

# Post-Shutdown Cost Recovery for Government Contractors

*Holland & Knight LLP*

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Holland & Knight

# Today's Speakers



**Chris Nagel**

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- Partner, National Government Contracts Team
- Mr. Nagel advises businesses on a broad range of legal issues involving their relationship with the government. His work focuses on companies that contract with the U.S. Department of Defense (DoD) and U.S. Intelligence Community (IC), as well as other aspects and matters that involve national security.
- Mr. Nagel represents clients in bid protests, contract claims, suspension/debarment, False Claims Act (FCA) matters and disputes between contractors. He helps with compliance issues, including internal investigations and employee training.
- 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.
- Prior to his service in the Marines, Mr. Nagel worked as a staffer to a member of Congress and as a writer at the White House.

# Today's Speakers



**Amy Fuentes**

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- Partner, National Government Contracts Team
- Represents contractors in responding to stop work orders, agency terminations, requests for equitable adjustments, certified claims, and appeals to the board of contract appeals and the U.S. Court of Federal Claims.
- Specializes in small business issues including size and status protests and appeals, affiliation analysis, mergers and acquisitions issues, and SBIR/STTR contracts.
- Advises clients on regulatory compliance matters including the FAR and DFARS, GSA MAS requirements, and domestic preference requirements.
- Serves as bid protest counsel before the GAO, U.S. Court of Federal Claims, and FAA ODRA.

# Introductions: David Black



**David Black**

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- Co-Chair, National Government Contracts Team
- Trusted advisor, problem solver, and advocate for federal contractors in every stage of growth
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- Represent contractors in protests and claims and responding to government investigations, audits, False Claims Act investigations and litigations
- Represent subcontractors in negotiating teaming agreements and subcontracts, and in disputes with prime contractors

## *Agenda*

- » **Post-Shutdown Context**
- » **When REAs are Required After a Shutdown (or Not):  
Know Your Contract Clause**
- » **Cost Allowability**
- » **Best Practices for REA Preparation**
- » **When an REA Stalls or Hits an Impasse**
- » **Performance Considerations Following a Stop Work  
Order**
- » **Closing and Q&A**



# Post-Shutdown Context

# Post-Shutdown Context

- **Shutdown Lasted 43 Days** (longest in U.S. history)
- **Government Re-Opened on November 13, 2025**
- **Resumption of Operations**
  - Once appropriations are restored, agencies and contractors must quickly transition from shutdown protocols back to normal operations.
  - Contractors should be prepared to resume work immediately, as required by FAR 52.242-15 (Stop-Work Order), which mandates prompt resumption and allows for equitable adjustment claims for costs incurred during the shutdown and restart periods.
- **Funding Status:**
  - Contractors must confirm whether their contracts were fully funded prior to the shutdown. If not, new work cannot begin until funds are obligated.
  - Any work performed without obligated funds risks being considered voluntary and uncompensated, exposing both the contractor and the government to Anti-Deficiency Act violations.

# When REAs are Required After a Shutdown (or Not)

*Know Your Contract Clause*



# Shutdown Impacts on Contracts

**Undertake a Contract-by-Contract Review (See 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)
- 52.242-15 (Stop Work Order)
- 52.242-17 (Government Delay of Work)
- 52.243-1 (et seq.) (Changes)
- 52.232-5, Prompt Payment

# 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.*

# Clause-Specific Remedies and Timeframes

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

- » “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.*

# Clause-Specific Remedies and Timeframes

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

- » “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.*

# Clause-Specific Remedies and Timeframes

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

- » “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 52.232-5 -- 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.
  - The Current PPA interest rate is **4.875% through December 31, 2023.**
- 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.



# Cost-Recovery if No Stop Work Order

## 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?

## **52.243-1 Changes—Fixed-Price.**

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.

(2) Method of shipment or packing.

(3) Place of delivery.

## **52.243-1 Changes—Fixed-Price.**

b) 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.

(c) 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.

## **52.243-1 Changes—Fixed-Price.**

(e) 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.



# 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)

# Potentially Recoverable Shutdown Costs

## Direct costs

- » Ideally, costs were **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.



# Potentially Recoverable Shutdown Costs

## 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)



# Best Practices for the REA Process

# REA Process

- **Timely give required notice** of intent to submit an REA (check your clause)
- **Establish a team or working group** for REA preparation
  - Contracts, Program Management, Finance, HR, Executive
- **Outline and Identify Costs** Incurred Due to Shutdown Delay
  - Prepare to defend the “reasonableness” of costs and “mitigation efforts”
  - Include subcontractors

# REA Process

- **Outline Schedule Impacts** to Contract Work
- **Collect documentation** to support costs
- **Prepare REA “Narrative”** Explaining Entitlement to Costs
- **Prepare REA Cost Workbook** Summarizing the Amount of Costs
- **Prepare Exhibits** to support the Narrative and Cost Workbook
- **Respond to the Agency** when it raises questions or concerns
- **Negotiate a fair and reasonable resolution**
- **Amend the contract to reflect the REA** (price and/or schedule)



# When an REA Stalls or Hits an Impasse

# REA Standstill or Impasse

- **Standstill**
  - Some patience is required
  - Follow up appropriately
  - Escalate appropriately
  - Respond promptly when the agency (finally) engages
- **Impasse**
  - Exhaust all attempts at negotiated resolution
  - Convert the REA to a CDA “claim” under FAR 52.233-1
  - Appeal to BCA or COFC if the claim is denied

# Performance Considerations Following a Shutdown

# Post-Shutdown Performance Considerations

- **Mobilization Considerations**
  - The customer
  - Employees
  - Subcontractors
  - Addressing schedule impacts through the REA process



# Questions?

