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Last month **we provided information** on the guidance given by the U.S. Office of Management and Budget (“OMB”) as the federal government (the “Government”) prepared for the Government shutdown (the “Shutdown”). Since that time, the government did indeed partially shut down and finally after 16 days, reopened. With the Shutdown behind us, what should and can your nonprofit be doing to recover costs incurred under your contracts during that time?

Please keep in mind that the following constitutes general guidance rather than specific advice to the impact of the Shutdown on your particular contract(s). Your particular situation will depend on fact-specific circumstances and the language contained in your contract with the relevant Government agency.

What rights do I have to recover costs due to the Shutdown if my nonprofit organization was issued a stop-work order?

Under a stop-work order, you are generally entitled to receive reasonable costs incurred, however, the type of contract at issue also may have an impact on what you may be able to recover. Under a firm fixed price contract, you may have grounds for asserting the full amount of your contract. However, this determination will depend upon the specific terms of your contract. At a minimum, you should be entitled to recover reasonable and necessary costs incurred due to the unforeseen Shutdown, such as demobilization and remobilization costs or possible idle labor costs. It is important to be careful when submitting an invoice to the Government for full compensation under a firm-fixed price contract because it could be construed as invoicing the Government for work not actually performed and, as a result, lead to allegations of fraud. Absent clear language in the contract, any invoice submitted to the Government should only reflect the amount of work actually performed at the fixed unit price. This may require you to submit an invoice for the proportional amount of the fixed price based upon the work actually performed, if any. To recoup the difference between the proportional amount and the contract amount, or other costs associated with the Shutdown, contractors should submit a request for an equitable adjustment (“REA”) or a claim to ensure that you are fully compensated and do not underwrite the Government’s Shutdown. Conversely, under a cost-reimbursement contract, you would be precluded from asserting the full anticipated amount of the contract and would likely be limited to only those reasonable costs incurred due to the Shutdown, such as demobilization and remobilization costs, and possibly idle labor costs.

What costs are reimbursable as a result of the Shutdown?

Unmitigable and reasonable costs incurred due to the Shutdown generally should be reimbursable. In order to recover these costs because of the Shutdown, contractors must be able to demonstrate that the cost impact occurred and tie the impact to the Shutdown. Employees that are prevented from performing work, therefore, should provide detailed time entries and record their labor costs in segregated accounts to demonstrate the idle or other labor costs of the Shutdown. Other cost impacts, such as costs associated with rescheduling work or deliveries, or increased supplier prices, should be similarly documented.

How should I invoice the Government for my contract during the Shutdown?

It is important to be careful when submitting an invoice to the Government for full compensation under a firm-fixed price contract because it could be construed as invoicing the Government for work not actually performed and, as a result, lead to allegations of fraud. Absent clear language in the contract, any invoice submitted to the Government should only reflect the amount of work actually performed at the fixed unit price. This may require you to submit an invoice for the proportional amount of the fixed price based upon the work actually performed, if any. To recoup the difference between the proportional amount and the contract amount, or other costs associated with the shutdown, contractors should submit an REA or a claim to ensure that you are fully compensated and do not underwrite the

Government's shutdown.

Similarly, for cost-reimbursement contracts, contractors should submit an invoice that reflects the costs and markups associated with the work actually performed. Conversely, however, under a cost reimbursement contract, a claim to recover the full anticipated contract value would be difficult given the nature of cost-reimbursement contract.

What if the Government refuses to pay (in full or in part) my nonprofit organization for work performed during the Shutdown?

If the work was funded throughout the period of the Shutdown (*i.e.*, the contract did not expire or the contractor has not assumed that an option would be exercised), depending on the circumstance, the contractor should consider filing an REA or a claim.

What if the Government rejects my invoice and stipulates to partial payment due to the Shutdown? For instance, what if my employees were available and ready to work, but could not access Government premises to perform services under a fixed-price contract? If I paid those employees who did not actually work, can I charge the Government for that payment?

Under a stop-work order, you would likely be precluded from asserting the full amount of the contract, however, you would be able to assert reasonable costs incurred due to the Shutdown, such as demobilization and remobilization costs, and possibly idle labor costs.

If you did not receive a stop-work order and your employees were ready and available to work under the firm-fixed price contract, there may be an argument, dependent upon the specific terms of each contract, that the contractor is the beneficiary of these circumstances and therefore the total price due under the contract should not be reduced simply because of the Government shutdown. Firm-fixed price contracts are designed to place risk on the contractor for cost overruns, but contractors are entitled to benefit when costs are less than anticipated. Alternatively, the Government could assert its defense as a sovereign, releasing it of liability. Thus, the most conservative course of action, because of concerns over fraud (*e.g.*, possibly misrepresenting that you performed work when you did not during the Shutdown), would be to submit an invoice for the proportional amount of the fixed price based upon the work actually performed, followed by an REA or a claim for the difference, as well as any additional costs incurred as a result of the Shutdown.

Is it different if this situation occurs under a cost-reimbursement contract?

The situation is no different if a stop-work order has been issued. However, if a stop-work order has not been issued, the situation differs greatly because, by the terms of the contract, the contractor is only entitled to those reasonable costs incurred. As a result, the contractor would only be able to seek those costs incurred after taking steps to mitigate such costs.

Are there other theories of recovery if I did not receive a stop-work order?

Yes. FAR 52.242-17, the Government Delay of Work clause, entitles contractors to an adjustment to their contract for Government-caused delays. However, for a contractor to assert delay claims, the contractor must file its claim within 20 days of when the delay costs were incurred, or "as soon as practicable after the termination of the delay or interruption." Given this language, if a contractor is not subject to a stop-work order, thereby foreclosing its right to "stop-work order" costs, the contractor may seek to assert an adjustment under the theory that the Government Shutdown resulted in additional costs due to the delay of work. To do so, the contractor would need to file its claim within 20 days of when the costs were incurred (*e.g.*, the Shutdown took place on October 1, therefore a claim to recover all costs would need to be filed by October 21), or as soon as practicable following the delay (*i.e.*, the Shutdown). Even if you cannot immediately quantify your claim, it is important that you promptly notify the contracting officer in writing that the Shutdown delayed or interfered with your work, the delay increased your cost or will have an impact on your schedule, and that you will be submitting a claim when the costs are fully quantified.

Additionally, the FAR's Changes clause (FAR 52.243-1, Changes—Fixed Price, 52.243-2, Changes—Cost Reimbursement, 52.243-3, Changes—Time-and-Materials or Labor-Hours, 52.243-4, Changes) allows contracting officers to make changes to a contract, by written order, at any time. Although it is unlikely your contracting officer characterized an order to suspend work (or other Shutdown-related orders) as a "change" to the contract schedule, such a significant interruption arguably constitutes a change to the contract. If you want to preserve your right to any claim on the basis that the Shutdown was a "change" (in addition to a claim under the stop-work order or Government Delay clause), assuming one of the above-cited changes clauses was contained in your contract, you must assert

your right to an adjustment (such as an increase in the price or a revision to the performance schedule) within 30 days of the receipt of a written change order. If you did not receive an explicit "change order," the 30-day clock likely begins as soon as you received written direction relating to the Shutdown, or possibly the start of the Shutdown itself.

Given that an order may have been issued prior to the Shutdown, contractors' time for requesting an adjustment to the contract is likely accruing and the 30-day deadline approaching. Again, due to the potentially truncated timeline under your contract's Changes clause, you may need to quickly consider whether you will be seeking recovery under this FAR provision.

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For more information, please contact **Dismas Locaria, Melanie Jones Totman, Elizabeth Buehler, or Jeffrey Tenenbaum.**

This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.