

Recurring Appropriations Issues Affecting Contractors-- The Use of Continuing Resolutions

Continuing temporary appropriations acts, commonly known as continuing resolutions (CRs), have been an integral component of the annual congressional appropriations process for decades. During the 54 year period covering fiscal years 1952-2005, Congress passed continuing resolutions for all but five fiscal years. Because CRs have become routine legislative funding tools, it is important to understand how they may affect government contracts.

The federal government operates on a budget calendar that runs from October 1 through September 30. Each year, Congress is supposed to pass 12 separate appropriation bills (corresponding to the major functional areas of the government) which, once enacted into law, ensure operation of the federal government. If Congress fails to pass one or more such bills, or if the President fails to sign them into law, then non-essential functions of the government will cease unless some stop-gap measure--a continuing resolution--is enacted.

A CR appropriates funds for Executive Branch departments at levels commensurate with the level of the preceding year's appropriations act. Continuing resolutions may have a relatively short duration in the expectation that action on regular appropriations bills will be concluded within days or weeks of the beginning of the new fiscal year or may last the whole fiscal year. For example, in February of this year, Congress passed a CR to fund the majority of Executive Branch agencies through the end of the fiscal year which just concluded. (See, H.J. Res. 20, 110th Cong., 1st Sess.; Pub. L. 110-5 (Feb. 15, 2007)). In either case, CRs fund continuing spending only at the rate of expenditure of the preceding year and only for the period stated.

Of particular import to the government contracting community, Congress has again failed to complete its appropriations work and enact appropriations legislation for the departments and agencies of the Executive Branch before the new fiscal year (2008) which began on October 1, 2007. As in past years, Congress has, again, passed a CR. (See, H.J. Res. 52, 110th Cong., 1st Sess; Pub. L. 110-92 (Sept. 29, 2007)). This CR gives each of the departments and agencies "authority" (Continuing Resolution Authority ("CRA")) to spend during the term of the CR at the same RATE as in the year just expired. CRA authority expires with the term of the resolution (here, November 16, 2007) and does NOT entitle a department or agency to (a) increase the RATE of spending on objectives that have been authorized; (b) make expenditures on new objectives that have been authorized but for which appropriations have not been passed, (c) exercise options or other privileges of contracts grants or other obligation objectives which are, by contract or grant, of a stated duration LONGER than the CR/CRA, or (d) commit the government to spending for the full fiscal year. (See, Anti-Deficiency Act, 31 U.S.C. 1341 et seq.). Only the proportionate amount spent in the first month and a half of the last fiscal year may be spent under this CR.

This last limitation is of considerable importance because it means, for example, that contract options which are stated to be of a duration LONGER than the CRA cannot be exercised. Moreover, the CRA creates a funding "gap" which, as a matter of constitutional and statutory law, cannot be filled by voluntary expenditures or performance by government contractors. 31 U.S.C. 1301; GAO, *Principles of Federal Appropriations Law* (Red Book), Vol. 2, ch. 6 at 6-162-163 (3 d Ed. 2006).

As a practical matter, government contractors caught in this CRA squeeze usually will want to continue or undertake performance. They are likely to do so either at the instance of government officers (that is,

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contractors would perform work on the assumption that appropriations for the full year will eventually be passed and they will be reimbursed) or because they fear losing the particular contract or grant opportunity by abandoning the work, even temporarily. In most instances in the past, this practice has borne the anticipated fruit. It is important to realize, however, that there exists no obligation on the part of the government ever to fund an EXPIRED funding provision. And, there may be instances in which a contractor does not want the government to exercise an option (because it would create or exacerbate a loss). In such instances, contractors should be aware that, as noted above, an "option" exercisable for a year cannot be exercised using CRA funding.

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