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Mitigating the Economic Risk in the Event of a Government Shutdown – Near Terms Steps for Government Contractors

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The end of fiscal year 2023 is just a few days away and Congress has not passed a single spending bill — and there are 12 such bills that must be passed to fully fund the federal government (and all of its agencies) for fiscal year 2024. Absent congressional approval of a continuing resolution, or of any or all 12 spending bills, most federal agencies and government offices will shutter their doors at midnight on October 1. That means that many federally funded procurement and nonprocurement programs will also come to a spending halt. Hence, many federal contractors (commercial entities, grant recipients and subrecipients, and subcontractors, will have to suspend work on any federally funded projects, contracts and subcontracts, and grants (and subgrants).

But what is a shutdown? Among other things, it is an action taken by the federal government while acting in its sovereign capacity — and not in its contractual capacity. This is an important distinction because unless you receive specific instructions from your agency customer, any costs you incur as a consequence of the shutdown may not be recoverable. On the other hand, if you do receive, or otherwise request and obtain specific directions from the contracting officer as to what actions you are to take to ensure continuity of performance, or preservation of capabilities (*i.e.*, workforce) or capacity (facilities, resources), may require you to incur cost.

If you are a government contractor or a federal funding recipient, what can, and should you do to mitigate the risk of economic loss as a result of the shutdown? There are several steps you can take, such as the following:

1. Prepare and/or Update the Current Inventory Open Contracts and Agreements.

Whether you have a single federal award or a portfolio of many contracting vehicles (subcontracts, grants, cooperative agreements, and sub-agreements), it is important that you have a schedule of all currently funded federal contracting vehicles in hand, organized by category of agreement: prime contract, subcontract, agency, customer, contracting officer, contact info, contract type, (fixed price, T&M, fixed unit price, IDIQ, MATOC, etc.), inclusive of each task or delivery order issued under each contract. Ditto subcontracts, grants, subgrants, etc.

This schedule of contracts will serve in large part as a roadmap for additional mitigation measures. For example, for each contract/order, identify the specific FAR, DFARS, or other agency clauses that may bear directly on the quest to recover performance or preservation costs incurred during the shutdown and at the direction of the funding agency. And, also, be mindful that your continued performance may require delivery of services or supplies that are deemed essential to the mission of each funding agency. Additionally, there is the possibility that

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one or more of your contracts has been fully funded through completion or for more than one fiscal year.

2. The Contracting Officer – Request Specific Instructions, Put It in Writing

All contractors and funding recipients should contact the contracting officer (or the grants officer, the prime contractor, or the higher tier subcontractor) before and soon after the shutdown goes into effect. Why? If you have not already received performance instructions from the program contracting officer, you should proactively seek direction confirming specifically what the customer requires of your *vis a vis* contract performance or preservation: are you to suspend work, in whole or in part? Should you continue performance, and if so, for how long? If work is halted, what steps does the agency require in order to preserve capabilities and capacity? If work is to continue, is there adequate funding already obligated to pay for performance?

Whatever instructions or direction you are given — it will not be binding unless it comes directly from the contracting officer, and to avoid taking chances — obtain it in writing (a confirming email from the contracting officer should suffice, and a confirming reply may also be helpful).

And do bear in mind that if there is no funding available to pay for performance rendered during the shutdown, you are at risk of not being paid. On the other hand, if there is no funding available, you have no obligation to continue performance if asked to do so.

3. New Cost Pools for Tracking Costs Related to, or Caused by the Shutdown

In all likelihood, not all costs incurred during the shutdown will actually be recoverable under the contract. Even so, in order to maximize your recovery of costs incurred as a result of the shutdown, you should consider setting up separate cost pools specifically intended to capture all categories of costs incurred solely as a consequence of the shutdown. For example, you may determine that it is necessary to continue paying your direct labor employees in order to preserve capability and capacity to immediately resume performance once the shutdown ends.

One way to maximize your prospect for recovery is to keep accurate, contemporaneous records of your decisions, the instructions you receive, the costs you incur, and so on. In due course, you may elect to submit a formal request for equitable adjustment or a claim under the disputes clause and those records will be very important and will likely be central to your ability to substantiate and quantify your cost impacts.

Without missing a beat, as soon as the shutdown ends, you should assess the materiality and quantify the amount of increased costs incurred in support of each of your contracts. Where it makes economic sense to do so, you should take immediate steps to seek recovery from the customer, be it the agency, the prime contractor, or a higher tier subcontractor. Depending on the nature of your costs incurred, the clauses in your contract and the directions provided by your customer, you may have an abbreviated window in which to assert your claims, perhaps as little as 30 days.

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