

# Shutdown Strategies: How Contractors Can Effectively Manage the Shutdown

September 30, 2025

# Today's Speakers



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**Bob Tompkins** is a partner in Holland & Knight's Washington, D.C., office and co-chair of the National Government Contracts Practice. Mr. Tompkins provides strategic advice and counsel to government contractors, their management and investors. He is experienced in government contract protests and disputes, government investigations and related proceedings, mergers and acquisitions, matters related to the U.S. Small Business Administration (SBA) government contracting programs and providing general counseling to clients. He also serves as a member of the firm's Risk and Crisis Management Team and represents contractors and grant recipients in complex, high-stakes matters, including congressional investigations, inspector general inquiries, suspension and debarment proceedings.

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## Practices

- Government Contracts
- Litigation and Dispute Resolution
- Compliance Services
- False Claims Act Defense
- White Collar Defense and Investigations
- Mergers and Acquisitions
- Native American Law
- Congressional Investigations
- Regulatory and Federal Litigation
- Risk and Crisis Management

## Education

- Washington and Lee University, J.D.
- Washington and Lee University, B.A.

## Bar Admission

- District of Columbia
- Virginia

# Today's Speakers



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**David Black** serves as Co-Chair of the National Government Contracts Team, where he is a trusted advisor, strategic problem solver, and steadfast advocate for federal contractors at every stage of growth. He provides comprehensive counseling on government contracts and excels in dispute resolution, representing contractors in bid protests, claims, and responses to government investigations, audits, and litigation under the False Claims Act. David also advises subcontractors on negotiating teaming agreements and subcontracts, and represents them in disputes with prime contractors, ensuring their interests are protected in complex contractual relationships.

## Practices

- Government Contracts
- Litigation and Dispute Resolution
- False Claims Act Defense
- Education
- White Collar Defense & Investigations
- Regulatory and Federal Litigation
- Risk and Crisis Management
- Mergers and Acquisitions
- Compliance Services.

## Education

- Georgetown University Law Center, J.D.
- University of Virginia, B.A.

## Bar Admission

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- Virginia

# Today's Speakers



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**Chris Nagel** is a government contracts attorney based in Holland & Knight's Tysons, Virginia office. Mr. Nagel advises businesses on a broad range of legal issues involving their relationship with the government. Mr. Nagel represents clients in bid protests, contract claims, suspension/debarment, False Claims Act (FCA) matters and disputes between contractors. He regularly guides corporations through compliance issues, including internal investigations and employee training. In addition, Mr. Nagel served for 12 years on active duty and as a reservist in the U.S. Marine Corps (USMC). While on active duty, he was deployed to Afghanistan, where he adjudicated claims against the North Atlantic Treaty Organization (NATO) and the U.S. government. His previous tours include stints as a special assistant U.S. attorney for the U.S. District Court for the Eastern District of Virginia, officer-in-charge of the Quantico Legal Assistance Office and as a military prosecutor.

## Practices

- Government Contracts
- Litigation and Dispute Resolution
- Anti-Corruption and FCPA

## Education

- William & Mary Law School, J.D.
- Miami University, B.A.

## Bar Admission

- Virginia
- Maryland
- Colorado

# Today's Speakers



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**Timothy J. Taylor** is an employment and litigation attorney in Holland & Knight's Tysons office. Mr. Taylor represents employers, companies and individuals in high-stakes litigation, investigations and compliance matters across a wide variety of areas and, in particular, vis-à-vis government regulators. He serves clients in highly regulated industries, especially healthcare and government contracts.

Before rejoining Holland & Knight, Mr. Taylor served as Deputy Solicitor of Labor, the second-in-command legal officer for the federal government's second-largest litigation department, housed in the U.S. Department of Labor (DOL). Mr. Taylor uses that experience to defend and counsel clients facing a wide variety of federal employment issues.

