entitlement, the board did not address the quantum issues of indirect costs or profit.

Put in perspective, four significant factors contributed to DRC being able to recover: (1) the Air Force program manager directed that the data entry employees be sent home until the computers were available; (2) the disadvantage of the contract being T&M was overcome by asserting a constructive stop work; (3) DRC built the record to support its business decision not to furlough the employees; and (4) DRC and its subcontractor actually paid the employees for the time that the employees were on standby.

Guidelines

These *Guidelines* are intended to assist contractors in understanding the key issues with respect to Government shutdowns and how to mitigate losses and recover costs. They are not, however, a substitute for professional representation in any specific situations.

1. Act now:
 - a. Create a Mission-Essential Contractor Services Plan of the type contemplated in DFARS 252.237-7023, even if your contract is not a defense contract. Submit the plan to your CO for information, input, discussion, and comment. Ideally, obtain CO approval.
 - b. Make a written policy to address shutdowns, and consider seriously a policy that employees must

take available paid time off. Require the workforce to utilize accrued paid time off when not billing work to another contract or engaging in indirect work to sustain the readiness of the workforce to return to work. Request the Government to accept the labor costs associated with keeping the idle workforce in standby by allowing them to bill direct hours for all employees who maintained full readiness to return to work and were not utilized continuously as excepted labor or were otherwise unable to fully perform their duties without access to facility. Communications with the Government during the shutdown process and during the shutdown period will be important in establishing the reasonableness of these decisions.

2. If a shutdown occurs, act quickly. Keep paperwork documenting mitigation efforts and communications with the Government. Document decisions, including justifications for incurring shutdown-related costs. Be prepared to outline the steps taken to mitigate the impact of the shutdown. Be able to show that costs were incurred as a result of the Government’s direction to stop work. If possible, communicate with the CO about delays and work stoppages and seek guidance. Keeping a record of all communications will be valuable to resolving claims to recover shutdown-related costs.

3. Know the rules: Is there is a stop work order? A standby order? Perhaps there is simply a notice that contractors will not be able to access and perform work on certain Government facilities. Review your contract and the agency shutdown plan closely. Consider the contract type, such as a time-and-materials or firm-fixed-price contract. Is work performed on-site, off-site, or both? Is the work for manufacturing or advisory and assistance services, or is it work that the contractor may be able to perform in the absence of Government personnel?

4. In past shutdowns, some contractors were asked to continue to work under the terms of their contract until obligations were liquidated so long as the employees did not need supervision or as long as the agency could provide adequate supervision of the projects. Accordingly, closely monitor costs incurred not unlike a contractor would under the FAR 52.232-20 “Limitation of Costs” clause. Give notice as the incurred costs approach the obligation ceiling. Unless directed by the CO, stop work when the funds are expended.

5. The Government may instruct contractors that they cannot come onto federal facilities, which may be the primary workplace of the contractor's employees. If this happens, contractors should attempt to seek guidance from the CO as to whether work can be performed from alternative locations, such as the contractor's corporate offices or from home. Where the contract provides that a contractor will have access to the Government facility, the contract could be interpreted as implying that Government will be responsible for costs incurred if the contractor does not have access.⁸⁸

6. If working from other locations is not a viable alternative, then contractors may mitigate losses and limit costs by moving employees to other projects or contracts, if the funding agency will approve the shift. Failing this, perhaps use the opportunity to conduct human resources training or compliance training, such as the business ethics and compliance training required by the FAR 52.203-13 "Contractor Code of Business Ethics and Conduct" clause. Alternatively, perform work on bids and proposals, research and development, skill building, and marketing efforts. Although these may not be directly chargeable to a contract, these activities may ultimately pay off in the future.

7. Implement change order accounting. Contractors can increase their recovery chances and maximize recovery of losses if they implement change order accounting.⁸⁹ Create a separate charge code to help identify and segregate costs that are shutdown related. The types of costs contractors may want to capture are costs of idle workers, facilities, and equipment, severance costs, unabsorbed overhead, and shutdown and restart costs. Note that recovery of an additional fee, however, is unlikely since an increase in fee is normally only permitted when new work is added to a contract.⁹⁰

8. Timely prepare a request for equitable adjustment, setting out costs during the shutdown period that were incurred specifically for the contract and as a result of the shutdown. Refer to FAR 52.243-2, "Changes—Cost-Reimbursement," FAR 52.243-3, "Changes—Time-and-Materials or Labor-Hours," and other appropriate clauses. Remember that contractors should give timely notice of potential requests for equitable adjustment or claims, and they should work to link their requests and claims to specific provisions of their contracts.

