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After the Flood: Cleaning up from Gov't Shutdown 2013

Law360
December 2, 2013

Back in September, we advised contractors to record everything in order, among other things, to capture and, if necessary, be ready to assert requests for equitable adjustment (REAs) if shutdown-related government actions led to increased costs or delays. For all those who took this advice, congratulations, but read on for how to make certain that your efforts can be translated into maximum recovery. For those who did not have the opportunity to keep good records regarding those confusing and hectic weeks, there is still hope, but every day is critical.

By now you should have a better idea as to whether the shutdown has had a cost impact on your company, at least at a high level. If you can confidently assess the quantum (or net amount) of such costs as relatively small, you may wish to absorb them and thereby promote your company's reputation as a "team player." However, among the types of relief that should be considered are acceleration, unabsorbed overhead, delay and disruption, furlough costs, and recruitment costs to replace personnel lost due to inactivity or contract downtime.

To make an assessment of whether to assert one or more such legal theories, you may want to consider current customer relations, customer temperament, and the specific budgetary circumstances in which your customer finds itself going forward, among other factors. These considerations are actually relevant regardless of how much money is involved, and of course, this is fundamentally a business judgment rather than a legal call.

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But the important thing is not to simply abandon, through inaction, the right to assert such requests. Thus, if the potential damage from the shutdown is significant and if, to this point, you have not done a great job of "recording everything," the time to capture the facts and data necessary to assert any REAs (and, if necessary, claims under the Disputes Clause) is now. Every day that passes, memories dim, other projects distract, and critical documents are lost or destroyed.

If the shutdown really hurt your company, assemble a team of project personnel and cost estimators now to inventory the damages attributable to government actions or inactions, to identify key persons and documents with information relevant to those costs or schedule impacts, and to safeguard and capture those documents and experiences required to prove any REAs or claims.

Where necessary documents do not exist, consider documenting what happened through memos or declarations, while memories are still reasonably fresh. Finally, when the anticipated quantum of shutdown-related damages is high, legal counsel should be involved early in order to maximize the capture of the right evidence and to help determine which costs are most feasibly recoverable.

And in parallel with these efforts, for all companies wanting to pursue shutdown cost reimbursement or schedule extensions, you should consider the Notification of Changes Clause, FAR 52.243-7. This clause, often overlooked in the heat of a crisis, requires the contractor to make a "prompt" report of actions deemed by the contractor to be a constructive change to the contract. While the clause does not define "prompt," it is safe to say that the longer the delay, the greater the risk that the government will be able to argue, successfully, that it was prejudiced by the failure to receive notification. The prescriptive language from the main FAR text, FAR 43.104(a), specifies the principle reasons for the notice requirement as follows:

(a) When a contractor considers that the Government has effected or may effect a change in the contract that has not been identified as such in writing and signed by the contracting officer, it is necessary that the contractor notify the Government in writing as soon as possible. This will permit the Government to evaluate the alleged change and—

- (1) Confirm that it is a change, direct the mode of further performance, and plan for its funding;
- (2) Countermand the alleged change; or
- (3) Notify the contractor that no change is considered to have occurred.

The clause spells out what should be included in the notification, to include the anticipated cost and schedule impact. The notification is not an actual REA or claim, and thus it does not need to be certified, or prepared with the same level of detail as would be required for either an REA or claim. Nevertheless, companies must exercise due care to ensure accuracy and completeness as far as possible, and the notification should specify, as appropriate, when the matters set forth in it are based on partial or undeveloped data.

In deciding when to make notification, the company, ideally with the assistance of legal counsel, should

balance the need for prompt notice, against the time required to achieve an adequate level of confidence in the matters conveyed to the contracting officer. In certain situations, it may be prudent to make a very high-level initial notification, with little detail, and inform the contracting officer that a more detailed notification will be transmitted as soon as possible.

We also recommend that, in advance of making any written notifications under the clause, the contractor have a conversation with the contracting officer and program manager to preview the letter, answer questions, and address concerns and any misunderstandings, or government "sticker shock."

But in any event, the clock is ticking. Companies that have suffered financial damage because of untimely, inconsistent or unsound government action in response to the recent fiscal unpleasantness should take action now to preserve their rights to be made whole.