## Practices

- Labor & Employment
- DEI Task Force
- Wage & Hour
- Prevailing Wage
- Government Contracts

## Education

- Harvard Law School, *cum laude*
- BYU, *summa cum laude*

## Bar Admission

- Virginia
- District of Columbia

# Today's Speakers



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**Andrew C. Erickson** is a partner in Holland & Knight's Tysons office, where he practices in the areas of mergers and acquisitions, private equity, entity structuring and formation, finance, and general corporate matters. In addition, Mr. Erickson represents borrowers and lenders in connection with senior credit facilities and other debt financing. He provides counsel to clients in a number of industries, including government contracting, national security and defense, private equity, information technology, financial services and energy. Mr. Erickson also focuses a portion of his practice on international and cross-border transactions including mergers and acquisitions, financings, investments, and private equity transactions.

## Practices

- Mergers and Acquisitions
- Private Equity
- Corporate Services
- International and Cross-Border Transactions

## Education

- Georgetown University Law Center, J.D.
- The George Washington University, B.A., Political Science, *summa cum laude*

## Bar Admission

- Virginia

# Today's Speakers



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**Angela M. Jimenez** is a litigation attorney in Holland & Knight's Tysons office with broad experience in government contracting, federal assistance agreements, and related litigation. She counsels clients on compliance with the complex regulatory framework governing federal contractors and grantees. Her practice includes representing clients in contract claims, suspension and debarment proceedings, False Claims Act (FCA) matters, disputes between contractors, and government investigations and enforcement actions. She also advises on corporate transactions, including mergers and acquisitions (M&A) involving government contractors, and regularly guides corporations through compliance reviews and internal investigations.

## Practices

- Government Contracts
- Litigation and Dispute Resolution
- False Claims Act  
Defense/Investigations
- Mergers and Acquisitions

## Education

- The George Washington Law School, J.D.
- Rutgers University, B.A., *summa cum laude*

## Bar Admission

- Virginia

# Today's Speakers



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**Hillary J. Freund** is a litigation attorney in Holland & Knight's Washington, D.C., office. Ms. Freund focuses her practice on government contracts litigation and counseling. Ms. Freund represents government contractors in bid protests before the U.S. Government Accountability Office (GAO) and the U.S. Court of Federal Claims, and litigates contract disputes on behalf of clients at the U.S. Court of Federal Claims, as well as the Armed Services Board of Contract Appeals (ASBCA) and Civilian Board of Contract Appeals (CBCA). In addition, Ms. Freund also counsels clients on a variety of matters in federal government contracting and federal grants.

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## Practices

- Government Contracts
- Litigation and Dispute Resolution

## Education

- The George Washington Law School, J.D.
- Virginia Tech, B.S.

## Bar Admission

- District of Columbia
- Virginia



# Agenda

- The Anatomy of a Shutdown
- Relevant FAR and Government Contracts Legal Authorities
- The Contractor's Action Plan
- Labor and Employment Issues
- Closing and Q&A

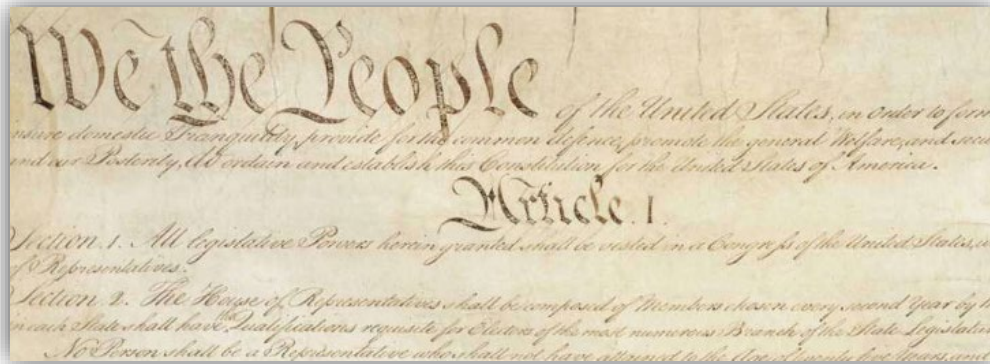
# Shutdowns 101

The Anatomy of a Shutdown

# Shutdowns 101: The Anatomy of a Shutdown

Agencies may not operate without appropriated funds:

- Article 1, Section 9, clause 7 of the United States Constitution provides that “[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law.”



