

Client Alert

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Now or Never – Protecting Your Right to Recover Costs Caused by the Government Shutdown

By **Bradley D. Wine** and **Pablo A. Nichols**

Now that the government shutdown has ended, contractors must quickly assess whether and how to recover any additional costs that were caused by the shutdown. The clock is ticking and any unjustified delay may result in a contractor being denied recovery of otherwise recoverable costs.

It is without question that the government shutdown materially impacted government contractors in a myriad of ways. Some contractors received direct suspension of work orders from their contracting officers. Others were unable to deliver goods or services due to the furloughing of government workers and the closing of government facilities.

In nearly all government contracts, contractors have the right to recover increased costs caused by the government shutdown regardless of whether the specific government action was an express suspension of work order, an implied or express government delay, or a constructive change. This right of recovery, however, must be exercised quickly or else it may be lost forever.

The specific notice requirements for each contract depend on factors such as the type of contract and the nature of the requested adjustment. Below is a quick summary of some of the more common Federal Acquisition Regulation (FAR) clauses that require notice to the Contracting Officer for the contractor to qualify for an equitable adjustment.¹ Contractors should immediately review their existing contracts to identify the relevant applicable FAR clauses and understand the corresponding notice requirements.

1. FAR 52.242-14, SUSPENSION OF WORK ORDERS FOR FIXED-PRICE CONSTRUCTION OR ARCHITECTURE-ENGINEER CONTRACTS

A fixed-price construction or architecture-engineer contractor may be entitled to increased costs when the government suspends, delays or interrupts all or any part of the work called for under the contract. FAR 52.242-14. The suspension, delay or interruption may be either the result of an express suspension of work order under subsection (a) or, under subsection (b), caused by “an act of the Contracting Officer in the administration of this contract, or [] the Contracting Officer’s failure to act within the time specified in this contract (or within a reasonable time if not specified)[.]”

A claim for costs under this provision, however, will not be allowed unless the contractor asserts the claim in

¹ This list is not exhaustive and contractors should undertake an analysis for each of their impacted contracts to identify specific notice and other procedural requirements for asserting a right to recover increased costs.

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writing, including the amount, “as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.” FAR 52.242-14(c). Additionally, if the suspended, delayed or interrupted work is not the result of an express suspension of work order from the Contracting Officer, the contractor must also notify the Contracting Officer in writing of the act or failure to act at issue no more than 20 days after the additional costs are incurred. *Id.* A claim for costs incurred more than 20 days prior to the contractor’s written notice will not be allowed. *Id.*

Thus, a contractor with a fixed-price construction or architecture-engineer contract whose work was suspended, delayed or interrupted as a result of the shutdown, may be required to provide notice as early as Monday, October 21 in order to recover increased costs incurred on October 1.² Failure to submit timely notice under FAR 52.242-14(c) may result in the denial of costs incurred more than 20 days prior to the notice, even if the contractor submits its request for an equitable adjustment “as soon as practicable” after the reopening of the government on October 17, 2013.

2. FAR 52.242-17, GOVERNMENT DELAY OF WORK CLAIMS FOR FIXED-PRICE CONTRACTS FOR SUPPLIES OTHER THAN COMMERCIAL OR MODIFIED COMMERCIAL ITEMS

Like the Suspension of Work clause, the Government Delay of Work clause also permits recovery of increased costs where an act of or failure to act by the Contracting Officer causes a delay or interruption that in turn causes the cost of performance to increase. FAR 52.242-17(a). Also, like the Suspension of Work clause, to recover a claim made under the Government Delay of Work clause, the contractor must provide notice in writing to the Contracting Officer of the act or failure to act involved no later than 20 days after the increased costs are incurred, and assert the claim “as soon as is practicable” after the termination of the delay, but no later than the day of final payment under the contract. FAR 52.242-17(c).

Thus, any contractor with a fixed-price contract for supplies other than commercial or modified commercial items may be required to provide notice as early as Monday, October 21 in order to recover costs incurred on October 1 as a result of the shutdown.

3. CHANGES FOR FIXED-PRICE, COST-REIMBURSEMENT, TIME AND MATERIALS, AND LABOR HOURS CONTRACTS

The notification requirements for changes in a fixed-price contract (FAR 52-243-1), cost-reimbursement contract (FAR 52-242-2), and time and materials or labor hours contract (FAR 52.243-3) are essentially the same. In each case, the contractor must “assert its right to an adjustment” under the designated clause within 30 days of receipt of the contracting officer’s written change order. Thus, notification deadlines under these clauses may be as early as October 31.

4. FAR 52.243-4, THE CHANGES CLAUSE

For contracts that incorporate only the general Changes clause, FAR 52.243-4, the requirement is somewhat different. Under the Changes clause, if the Contracting Officer issues a written order designated to be a change

² FAR 2.101 defines a “day” as a calendar day, unless otherwise specified. Contractors should evaluate their contracts to assess whether there is a basis to argue that the ordinary 20-day deadline should be tolled due to the shutdown. Unless a tolling exception is clear, however, contractors would be wise not to rely on an equitable tolling argument to repair an otherwise untimely request for equitable adjustment.

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order under FAR 52.243-4(a), the contractor must assert its right to an equitable adjustment within 30 days after receipt of the written order. Thus, for example, a contractor that received a change order on September 30 suspending access to a particular government facility, would have until October 30 to assert its right to an adjustment.

If, on the other hand, the contracting officer did not issue an express change order, but instead gave written or oral direction that “causes a change,” then the contractor should provide the Contracting Officer with written notice that the contractor regards the order as a change order. Thus, in our example, if the Contracting Officer called the contractor on September 30 and said, “our facility will be closed during the shutdown so tell your workers not to come in tomorrow,” the contractor should immediately inform the Contracting Officer in writing that the contractor deems that instruction a change order under FAR 52.243-4(b).³ No adjustment will be made for costs incurred more than 20 days before the contractor provides written notice. FAR 52.243-4(d).⁴ Consequently, a contractor that wishes to assert an equitable adjustment under the Changes clause, FAR 52.243-4, should provide notice to the Contracting Officer immediately and assert its right to an equitable adjustment no later than 30 days thereafter.

5. STOP-WORK ORDERS

Finally, in the unlikely event that a contractor received a stop-work order from the Contracting Officer, and that order is subsequently cancelled or expires, the contractor is entitled to an equitable adjustment for properly allocable costs, provided that the contractor asserts its right to an adjustment within 30 days after the end of the work stoppage.

In sum, the FAR affords contractors the right to recover increased costs caused by the government shutdown. Notice deadlines, however, are rapidly approaching and contractors that are unaware of their rights may find themselves unable to recover some or even all of their costs.

For more information contact:

Contact:

Bradley D. Wine
(703) 760-7316
bwine@mofo.com

Pablo A. Nichols
(415) 268-6653
pnichols@mofo.com

³ The notification of change requirements are set forth in FAR 52.243-7.

⁴ Unless the adjustment is based on defective specifications.

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