

Don't Let The Clock Run Out On Gov't Contractors

Law360, New York (October 15, 2013, 1:32 PM ET) -- It has been a tumultuous few weeks for our whole country. There is a lot of pain to go around, but among those most acutely affected by that tumult are those in the federal government contracting community. Much has been written about the negative impacts on intangibles like morale, mission, safety and, indeed, the very fabric of our system. Those negatives are very real and have been eloquently addressed by others. The disruption, however, will also cause more concrete and tangible harm, in the form of unforeseen economic injury to those companies doing business with the government. That aspect of the current political impasse is of interest here, and a matter to which some attention should likely be paid.

The lapse in appropriations has obvious impacts for new federal contracts, renewals and work orders to be funded with fiscal year 2014 funds. Even for those contracts for which alternative sources of funding exist, however, there are significant potential impacts. Imagine a company with a contract for the provision of IT support or data analysis, whose workers were told by the contracting officer to stay home starting Oct. 1, 2013, because the doors at the agency building where the services are performed would be locked.

Eventually, one hopes, the shutdown will end, and the company can return to performing its task. In the interim, however, the company may well face increased costs in the form of payments to idle workers, demobilization and remobilization costs, preservation or expensive workaround activities, or other out-of-scope tasks. Impacts on deadlines may be uncertain, and acceleration and overtime may be necessary to avoid penalties or default when things return to something more like normal.

What we have, in other words, is a classic government-caused suspension of work, although the scope of that suspension is probably unprecedented. Just like a construction company that has been arbitrarily locked out of the job site, an incalculable number of federal government contractors have likely had their performances impeded by the government. Regardless of what part of the government might be at fault, the fact remains that the government has almost surely, *de facto*, suspended the performance of hundreds or thousands of contracts for reasons beyond the control or fault of the companies performing the work.

The day-to-day focus since Oct. 1 has, understandably, been to work with federal customers to try to address the many challenges presented. Ultimately, however, the federal government contractor has a duty to its shareholders and stakeholders to not, voluntarily, shoulder all of the financial burden for circumstances it did not create, and that it could not avoid. There are undeniable (and unfortunate) costs to the government shutdown, but the innocent government contractor merely trying to perform its obligations should not be the sole party to bear those costs. Although the number of the suspensions and delays we are seeing right now may be without precedent, the government contracting scheme comfortably accommodates circumstances of government-caused suspensions and delay, and provides for compensation to the contractor in such circumstances.

Depending upon the specific nature of the contract, the work at issue and the character of the impact, the precise nature of a claim for reimbursement could take many forms. But, many — if not most — could implicate fairly tight deadlines for providing notice to the government. To cite just a few examples: the standard Changes-Fixed Price clause of the Federal Acquisition Regulation requires a contractor to assert its right to an adjustment “within 30 days” of the order of the contracting officer asserted to constitute the constructive change, FAR 52.243-1(c), as does the standard Changes-Cost Reimbursement clause. FAR 52-243-2(c). Similarly, the Suspension of Work clause for fixed price construction contracts, FAR 52-242-14, can bar recovery of costs going back more than 20 days from the date that the contractor notified the contracting officer in writing of the “act or failure to act involved,” and if the claim is not fully presented “as soon as practicable” after the termination of the delay or suspension. FAR 52-242-14(c).

The Stop Work Order clause for supplies, services and research and development contracts requires a contractor to assert its right to recovery “within 30 days” of the end of the work stoppage. FAR 52-242-15(b)(2). The Government Delay of Work clause for noncommercial supplies and services, like the fixed price Suspension of Work clause for fixed price construction contracts, can bar recovery of costs going back more than 20 days from the date that the contractor notified the contracting officer in writing of the “act or failure to act involved,” and if the claim is not fully presented “as soon as practicable” after the termination of the delay or suspension. FAR 52-242-17(b).

If a contractor were locked out and effectively directed not to perform on Oct. 1, 2013, and a “constructive change” theory is contemplated in support of an equitable adjustment to the contract price, serious consideration should be given to making that assertion of entitlement by Oct. 31, 2013, or the government could have an easy basis for denial. For decades, the courts have recognized — and often enforced — government defenses based upon failure by contractors to protest or to provide timely and adequate notice. E.g., *J.A. Ross & Co. v. United States*, 115 F. Supp. 187 (Ct. Cl. 1953). While the case law is mixed, and some boards and courts require the government to show prejudice or lack of knowledge if it is to rely upon a lack-of-notice defense, it is rarely a good idea to hand over to the government even a potential dispositive defense, if that can be avoided.

The above recitation is far from an exhaustive list of potentially applicable contract clauses, and, again, the precise nature of the harm and resultant claims could take any number of forms. The basic, and critically important, point for present purposes is this: the time to be looking past the daily crises and to be proactively planning for steps to protect the government contractor down the line is right now. When the drama is finally over, it may be too late.

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