- The Anti-Deficiency Act provides that the Government may not (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law...

13 U.S.C. 1341

# Shutdowns 101: The Anatomy of a Shutdown

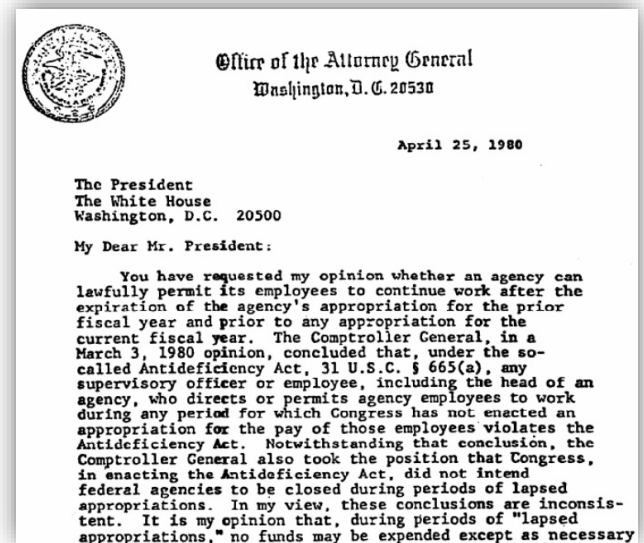
## The Government may not accept voluntary services:

- The Government may not accept voluntary services:
  - The Anti-Deficiency Act provides that “[a]n officer or employee of the United States Government...may not accept voluntary services...”



# Shutdowns 101: Learning from the Past

- Between FY1977 and FY1980, there were six funding gaps ranging from 8 to 17 days.
- Prior to FY1981, it was the Government's opinion that operations could continue as normal during these funding gaps.
- This changed after FY1981 with the Civiletti Memorandum written by Attorney General Benjamin Civiletti.
- The Civiletti Memorandum was a “game changer” and emphasized that the Government could not operate without appropriated funds.
- Civiletti concluded:
  - Approaches taken by agencies to keep agencies minimally functioning during a lapse in appropriations was “legally unsupportable.” This included employee pay obligations.
  - Unless there is an exception in the Anti-Deficiency Act, agencies may not incur further obligations even if doing so “would avoid greater costs to the agencies...”
  - DOJ “will take actions to enforce the criminal provisions of the Act in appropriate cases...”



# Shutdowns 101: Learning from the Past

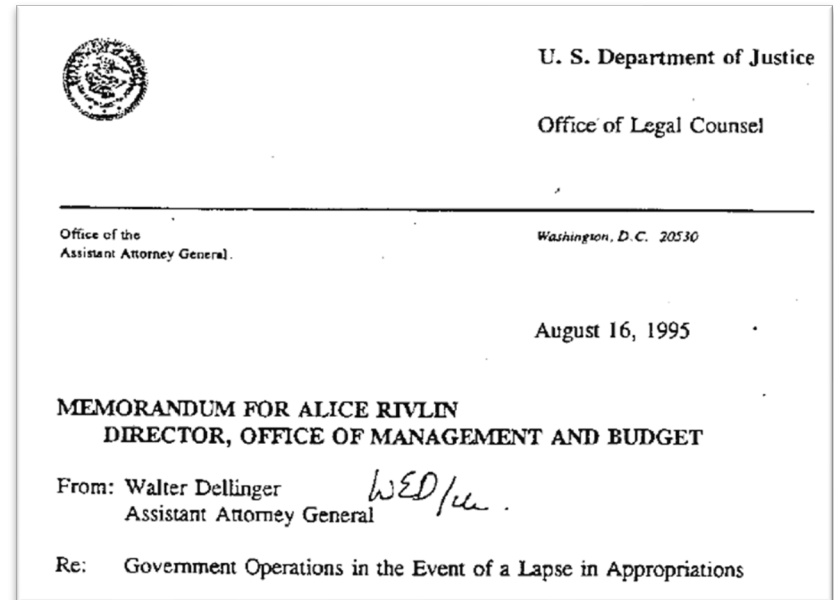
The Anti-Deficiency Act was subsequently amended to clarify an exception:

