CLIENT ALERT

Potential Federal Government Shutdown: Crowell & Moring Identifies and Answers Common Questions

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Congress has not passed crucial funding bills for the start of FY 2022 and, on September 28, 2021, Treasury Secretary Yellen informed Congress that Treasury now estimates that the Federal government will reach the debt ceiling by October 18. As a result, we again face the prospect of a government shutdown for lack of funding. While Congress may yet take action, agencies across the government are likely to begin taking steps to prepare for a shutdown, and contractors should do so as well.

Although the issues that contractors would face under a government shutdown may vary with the circumstances of individual contracts, there are a number of common considerations. Based on our experience under prior Federal government shutdowns, these include:

- **Where Is the Money?** For incrementally funded contracts, a "shutdown" situation is likely similar to those experienced at the end of any fiscal year when there is a "gap" between appropriations. Contractors will need to consider the implications of the various standard clauses (Limitation of Costs, Limitation of Funds, Limitation of Government Obligations) that may affect the government's obligation to pay costs in excess of the amounts already obligated to their contracts. Of particular concern will be the standard provisions in those clauses that may limit the government's liability for termination costs in the event that the contracts are eventually terminated without new funding. Contractors will need to decide whether to continue to perform or to take the actions authorized when funding is insufficient to pay for anticipated costs. But for contracts that are fully funded or that have incremental funding sufficient to cover all anticipated costs, including termination costs, a shutdown would not normally create new funding risks.

- **Delay and Disruption.** Due to the unavailability of appropriated funds, contractors may be unable to access closed government facilities or obtain timely approvals, directions or support from the government. For example, a contractor that performs services in a federal facility may find that the facility is closed, so the contractor's employees do not have access to their workplace. In that situation, contractors will need to decide whether to (1) continue to pay employees for idle time caused by the shutdown, (2) force employees to take vacation or other paid leave for the duration of the shutdown, or (3) furlough or lay off employees. In connection with those decisions, contractors need to consider not only their contractual requirements, but also the applicability and requirements of federal, state, and local labor and employment laws (such as WARN Acts), the terms of their employment contracts and collective bargaining agreements, the impact that their decisions may have on employee relations, and other factors. In a situation in which the duration of the shutdown is unclear, those decisions can be even more difficult, involving a variety of competing and largely unattractive options.

- **Remedy.** Contract type and the availability of a remedy from the government for the consequences of a shutdown will also be important in the decision-making process. For contractors with cost-reimbursement contracts, the reasonable costs of coping with a shutdown should be recoverable, although there may be issues about the allocability and allowability of specific items of cost. On fixed-price contracts, any recovery from the government will likely depend on whether the contractor is entitled to an equitable adjustment. And, on T&M contracts, there are likely to be contract-specific issues about whether the contractor is entitled to be paid under the contract for idle time or would need to make a claim for an equitable adjustment. Again, every situation should be assessed separately, based on specific facts. In general, however, contractors should take steps to ensure that any increased costs associated with the shutdown are collected in a way that will support a claim or a request for equitable adjustment if the contractor ultimately decides to pursue one.

- **Mission Creep.** Some contractors may actually be approached by their government customer seeking to off-load, at least temporarily, work that cannot be performed by the government during the shutdown period. If the contract funding is available, the government may want to increase the scope of the contract in order to ensure that certain work is not disrupted or delayed. Contractors should ensure that any increases in scope and associated cost or price adjustments are appropriately reflected in a contract modification.

- **Timing of Payment.** There may be delays in payment. As noted above, the government's ultimate legal liability for payments due on contracts that are already funded at the time of the shutdown are unlikely to be at issue, but if the government employees who process contractor invoices and make contractor payments are not at work, there will obviously be no payments made. For large contractors with substantial bills that may involve payments of millions of dollars on a daily basis, the consequences of even a short delay in payment could be economically significant, although probably not an existential threat to the company. For contractors without readily available cash or credit lines, the consequences of more than a brief delay in payment could be more consequential.

A shutdown may not occur and, if it does, may not last long. But prudent contractors will assess the likely impacts of a shutdown on their operations and make contingent plans for dealing with the consequences. Our team is closely monitoring events and standing by to help you work through any issues that may arise.

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