



Government Shutdown Q & A: Navigating in Uncharted Waters

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What is the Debt Ceiling?

- Debt Ceiling: Statutory limit on the total federal debt
 - Raised many times since enactment in 1917; now stands at \$17 trillion
 - Congress has never failed to raise debt ceiling when necessary
 - Failure to raise debt ceiling means Treasury cannot borrow to manage cash flow, pay interest on federal deficit, or pay the bills of federal contractors
 - Debt ceiling issue is not the absence of appropriations, but rather the cash to fund those appropriations

What is Government Shutdown, and How Does Differ from the Debt Ceiling?

- Government Shutdown: Congressional failure to make FY '14 appropriations to enable federal agencies to operate
 - With certain exceptions, appropriations are necessary for the new fiscal year's work, whether or not there is cash on hand to pay resulting obligations
- Resolution of the debt ceiling impasse does not resolve the problem of the failure to make appropriations, and vice versa

What Happens When Appropriations Lapse?

- Constitution Art. 1, Section 9: “No money shall be drawn from the Treasury, but in consequence of appropriations made law.”
 - Contractors cannot be paid without supporting appropriations.
 - Provision is silent regarding the making of contracts or incurrence of obligations (i.e., contractors continuing to perform existing contracts) where supporting appropriations are absent

Anti-Deficiency Act Fills Constitutional Gap

- Prohibits federal government from obligating funds (or accepting voluntary service) in advance of appropriations, except as authorized by law.
 - What is “authorized by law”?
 - Administration of benefits, provided funds available in absence of new appropriations
 - Activities and purchases financed with unexhausted prior year or multi-year funds
 - Exercise of President’s constitutional authority: National security, foreign relations
 - Activities to protect life and property

Sovereign Acts Doctrine

- Government acts in dual capacity, as both sovereign and contractor
- Sovereign Acts Doctrine seeks to balance government's need to legislate with obligation to honor contracts
 - Sovereign act: “public and general in nature”
 - Contractor: “private and contractual in nature”
 - Simply contracting for goods and services is not a sovereign act

Sovereign Acts vs. Contracting Acts: Why is the Difference Important?

- Government as Contracting Party: Contractor receives additional time and additional money
- Government as Sovereign Actor: Contractor receives additional time to perform, but not additional money
- Government generally not held liable for acts it performs as a sovereign
 - But government can, expressly or impliedly, agree to pay contractor the amount by which costs are increased by a sovereign act

The Lapse in Appropriations Is a Sovereign Act, But Is All Hope Lost?

- Failure to enact appropriations legislation that is not targeted to any government contracts makes shutdown public and general, i.e, a sovereign act
 - Default rule is that government will not be liable for increased contractor costs attributable to the shutdown
- But, the sovereign acts doctrine calls for a case-specific analysis of the affected contract.

How Might Your Contract Avoid the Sovereign Acts Default Rule?

- Ways that a case-specific analysis of your contract may avoid the Sovereign Acts default rule, and entitle you to recover the increased costs caused by the shutdown.
 - Does your contract shift risk of increased costs of sovereign acts to the government?
 - Is contract cost-reimbursement type?
 - Does contract have the Stop-Work Order or Suspension of Work clause?
 - Does contract promise contractor access to government facilities that are closed?

How to Maximize the Chance of Recovery

- To the extent possible, obtain government direction
- Review contracts to assess likelihood of government liability
- Mitigate damages: obligation under all contracts and lowers impact if arguments are unsuccessful
 - Notify subcontractors to mitigate damages, reassign workers, encourage vacations, layoffs

How to Maximize the Chance of Recovery (Continued)

- Prepare for asserting claims for increased costs
 - Document adverse impact on performance (written narrative, project logs, daily reports)
 - Establish separate charge lines to capture increased costs flowing from shutdown
 - Notify contracting officer of performance issues caused by shutdown (even if CO is furloughed)
 - Advise subcontractors to prepare similar documentation

Shutdown's Effect on New Defense Contracts

- Pay Our Military Act made appropriations for military personnel and, as determined by the Secretary (Defense or Homeland Security), civilian personnel and contractors who provide support to military personnel
 - Awaiting guidance from DoD as to application of POMA on contractors
 - DoD has resumed awarding contracts, but may not be announcing all awards

Shutdown's Effect on New Civilian Contracts

- Difficult to generalize regarding the level of contracting activity at federal agencies
- Many employees, including contracting officers, are furloughed
 - Many agencies are either not evaluating proposals or are not announcing awards
 - E.g., GSA managed buildings operating in “weekend mode” and OASIS contract award delayed

Shutdown's Effect on Bid Protests

- GAO Bid Protest Function Closed
 - CICA Automatic Stay ineffective for protests of announced awards
 - No GAO personnel to notify awarding agency
 - Filing deadline extended
 - GAO will extend 100-day deadline one day for every day of shutdown
- Court of Federal Claims Operating for Now
 - Possibility for Temporary Restraining Order of contract performance
 - Difficult standard to meet
 - Process more formal and expensive
 - Court routinely granting stays of action to Department of Justice

Human Resources Issues

- Ability to furlough employees depends on federal and state statutes, employment contracts, and collective bargaining agreements.
- There are no “one size fits all” answers
- WARN Act: not at issue for short duration furloughs
- Fair Labor Standards Act
 - Non-exempt employees:
 - Can reduce hours and wages, but must comply with minimum wage laws
 - Exempt employees:
 - Generally must be paid full week salary if any work performed
 - May be able to furlough in full week increments, or require use of accrued leave
 - Other options possibly available

Scenarios

- Agency issues notice to suspend work.
 - Must stop work. Document potential claim.
- Agency notifies you to continue performing contract (appropriations in place or activity is “excepted” from Anti-Deficiency Act)
 - Low risk; should be paid
 - If not paid timely, Prompt Payment Act entitles contractor to interest on overdue payments

Scenarios (Continued)

- Agency notifies you to continue performing contract (insufficient appropriations in place and not “excepted” under Anti-Deficiency Act)
 - Continue performing.
 - Slight risk of non-payment, but recovery limited to obligated funds if contract is terminated for convenience before new appropriation passed.
 - Cash flow issues. Can contractor absorb or finance costs until cash flow from government resumes?

Scenarios (Continued)

- Agency is silent
 - Document silence
 - Assess likelihood of recovery
 - Assess ability to absorb or finance costs
 - Document claim

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