- The prohibition against spending did not include emergency situations: **“emergencies involving the safety of human life or the protection of property”**

13 U.S.C. 1342

# Shutdowns 101: Learning from the Past

- In 1995, Assistant AG Walter Dellinger issued an opinion regarding the scope of the emergency exception to the Anti-Deficiency Act.
- Dellinger's opinion has been interpreted broadly:
  - Besides law enforcement and other individuals necessary to protect property and life and limb, individuals necessary for the private economy could continue to work including air traffic controllers and meat inspectors.



# Excerpt from Department of War's Shutdown Contingency Plan Guidance

## Lapse Plan Summary Overview

Estimated time (to nearest half day) required to complete shutdown activities:	<i>1/2 day</i>
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Total number of civilian employees expected to be on board before implementation of the plan:	<i>741,477</i>
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### **Total number of civilian employees to be retained under the plan for each of the following categories:**

Compensation is financed by a resource other than annual appropriations:	<i>182,684</i>
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Necessary to perform activities expressly authorized by law:	<i>0</i>
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Necessary to perform activities necessarily implied by law:	<i>0</i>
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Necessary to the discharge of the President's constitutional duties and powers:	<i>0</i>
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Necessary to protect life and property:	<i>223,889</i>
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*- The figures above do not include 2,067,700 military personnel who continue to perform duties during a lapse in appropriation.*



# The Contractor's Tool Kit

FAR Provisions and Clauses and Other Legal Authorities

# Impact on Contracts

- This presentation focuses primarily on procurement contracts
- The shutdown could impact other significant contracting/agreement programs at the affected agencies, including:
  - Grants and cooperative agreements
  - HUD: housing assistance payment contracts to project owners
  - Indian Self-Determination and Education Assistance Act (ISDEAA) “Section 638” Contracts with Tribes and Tribally-owned entities (i.e.
  - Federal Real Estate Leases
- We are happy to address questions about these and other programs off-line.

# Impact on Contracts

- Remember the basic rule: Agencies cannot incur obligations in advance of, or that exceed, an appropriation.
- This means where an appropriation has lapsed, an agency cannot incur new obligations – including new contracts, task orders or exercising options on contracts except in very limited circumstances.
- **With respect to existing procurement contracts, a key threshold question is: to what extent have funds been obligated to the contract?**
- So how do you figure this out?

# Impact on Contracts

- FAR Subpart 32.7 requires the government to either fully or incrementally fund all fixed-price and cost-type contracts.
- This FAR subpart, and the clauses it prescribes, implement and are bounded by the Anti-Deficiency Act.
- The FAR contains a number of clauses addressing “**Limitation of Costs**” and “**Limitation of Funds.**”
- **Assess your contract type**, the funds presently obligated, and the relevant FAR clauses in your contract (i.e. the 52.232.xx clauses)
- Don’t forget the Prompt Payment Act (discussed below)!

# Impact on Contracts

- **What if these ADA and FAR requirements are not followed and work continues without obligated funding?**
- The Contractor is likely providing **improper “voluntary services”** (see discussion above) and is **“at risk.”**
- The Contracting Officer may be committing administrative or even criminal violations by accepting voluntary services.
- *The practical quagmire: what if the Government tacitly encourages continued performance or simply goes silent?*

# Impact on Contracts

- **Even if a Contract is funded there are other potential impacts of the shutdown that may disrupt the contract, including:**
  - The Agency **lacks funds to administer** the contract
  - The Agency **lack of funds makes acceptance of the services impossible or meaningless** (i.e. the federal building where the services are to be performed is closed)
  - The Agency **lacks funds to carry out administrative functions**, like paying the contractor
- Per OMB Cir. A-11, agency shutdown plans are hosted on each agency's website
- All of these considerations create additional layers of risk for contractors (and grantees)

# Impact on Contracts

- There are other impacts that implicate the contracting process, including:
- Per its shutdown plan: SBA: will stop reviewing and approving applications, such as 8(a) applications, mentor-protégé applications and 8(a) joint venture agreements. (But HUBZone applications may continue)
- State Department: export control licenses and related support from the Directorate of Defense Trade Controls are “significantly curtailed.”
- Rule-making processes (i.e. FAR and SBA) are suspended.

