

October 14, 2013

Shutdown Week Three - Practical Considerations

As the shutdown enters its third week, practical considerations for federal contractors become more urgent. Lines of credit are being drawn down with no clear path to the end of the financial bleeding. CFOs are doing what they can. Comptrollers are stretching out terms as much as possible. But the burden ultimately falls on the program, its managers, and other line managers.

Finance Departments are watching carefully crafted metrics sour. Black numbers are becoming red. Pressure increasingly is being put on the operational activities (read: “productive part of the business”) to “do something” about the cash outflow; but, what?

After all the immediately identifiable cuts and efficiencies are made and taken, thoughts turn to the “long haul,” and to the contract itself, for any additional level of possible (at least temporary) relief. A wise old Contracting Officer once had a framed quotation in his office, “What Does the Contract Say?” Plainly, that advice should be the direction for affected contractors to head in the current situation. So, first and foremost, read and reread the contract!

There also are other steps to consider. Check the fiscal year of the funds obligated on your contract vehicle. If the funds obligated there are “FY13” funds, the contracting activity’s actions with regard to work done or to be done under that vehicle are highly discretionary, and will likely depend on Contracting Officer discretion almost entirely. That discretion may be conditioned, however, by the availability of required support from other government personnel, such as COTRs, Auditors, Inspectors, and so forth, who may be personnel subject to furlough, themselves.

If your FY13 contract is delayed to any extent, explicitly or constructively, or orderly performance is otherwise disrupted even partially by a discretionary act of your Contracting Officer, or otherwise affected by a lack of required support from the government, your contract provides for significant financial remedies, via the Changes or similar remedy-granting clauses. Such provisions are required by law to be included in every federal contract.

For example, if your work is explicitly stopped by an order of the Contracting Officer, check your contract to see if it contains a Stop Work Order Clause and/or a Suspension of Work Clause. Insist on a written Stop Work Order, to eliminate the possibility that you later may be considered a “volunteer,” and thus ineligible for any compensation. If your contract contains both clauses, do what you can to have the Contracting Officer issue a Stop Work Order rather than a Suspension of Work direction. The reason for the preference is that the Stop Work Order Clause provides for profit, while the Suspension of Work Clause does not (it only pays costs, not including any profit).

When pricing one’s delay claim, whether the delay results from a full stop or stretched-out period of performance, remember that extended and unabsorbed overhead are very real costs, and are compensable. Those costs should be included along with lost efficiencies. Those costs are recognized by government auditors, and can be calculated in accordance with well-recognized court decisions to provide relief. (The Changes Clause provides similar relief for contractors whose performance is disrupted but not completely stopped by government action or inaction regarding a

required element of government cooperation.) Remember, however, that you will only receive the costs you request. If you do not request compensation, the government will not pay you any!

Finally, if you have a pending award involving future (FY14 and beyond) funding that is affected, there *may* be some basis for a modicum of relief once things settle-down, and an award is made. That possibility, however, is highly fact dependent, and should be discussed with Government Contracts Counsel at the appropriate time.

J. William Eshelman
202.454.2830
eshelman@butzel.com

Copyright 2013, Butzel Long, a professional corporation
Any reproduction without permission of the author is prohibited.

The above news is only intended to highlight some of the important issues. This e-mail has been prepared by Butzel Long for information only and is not legal advice. This information is not intended to create, and receipt of it does not constitute, a client-lawyer relationship. Readers should not act upon this information without seeking professional counsel. This electronic newsletter and the information it contains may be considered attorney advertising in some states. If you feel you have received this information in error, or no longer wish to receive this service, please follow the instructions at the bottom of this message.

Attorney Advertising Notice - The contents of this e-mail may contain attorney advertising under the laws of various states. Prior results do not guarantee a similar outcome.

For previous e-news or to learn more about our law firm and its services, please visit our website at: www.butzel.com

Butzel Long Offices:

Ann Arbor
Bloomfield Hills
Detroit
Lansing
New York
Washington D.C.

Alliance Offices:

Beijing
Shanghai
Mexico City
Monterrey

Member:

Lex Mundi