

GOVERNMENT SHUTDOWN? CR? Are You Prepared?

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PSC PROFESSIONAL
SERVICES
COUNCIL



Speakers

Presenters



David Berteau

PSC President & CEO

Berteau@pscouncil.org



Alan Chvotkin

PSC Executive Vice President & Counsel

Chvotkin@pscouncil.org



Moderator

Ashlei Stevens

PSC Media Relations Director

Stevens@pscouncil.org

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.

APPROPRIATIONS OVERVIEW

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

Appropriations Status (as of 8/14/18)

BILL	HOUSE	SENATE
Agriculture, Food & Drug Administration	H.R. 5961 passed the Full Committee on May 16	S. 2976 passed the Senate on August 1 (included in H.R. 6147)
Commerce, Justice, Science	H.R. 5952 passed the Full Committee on May 17	S. 3072 passed the Full Committee on June 14
Defense	H.R. 6157 passed the House on June 28	S. 3159 passed the Full Committee on June 28
Energy and Water Development	H.R. 5895 passed the House on June 8	S. 2975 passed the Senate on June 25 (included in H.R. 5895)
Financial Services & General Government	H.R. 6258 passed the House on July 19 (included in H.R. 6147)	S. 3107 passed the Senate on August 1 (included in H.R. 6147)
Homeland Security	Draft passed the Full Committee on July 25	S. 3109 passed the Full Committee on June 21
Interior, Environment	H.R. 6147 passed the House on July 19 (included in H.R. 6147)	S. 3073 passed the Senate on August 1 (included in H.R. 6147)
Labor, Health & Human Services, Education	H.R. 6470 passed the Full Committee on July 11	S. 3158 passed the Full Committee on June 2
Legislative Branch	H.R. 5894 passed the House on June 8	S. 3071 passed the Senate on June 25 (included in H.R. 5895)
Military Construction, Veterans Affairs	H.R. 5786 passed the House on June 8	S. 3024 passed the Senate on June 25 (included in H.R. 5895)
State, Foreign Operations	H.R. 6385 passed the Full Committee on June 6	S. 3108 passed the Full Committee on June 21
Transportation, Housing & Urban Development	H.R. 6072 passed the Full Committee on May 23	S. 3023 passed the Senate on August 1 (included in H.R. 6147)

No final conference reports have cleared Congress

Passed Full Committee
 Passed Chamber

Elements of a “Continuing Resolution”

- Limits spending to the “rate” established under the most recently enacted regular appropriations
 - Generally “no new (program) starts,” but not a limit on contracting
 - May be modified by “anomalies” adopted in the CR
- FY18 consolidation appropriations sets highest spending levels for most agencies in at least six years
- Failure to enact an appropriations could trigger a partial or total government shutdown

ELEMENTS OF A 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

If It's Not an Appropriation...

- 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)

Effect on Contract Types

- Fixed price contracts
- Cost-type contracts
- T&M contracts
- ID/IQ contracts

Plus, for services contracts:

- Severable performance
- Non-severable performance (single undertaking with a definite final “product”)

IMPLICATIONS FOR:

- Award dates
- Bid submission due dates
- Option period extensions
- ID/IQ orders placed

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

**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
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- 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 DoD:
 - Defense Contract Management Agency
 - Defense Finance and Accounting Service
 - Defense Contract Audit Agency
- Civilian Agency Counterpart Activities
- Debriefings
- Protests at the agency or at GAO

Statutory Deadlines Not Automatically Extended

- GAO bid protest dates
 - Agency appeals/claims
 - Court filings
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- 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
- Required to remain “on stand-by” and not take additional work due to uncertain duration

Do You Know Where Your Employees Are?

- Contractor employee work site is at government facility
 - Denied access/shut out of government facility
- Contractor employee work site is not at government facility
- Official travel
- Leave status
- Human Resources/Labor Law Considerations

While You're Thinking

- Is your cash flow sufficient to accommodate a delay in payments?
- Can you fund B&P costs while waiting for delayed awards?
- Can you afford to pay your employees and not be reimbursed?
- What are the business implications of additional continuing resolutions for 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

“PAY OUR MILITARY ACT ” (POMA)

- “Pay Our Military Act” (P.L. 113-39; 9/30/13)
- Covered DoD and Coast Guard only; covered active military and those DoD civilians and contractors supporting the active force
- Covered pay and benefits; no funds for equipment, supplies or material
- SecDef guidance issued 10/5/13
- Expired when full-year appropriations was enacted; has never been renewed

QUESTIONS?

policy@pscouncil.org

[PSC Government Shutdown Resource Center](#)