# Excerpt from Department of War's Shutdown Contingency Plan Guidance

- **Existing Contracts:** Contractor may continue to provide contract services up to the limit of the funds obligated on the contract prior to the lapse in appropriations, if they do not require:
  1. Access to Government Facilities
  2. Active administration by Government personnel; or
  3. The use of Government resources in a manner that would cause the government to incur additional obligations
    - When appropriations expire and new funding is required to continue contract performance, a stop work order may be required.
- **New Contracts:** New contracts (including exercise of options) **may not be executed**, nor may increments of funding be placed on incrementally funded contracts, unless the contractor is supporting an excepted activity.
  - **“No funds will be available to pay such new contract or place additional increments of funds on contracts until Congress appropriates additional funds.”**



Was My Contract Impacted by  
the Shutdown?

If So, How?

# Shutdown Impacts on Contracts

**Undertake a Contract-by-Contract Review (See Eric's Action Plan below)**

**Was Your Contract Previously Funded** for the Duration of the Shutdown? Or Not?

**Did You Receive a Notice or Other Direction to Stop or Suspend Work** from the Government?

## **Key FAR Clauses**

- 52.242-14 (Suspension of Work)
- 52.242-17 (Government Delay of Work)
- 52.242-15 (Stop Work Order)
- 52.243-1 (et seq.) (Changes)
- 52.232-5, Prompt Payment

# Shutdown Impacts on Contracts

## **Even if No Stop Work Order was Issued, Was Performance Impeded by the Shutdown?**

- Inability to access Contracting Officers and furloughed Government personnel?
- Inability to access Government facilities or property?
- Delayed payments of invoices even though the contract is funded?
- Efforts to mitigate increased costs imposed by the shutdown?
- Did the contractor give prompt notice of delays or increased costs caused by these “constructive changes” in performance requirements?

# What Costs May a Contractor Seek to Recover?

# Potentially Recoverable Shutdown Costs

## Direct Costs

- Costs incurred to **maintain employees, facilities, equipment** idled by the shutdown that are ***reasonably necessary to immediately resume work when stop work is rescinded*** (subject to **reasonable efforts to mitigate** those costs)
  - Includes **salaries and benefits** *actually incurred* to maintain employment
- Costs incurred for **demobilization and re-mobilization activities** caused by stop work and resumption of work
- **Claims by subcontractors** for any of the above (subject to actual subcontract liability and reasonable efforts to mitigate those costs)
- Ideally, costs should be **tracked and documented in a “stop work” account** established at the time of the work stoppage.
- **Helpful case:** *Raytheon STX Corp.*, GSBCA No. 14296-COM, 00-1 BCA ¶ 30632, 1999 WL 997035 (Oct. 28, 1999) (reasonable costs incurred by prime contractor and subcontractor to maintain readiness of workforce to resume performance after stop work order rescinded was allowable as an equitable adjustment to the contract cost)

# Potentially Recoverable Shutdown Costs

## Indirect Costs

- **Cost reimbursement contracts:** Overhead, G&A, and reasonable fee on direct costs
- **Firm-Fixed-Price Contracts:** Any re-allocation of unabsorbed indirect costs *originally priced in contract* reasonably necessary to make the contractor whole.

## Other Items

- **Cost of preparing a payment request:** In some cases, costs of professional assistance to prepare REA
- **Prompt Payment Act** Interest on past due invoices (see below)

# Clause-Specific Timeframes and Format for REAs and Claims

# Clause-Specific Remedies and Timeframes

## FAR 52.242-15 – Stop-Work Order (Aug 1989)

- “Upon receipt of the order, the Contractor shall immediately comply with terms and **take all reasonable steps to minimize the incurrence of costs allocable to the work** covered by the order during the period of work stoppage.”
- “If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, **the contractor shall resume work**.”

