

# Contractor Operations during a Government Shutdown

Webinar | Jan. 10, 2019 | 3:30 – 4:30 p.m.

**PSC** PROFESSIONAL  
SERVICES  
COUNCIL



# Speakers

## *Presenter*



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## *Moderator*



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# Agenda

- Introduction
- Appropriations Primer
- What to Know NOW
- What to Know When Shutdown Ends
- What to Know for Next Time
- PSC Actions
- PSC Call to Action

# Introduction

- No “one size fits all” and circumstances changing continually
- PSC not providing legal, accounting or business advice
- If you hear something—or nothing—say something!  
[Tell us](#) what the gov’t is saying—or not saying.

[PSC Shutdown Impact Survey](#)

# Appropriations Primer

- Appropriations Period of Availability
  - [See CBO Letter to Budget Reform Committee \(released July 2018\)](#)
- Appropriations Purpose (Bona Fide Need)
- “Limitation of Funds” clauses (in cost reimbursement contracts)
- Anti-Deficiency Act
- Exempt funding that does not require a new appropriation
  - Multi-year (the “color” of money)
  - Indefinite
- Contract validly entered into before the lapse of funds that is fully funded prior to the lapse is allowed to continue UNLESS it requires
  - 1) government employee engagement who is unavailable or
  - 2) access to shuttered government facilities

# Appropriations Primer (continued)

## HOWEVER:

- No augmentation (supplementation)
- No volunteering service (if you want to be paid!); can't displace federal employees
- Can't be asked to work "at risk" or in a temporarily unfunded status

# It's Not an Appropriation If...

- Revolving Funds
- Obligations authorized by law (including advance appropriations)
- Obligations necessarily implied by law (issuing social security “checks”)
- President’s core constitutional duties
- Emergency affecting safety of human life or protection of property (significantly compromised by delay or inaction)

# ELEMENTS OF THE GOVERNMENT SHUTDOWN— GOVERNMENT ACTIONS



# Basis of Government Actions

- “Sovereign Acts”: for the public good, not targeted to any specific group (such as contractors)
- Contractual Capacity: typically action by the government’s contracting officer

# Triggering Actions

- Stop Work Order (FAR 42.1303; 52.242-15)\*: Can be applied to any type of contract
- Short-term focus but not longer than 90 days
- May be partial or complete – at any time
- Thereafter must restart or convert to termination
  
- Termination for Convenience
- Termination for Default
- Denied Access to Government Facilities

[\* Also -14 and -15 clauses]

**IF NOT DIRECTED BY THE GOVERNMENT TO STOP WORK  
YOU MUST CONTINUE TO PERFORM**

# Stop Work Actions

- Stop all work – including subcontractors and vendors
  - Identify effect on effort
  - Account for changes required because of the stop work
  - Mitigate costs incurred
- 
- Creates an entitlement for recovery that you can prove.  
Claim must be submitted:
    - Within 30 days of restart or 1 year if T4C
    - There are some recovery limitations

# Do You Need a Federal Employee?

- To approve payments?
- To accept deliveries of goods or services?
- To provide access to government facilities, personnel or information (including classified information)?
- Other circumstances?
- Do you know:
  - Where your contracting officers are?
  - Who can act if your contracting officer isn't there?

# Cascading Actions

- Availability of civilian agencies' audit, management and payments activities
- Proposal submission dates/award dates
- Invoicing/payment issues
- Expiring option periods/task orders
- Use of E-Verify
- Applications for certifications/approvals (e.g. 8(a))

# Statutory Deadlines Not Automatically Extended

- Debriefings
- GAO bid protest dates
- Agency appeals/claims
- Court filings – including Court of Federal Claims
  - But circumstances may authorize it

# ELEMENTS OF A GOVERNMENT SHUTDOWN— CONTRACTOR ACTIONS

# Employer Actions

- Employee Reassignment – Mitigate!
  - Work “at risk”
  - Other projects – “productively used”
  - Training
  - Vacation/leave
  - Furlough – direct and indirect charged employees
    - Warn Act/“Little Warn Act” requirements
    - FLSA implications
    - CBA or other labor law limitations
- Required to remain “on stand-by” and not take additional work due to uncertain duration



# While You're Thinking ...

- Is your cash flow sufficient to accommodate further delays in payments?
- Can you fund B&P costs while waiting for delayed awards and payment?
- Can you afford to pay your employees and not be reimbursed?
- What are the business implications of continued shutdown on your key customers?
- Other implications?