ENDNOTES:

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¹³31 U.S.C.A. § 1342.

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6-146 (3d ed. updated Mar. 2015), <https://www.gao.gov/legal/appropriations-law-decisions/red-book>.

¹⁷31 U.S.C.A. §§ 1349(a), 1350, 1518, 1519.

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⁴⁷31 U.S.C.A. § 3902.

⁴⁸See U.S. Senate Comm. on Homeland Security & Governmental Affairs, Permanent Subcomm. on Investigations, Staff Report, *The True Cost of Government Shutdowns* 63, 77, 110, 126, 132–33, 152, 168 (Sept. 17, 2019), <https://www.hsgac.senate.gov/imo/media/doc/2019-09-17%20PSI%20Staff%20Report%20-%20Government%20Shutdowns.pdf>.

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⁵²The Fair Compensation for Low-Wage Federal Contractor Employees Act of 2019, S. 162, was to provide back pay to estimated 580,000 federal support workers for the 2019 shutdown. The bill died in the Senate.

⁵³FAR 52.242-15(a).

⁵⁴FAR 52.242-14(a).

⁵⁵FAR 52.242-15(b).

⁵⁶See Fuel Tank Maint. Co., ASBCA 54402, 08-2

BCA ¶ 33,888 (“These requirements are not construed hypertechnically to deny legitimate contractor claims when the government is otherwise aware of the operative facts. The burden is on the government to establish that it was prejudiced by absence of the required notice.” (citations omitted)).

⁵⁷FAR 52.242-14(b).

⁵⁸FAR 52.242-17(a).

⁵⁹FAR 52.52.242-14(c); FAR 52.242-17(b).

⁶⁰See John C. Person, “Deductive Changes,” 01-08 Briefing Papers 1 (July 2001).

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⁷⁰DFARS 232.237-7023(f).

⁷¹DFARS 232.237-7023(f).

⁷²48 C.F.R. § 1852.242-72(a)(2)(iv).

⁷³48 C.F.R. § 1852.242-72(d)(4).

⁷⁴AST Anlagen-Und Sanierungstechnik GmbH, ASBCA No. 42118, 92-2 BCA ¶ 24,961.

⁷⁵S.A. Healy Co. v. United States, 576 F.2d 299, 307 (Ct. Cl. 1978).

⁷⁶Cleveland Telecomm. Corp. v. United States, 39 Fed. Cl. 649 (1997).

⁷⁷Cleveland Telecomm. Corp. v. United States, 39 Fed. Cl. 649, 653–54 (1997).

⁷⁸Cleveland Telecomm. Corp. v. United States, 39 Fed. Cl. 649, 652(1997).

⁷⁹Advanced Global Resources, ASBCA No. 62070, 19-1 BCA ¶ 37,433.

⁸⁰Phoenix Data Solutions, ASBCA No. 60207, 18-1 BCA ¶ 37,164.

⁸¹Amaratek, ASBCA No. 59149, 15-1 BCA ¶ 35,808.

⁸²Raytheon Stx Corp., GSBCA No. 14296-COM, 00-1 BCA ¶ 30,632.

⁸³Raytheon Stx Corp., GSBCA No. 14296-COM, 00-1 BCA ¶ 30,632.

⁸⁴Raytheon Stx Corp., GSBCA No. 14296-COM, 00-1 BCA ¶ 30,632.

⁸⁵Raytheon Stx Corp., GSBCA No. 14296-COM,

00-1 BCA ¶ 30,632.

⁸⁶Raytheon Stx Corp., GSBCA No. 14296-COM, 00-1 BCA ¶ 30,632.

⁸⁷Dynamics Research Corp., ASBCA No. 53788, 04-2 BCA ¶ 32,747.

⁸⁸Dynamics Research Corp., ASBCA No. 53788, 04-2 BCA ¶ 32,747.

⁸⁹FAR 52.243-6.

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NOTES:

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