**Mitigation vs. Readiness:** Contractors may continue to incur costs reasonably necessary to maintain ability to immediately resume work *if alternative work is unavailable*.

- “The Contracting Officer **shall make an equitable adjustment** in the delivery schedule or contract price, or both, and the contract shall be modified in writing accordingly, if-
- (1) The stop-work order **results in an increase in the time required for, or in the Contractor’s cost properly allocable to the performance** of any part of this contract; and
- (2) **The Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage**; provided, that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon the claim submitted at any time before final payment under this contract.”



# Clause-Specific Remedies and Timeframes

## FAR 52.242-14 – Suspension of Work (Apr 1984)

- “If the performance of all or any part of the work is, **for an unreasonable period of time**, suspended, delayed, or interrupted by (1) an act of the Contracting Officer in the administration of this contract . . . **an adjustment shall be made for any increase in the cost of performance** of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly.”
- **Does not apply to** (1) delays caused by the negligence of the contractor or (2) *for which an equitable adjustment is provided for or excluded under any other term or condition of the contract.*
- “A claim under this clause **shall not be allowed-**
  - (1) For any **costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing** of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order); and
  - (2) Unless **the claim, in an amount stated, is asserted in writing **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.

# Clause-Specific Remedies and Timeframes

## FAR 52.242-17 – Government Delay of Work (Apr 1984)

- “If the performance of all or any part of the work is delayed or interrupted (1) **by an act of the Contracting Officer in the administration of this contract that is not expressly or impliedly authorized by this contract** . . . an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption, and the contract modified in writing accordingly.”
- “Adjustment shall also be made in the **delivery or performance dates** and any other contractual term or condition affected by the delay or interruption.”
- **Does not apply to** (1) delays caused by the negligence of the contractor or (2) *for which an adjustment is provided for or excluded under any other term or condition of the contract.*
- “A claim under this clause **shall not be allowed-**
  - (1) For any **costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing** of the act or failure to act involved; and
  - (2) Unless **the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the** delay or interruption, but not later than the date of final payment under the contract.”

# Clause-Specific Remedies and Timeframes

## FAR 52.243-1 – Changes-Fixed-Price (Aug 1987)

- **The CO may make written changes** within the general scope of the contract in any one or more of the following: (1) description of services; (2) time of performance; or (3) place of performance.
- “If any such change causes an **increase or decrease in the cost of, or the time required for,** performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer **shall make an equitable adjustment in the contract price, the delivery schedule, or both,** and shall modify the contract.”
- “The Contractor must **assert its right to an adjustment** under this clause **within 30 days** from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.”
- “**Failure to agree to any adjustment shall be a dispute under the Disputes clause.** However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.”

# Clause-Specific Remedies and Timeframes

## FAR 52.243-5 – Prompt Payment (Jul 2013)

- The Prompt Payment Act (PPA) requires the Government to pay contractors interest on invoices properly submitted for work performed and accepted that go unpaid more than 30 days after submission.
- The FAR also contains enhanced prompt payment requirements for small business contractors which may provide for payment in as little as 15 days.
- In the not too distant past PPA remedies were not very significant because interest rates were low. That has now changed and interest obligations could become quite significant particularly if delays in payment become substantial.
- Per the PPA clause, the Government is supposed to automatically calculate and pay this interest if their payments exceed the PPA deadlines.
  - If you do not receive PPA interest as required, remind the contracting officer of the Government's affirmative obligations
  - **Document** timing of acceptance of work and submission of proper invoices to establish the date on which interest penalties will begin to accrue.

# The Contractor's Action Plan

# The Contractor's Action Plan

## Step 1: Review Contracts

- Determine Contract type, how funded and which FAR clauses are included
- Understand Funding Source
  - Annual Authority (Default)
  - Multiyear Authority
  - “No-year” authority
  - Fees or other non-Congressional source?
  - Was it fully executed and fully funded prior to lapse?