# When It Ends

- Continue to meet contract deliverables
- Keep invoicing for prior work
- Be prepared for immediate resumption of stopped work
- Expect solicitation due dates and new awards to come rapidly
- Prepare claims for Stop Work Order impacts (based on fixed timetables)

# Recoveries

- Material/vendor costs (including GFM/P)
- Certain employee costs – with or without an advance agreement
- Recovery of “unabsorbed” overhead  
(Costs incurred must be offset by insurance coverage paid. See DPAP and DCAA memos on Katrina.)
- Generally no recovery of back pay or “consequential damages”
- Government ratification of intervening contractual actions

## RECOVERY CLAIMS METHODS

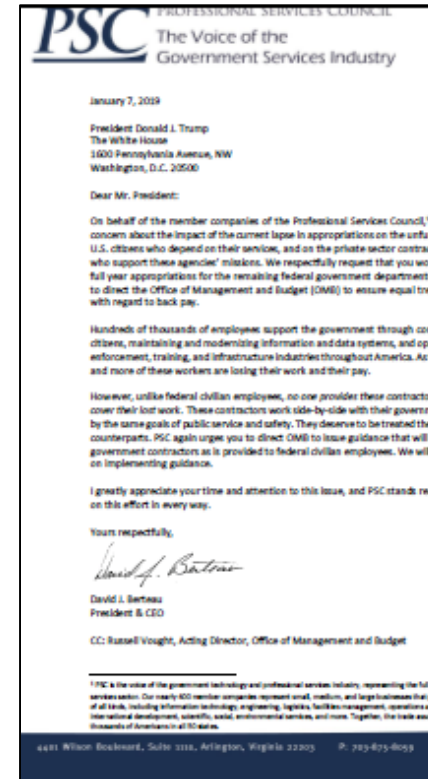
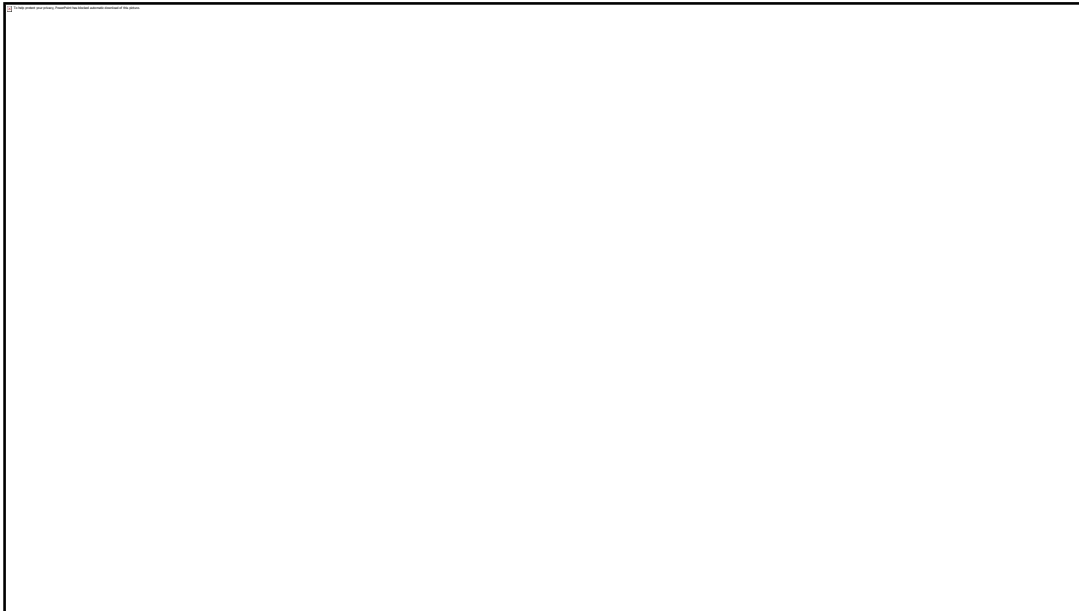
- Changes clauses
- Equitable adjustments

# Remember...

- Analyze your current situations
- Plan for multiple possible events
- Document, document, document
- Account, account, account
- Mitigate wherever possible
- Communicate before, during and after
- Promptly seek recoveries – watch for required notices and timeliness rules

# PSC Actions

- Letters to [the president](#) and [congressional leadership](#) calling for an end to the shutdown and back pay for contractor employees
- [Daily “PSC Perspectives” video updates](#)
- Dozens of media interviews



# PSC “Call to Action”

- Share [PSC’s Social Media Toolkit](#) with your employees and post on your company accounts to amplify our messaging to stop the shutdown
- [Share your shutdown stories with PSC so we can best speak on your behalf](#)
- Are you willing to talk to the press, on the record or on background, based on a referral from PSC? If so, contact [Ashlei Stevens](#) with information on the person or people with whom we should coordinate.
- Review [PSC’s key talking points](#) and share with your PR staff

# PSC Policy Year in Review Webinar Jan. 18

- Members-only webinar Friday, Jan. 18 at noon
- Major acquisition policy developments in 2018
- Issues to watch in 2019
- First look at PSC's [“Year in Review”](#) summary of acquisition laws and regulations

[Register Now!](#)



# QUESTIONS?

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