

## The Shutdown's Impact On Government Contracting Disputes

By **Jeffery Chiow and Lisa Himes**

(January 26, 2019, 10:39 AM EST)

The longest-ever partial shutdown of the federal government has finally ended — at least for three weeks. But it will take some time to unwind. As lawyers who litigate in various federal courts and other federal forums, most often on behalf of government contractors, we share here our understanding of the shutdown's impacts on the resolution of legal disputes. This shutdown forced adjudicative bodies and government litigants to decide, with little notice, what they were required and/or permitted to do in the absence of congressionally appropriated funds. The impact of those decisions will be felt in the weeks and months ahead, and may prove instructive for the next shutdown.



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### Federal Courts

Since the partial shutdown began on Dec. 22, 2018, the judiciary continued to operate by using court fee balances and other funds. In a series of announcements, the Administrative Office of U.S. Courts adjusted its forecast for the date on which the federal courts could no longer sustain funded operations, eventually settling on Jan. 31, 2019 (or Feb. 1 at the absolute latest). By deferring obligations and minding costs, the courts were ultimately able to stretch available funds for approximately seven weeks.



Lisa Himes

If the shutdown had continued into February, the judiciary's operations would have been guided by the terms of the Antideficiency Act, which allows only mission-critical work. Such work includes activities to support a court's exercise of its constitutional powers under Article III, and in particular the resolution of cases and necessary related services. Some courts, including the U.S. District Court for the Eastern District of Virginia and the U.S. Court of Appeals for the Federal Circuit issued orders alerting litigants of the court's expectations for hearings and filing deadlines in an unfunded state. Those orders, though, did not explain how security, trash removal, IT support or other support functions would have been handled in the absence of appropriations. The courts planned to keep the Case Management/Electronic Case Files docketing system and PACER, which allow public access to court documents, operating.

Courts were said to be working with their district's U.S. attorney, U.S. marshals and federal protective staff to address service levels required to maintain court operations. The U.S. General Services

Administration, which manages owned and leased courthouse facilities, had already begun reducing operations, requiring courts to mitigate the impact on building services.

## **U.S. Department of Justice**

### ***Civil Cases***

We regularly litigate claims and bid protests in the U.S. Court of Federal Claims and the Federal Circuit, in which the government is represented by the U.S. Department of Justice, Civil Division, National Courts section. When we contacted the DOJ attorneys in those matters during the shutdown, we got an automated reply which said something like:

The appropriation that funds my salary has lapsed, and as a result I have been furloughed and am currently out of the office. If your matter is urgent, please contact ... . Otherwise, I will respond after funding has been restored.

Depending upon the type of matter, that response was followed by a short — though sometimes substantive — response to our message from the DOJ attorney litigating the case. Our impression was that while the attorneys were officially furloughed, they were monitoring their cases in order to keep the trains moving.

In bid protest cases, we were told informally that where the DOJ was representing a funded federal agency, for example the U.S. Department of the Army, the DOJ attorneys were essentially operating as normal. For agencies where funding had lapsed though, for instance the U.S. Department of the Treasury, the DOJ sought a stay of proceedings.

The differing approach to protests involving funded versus unfunded agencies makes some sense as the DOJ would not have access to contracting officers or other government personnel, or to records when the agency involved in the case was shuttered. When the shutdown first started, DOJ attorneys requested extensions of filing deadlines even in cases involving funded agencies, presumably because the DOJ's own appropriations had lapsed. But a few weeks into the shutdown the DOJ filed its briefs for protests involving funded agencies on the scheduled deadlines.

In one recent case involving a GSA procurement on behalf of a funded DOD entity, the DOJ filed a 48-page dispositive motion. Interestingly, that same day several of the attorneys who signed that brief also signed a motion for a 30-day extension in a separate military pay case before the Federal Circuit, citing their furloughed status. Even though the military was funded, the DOJ had apparently decided litigation of such cases fell within the Antideficiency Act bar on non-essential work.

For claims we are litigating before the COFC, we received the same out-of-office replies from DOJ attorneys, but were able to reach them when necessary. In one large multiparty case, the DOJ requested a stay in proceedings which was granted by the court, essentially putting on hold discovery efforts. We expected that the DOJ would continue to work on claims and not reflexively seek extensions from the COFC, at least where it was representing a funded agency. But we could not be sure, in the absence of any announced policy.