## Review Subcontracts and Vendor Agreements

- Do they address a shutdown or otherwise address government terminations or stop work?
- What Notice requirements are included?
- What do they provide in terms of payment -- i.e. do they provide for “pay-when-paid” or something else?

# The Contractor's Action Plan

## Step 2: Review communications from the Contracting Agency

- Only an authorized Contracting Officer or representative can issue a Stop Work Order (complete or partial), or a Termination for Convenience
- If there is no communication from the Contracting Officer regarding work, contractor must proceed so long as the contract has remaining funds and subject to the FAR clauses included.
- If formally directed to stop work, wind down and stop. Advise subcontractors in writing. Document all of this.
- If formally directed to stop work, wind down and stop.
- Advise subcontractors in writing immediately.
- Follow up with the Contracting Officer and Subcontractors in writing to confirm compliance.
- Track costs of all of this.
- Document all of this.

# The Contractor's Action Plan

## **Step 3: Even if contract funding remains in place, determine whether work can logistically continue and what other impacts you will face:**

- Is a Government workplace necessary to continue working?
- Are Government employees necessary to continue working or accept deliverables?
- Are Government employees available to perform contract administration functions including making payments?
- Advise the contracting officer in writing of any such potential disruptions.

## **Step 4: Determine status of employees**

- Are they overseas or elsewhere? Does it make sense to have them come home?
- What is their employment status?
- Employee-related issues will be addressed later in the presentation.



# The Contractor's Action Plan

## Step 5: Understand cost and expense issues

- Set up separate cost centers for expenses related to winding down (and starting up operations) and advise subcontractors to do the same
- Understand impact on indirect rates
- Mitigate costs
- Document everything

## Step 6: Be aware of other potential practical issues

- Proposal submission dates and awards may change (but may not)
- E-Verify is unavailable; may not be able to onboard new employees
- SBA is impacted; certifications may not be approved

# The Contractor's Action Plan

## Step 7: Continue to prosecute protests and claims

- Debriefing deadlines are statutory and not automatically extended
- Statutes of Limitation may not be impacted by the shutdown; filings may still need to be made
- GAO is usually open; deadlines remain but some cases are suspended because agency counsel is unavailable
- COFC is usually open, but DOJ Attorneys are furloughed – stays are being granted on a case-by-case basis
- Agency claim deadlines remain

# The Contractor's Action Plan

## **Step 8: When shutdown ends, be prepared to start work quickly and seek reimbursement**

- Document stop work and start-up expenses
- Submit request for expenses related to the shutdown
  - REA or via changes clause
  - Employees costs and overhead
- Communicate with employees
- Invoice for prior work and consider whether additional interest payments are due

# The Contractor's Action Plan

## Step 9: Review your Loan Documents

- While the debt remains outstanding, contractors need to comply with their financial covenants.
- Financial covenants test a borrower's financial performance to signal to lenders financial weaknesses before a borrower defaults.
  - These tests create ratios comparing leverage, fixed expenses and other items to cash flow.
- Contractors will need to comply with financial covenants despite a shutdown as failure could lead to an Event of Default, which would likely result in a loss to access to credit.
- Contractors should review with counsel the applicable definitions of EBITDA to determine whether there may be some help available that it isn't currently using

# The Contractor's Action Plan

## Step 9 (continued): Project Compliance

- Contractors should project compliance with their financial covenants before a shutdown occurs and continue to project compliance as the actual effect of the shutdown becomes apparent.
- When testing compliance, be conservative about revenue loss during the shutdown and how long it may last. It is important to maintain a cushion.
- Be conservative about delays in receipt of payments both for accounts receivables currently outstanding and work-in-progress and for work performed after the shutdown ends.
- Contractors should examine expenses included in the fixed charge coverage ratio to determine whether any are arguably excludable and whether any can be suspended during a shutdown.