### ***Criminal Cases***

Relying upon the government's mandate to enforce the laws and defendants' right to a speedy trial, the

DOJ indicated that it would continue to litigate criminal cases unimpeded by the government shutdown. Of course, with the U.S. Federal Bureau of Investigation, the U.S. Marshals Service and other law enforcement agencies unfunded, it is not always possible for the DOJ to avoid shutdown impacts. Additionally, some courts have indicated that when the judiciary ran out of funding, the courts would seek to prioritize trials for any defendants who were detained. But there would be foreseeable complications to that approach if the courts had no funds to pay jurors. For defendants who were not detained, some defense attorneys sought to delay trials until jurors could be paid following the shutdown.

### ***False Claims Act and Freedom of Information Act Cases***

The litigation of False Claims Act cases is much harder to characterize, due in part to the various entities involved: inspectors general, qui tam whistleblowers and assistant U.S. attorneys, among others spread out in federal district courts across the nation. The same mix of funded and unfunded players affects Freedom of Information Act requests and related litigation. FCA and FOIA cases in active litigation were likely to be affected by the federal courts' slowdown and prioritization of their criminal dockets.

### **The U.S. Government Accountability Office**

Even before this shutdown happened, the U.S. Government Accountability Office, which is the principal forum for litigating bid protests, announced that it was fully funded and would remain open during a partial government shutdown. As with the COFC, though, there was a practical hurdle to resolving bid protests involving unfunded agencies.

The contracting officer, as well as other personnel, and records are practically speaking unavailable. So, although protests involving funded agencies proceeded as normal, the GAO stayed proceedings in cases involving unfunded agencies. Individual GAO attorneys will manage cases under their responsibility. Now that the shutdown has ended, we expect the GAO to issue clear instructions about any revised deadlines in cases that were impacted by the shutdown.

Just before the shutdown ended, the GAO announced that it would "toll all deadlines applicable to agencies that are normally associated with a bid protest until the end of the lapse in appropriations for your agency." The GAO added that an otherwise unfunded agency should alert the GAO if it "has available appropriations against which it may obligate the salaries of employees necessary to perform the work related to a bid protest, such as no-year carryover balances or a permanent appropriation ... ."

In our experience, although the GSA's appropriations have lapsed, it has acted like the DOJ, litigating bid protests as normal where a procurement is for the benefit of a funded entity. The GAO issued a request to the GSA in one of our cases asking under what statutory authority the agency was paying the salaries of the attorneys working on the protest case. In its request the GAO said:

"As a general rule, any work related to a bid protest before GAO would not fall into any of the exceptions to the Antideficiency Act that would apply during such a lapse in appropriations."

The GSA's response indicated that its Office of General Counsel employees' salaries are paid under the GSA's working capital fund, which presumably had sufficient funds available to pay its bid protest attorneys and their staff.

## **The Small Business Administration**

The Small Business Administration was not funded. Therefore, the SBA's area offices and the SBA's appellate body, the Office of Hearings and Appeals, were not open to handle protests challenging the size or status of intended awardees. For the OHA cases already in progress, the OHA granted a day-for-day extension to all deadlines for the duration of the shutdown. New size or status protests, which mostly should have involved contracts awarded by funded agencies — and maybe the GSA on behalf of such agencies — were being handled by the SBA's headquarters during the shutdown. Consolidating the work of six SBA area offices in SBA headquarters may delay resolution, and it will be interesting to see if some of that work is transferred back to area offices once they open. If delays are significant, contracting officers may decide to proceed with awards, as they are permitted to do after making a written determination that doing so is in the government's best interests.

## **The Armed Services and Civilian Boards of Contract Appeals**

Both the Armed Services Board of Contract Appeals and the Civilian Board of Contract Appeals indicated that they were open during the government shutdown. The civilian board, however, vacated its offices on Jan. 7 and cannot receive physical mailings until funding is restored. Its website indicates that all deadlines are to be honored, but also that individual judges may provide relief from deadlines.

## **A Word of Caution**

The U.S. Supreme Court has held that contractors must “turn square corners when they deal with the Government.”<sup>[1]</sup> Government contracting is a highly regulated and specialized area where virtually every dispute implicates in some way the government's waiver of sovereign immunity, allowing itself to be sued. Thus, the need for punctilious observation of rules and deadlines applies to litigation involving government contracts. Despite the shutdown, most bodies that handle government contracts-related litigation indicated that deadlines must be observed. And deadlines for challenging agency action are often short and strictly construed. If you are involved in or considering a claim or protest involving the government, including claims concerning the shutdown's impacts on your business, you should seek counsel quickly. It is better to be safe than sorry.

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[1] Federal Crop Ins. v. Merrill, 332 U.S. 380 (1947).