# The Contractor's Action Plan

## Step 9 (continued): Work with Lenders and Counsel Proactively

- If contractors project any failure to comply during a government shutdown, they should discuss with counsel whether and how to reach out proactively to lenders to signal the situation and to discuss the availability of a waiver.
- As a government shutdown looms, lenders will call contractors to ask questions about the effect a shutdown may have on the contractor's ability to meet its covenants.
- Lenders will want to work with you if you are proactive and can articulate a plan to survive the shutdown.
- Contractors should check their facilities for EBITDA cure mechanisms which may be needed if the shutdown lingers.

# Labor & Employment Issues

# Labor & Employment Issues

## If my employees can't work, do I need to prepare a WARN Act notice?

- Probably not.
- A WARN Act notice is required due to a “plant closing” or “mass layoff” of **30+ days** resulting in “employment loss.”
- Under the Act, “employment loss” is:
  - Involuntary not-for-cause termination;
  - A layoff of **6+ months**; or
  - A 50%+ reduction in work for **6 months**.
- But even after **6 months**, the “unforeseen business circumstances” exception to providing notice may apply.
- Ensure you are familiar with state law requirements (mini-WARN Acts).



# Labor & Employment Issues

## Do I have to keep paying my salaried employees?

• **Partial workweeks off:** Under the FLSA, if an exempt employee performs any work in a single workweek because of a temporary layoff, you need to pay him or her for the entire week.

- This rule applies when the employee is available to work but works reduced or partial hours because the employer does not make work available.
- **Full workweeks off:** Exempt employees may be placed on unpaid leave for full workweeks in which they perform no work.
  - Responding to even one email jeopardizes the full workweek exception to deductions from exempt employee pay.
  - Give clear written instructions regarding expectations that no work will be performed.
  - Consider retaining work computers and phones, disabling email and network, and giving express instructions not to work.
  - Ensure the essential job duties of employees on temporary layoff are assigned to a working employee.

# Labor & Employment Issues

## What should I do about PTO?

- Under the FLSA, if an exempt employee receives his or her full salary, an employer may impose a mandatory deduction to an exempt employee's PTO balance for a full or partial day absence resulting from a temporary layoff.
- Ensure you can also do this under state law before doing it.
- Do not require use of separately accrued sick leave and be aware of applicable paid sick and safe leave laws if such leave is combined with PTO.
- Review your employee handbook, standard offer letter, and other policies for any contrary representations.
- Tread carefully with advanced leave/ negative accruals.
- Consider the impact on employee morale.
- Option: require employees to use PTO for partial furlough weeks, but give employees the option for full furlough weeks.

# Labor & Employment Issues

## What about employee benefits?

- Healthcare continued coverage:
  - Many plans will not carry employees who have been “inactive” for more than thirty days.
  - Employees may need to be informed of their COBRA rights and offered the option of electing COBRA continuation coverage.
- Covering employee-side premiums and then requiring repayment:
  - Is this okay? It may depend on whether your plan is fully insured or self-insured.
- Under state law, employees on shutdown temporary layoff may be eligible for UI benefits.
  - Do not advise employees on eligibility, make predictions about eligibility determinations or answer questions that require the interpretation of state-issued regulations.
  - Refer employees to the appropriate state agency for advice.

# Labor & Employment Issues

## **What if our company has a union?**

- You may need to enter mid-contract negotiations with your union(s). It depends on what your collective-bargaining agreement says, or doesn't say, about layoff procedures and notice, exceptions to those provisions, or government shutdowns.
- You should consult with labor counsel before any unilateral layoffs, reductions in wages, or forced vacations that affect unionized employees.

# Labor & Employment Issues

## Any thoughts on best practices?

- Align all shutdown-related messaging among management, HR, legal, and compliance functions.
- Open communication with employees is critical.
  - Forced temporary layoffs can reduce morale among those losing work *and* those still working.
  - Low morale can cause employees to leave, work poorly or less, and sue for seemingly unrelated reasons.
- Share information once it can be conveyed accurately.
  - If the situation is murky, say so. Don't guess or forecast.
  - Tell employees that you'll share information as you learn it.
- Designate specific management and HR personnel to handle questions.

Questions?

