

SEQUESTRATION: A DOZEN WAYS THE GOVERNMENT CAN REDUCE OR ELIMINATE YOUR CONTRACT

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As of the last week in August 2017, there is no agreement in Washington, DC on a great budgetary trifecta: (1) a needed increase in the debt ceiling, which now stands at \$19.86 trillion; (2) a budget for fiscal year 2018--the fiscal year that begins on October 1, 2017, without which the government will shut down; and (3) possible "sequestration," or the automatic cancellation (cut) of agency budgets because of spending that exceeds statutory caps. Indeed, the Office of Management and Budget ("OMB") Sequestration Report for Fiscal Year 2018, issued on August 18, 2017, states that "if the 2018 discretionary caps remain unchanged, [], if enacted, the actions to date by the House of Representatives would result in a sequestration of \$72.4 billion in the defense category. []Also... action or funding guidance in the Senate, if enacted, would result in a sequestration of \$2.0 billion in the defense category and a sequestration of \$3.8 bi in the non-defense category under the current 2018 spending limits."

The Administration and the Congress face difficult choices in September to avoid a debt crisis, a budget crisis and a sequestration, or spending crisis. All of these will impact on government contractors, who always seem to take a "hit" in these circumstances. Agencies are always reluctant to cut permanent staff to meet short-term budgetary reductions. The most likely candidates for the reductions required by any sequestration are (1) travel; (2) training and (3) contracts. The federal government spends over \$500 billion per year on contracts, so these are clearly targets for sequester reductions.

The following is a list of twelve ways that Agencies and Contracting Officers ("COs") can use to meet short term spending reduction/sequester requirements, if they are put in place. Each item is meant only to illustrate possible discretionary actions – it is not a suggestion that such action will be taken against any contract or contractor.

1. **Not issue new solicitations for lower priority items.** If the requirements are relatively low, the Agency can decline to issue a solicitation or simply defer the issuance of the solicitation until funds become available. Pursuant to the Anti-Deficiency Act, 31 U.S.C. § 1341, Contracting Officers may not enter into a contract in excess of the available appropriations, and a solicitation that could cause a violation of this Act (if awarded) would not be issued without including conditions that would make the solicitation meaningless.
2. **Cancel existing solicitations.** Solicitations may be canceled at any time prior to award (even after proposals have been evaluated or bids submitted). In sealed bidding contracts, the Federal Acquisition Regulation ("FAR") permits solicitations to be canceled when "clearly in the public interest" (e.g., there no longer is a requirement). FAR 14.209. Sequestration is likely to qualify as "the public interest." In negotiated procurements, a solicitation can be canceled wherever there is a reasonable basis for doing so. See FAR 15.206.

3. **Decline to exercise an option.** Many contracts include additional quantities of goods as options, or additional years of performance of a service contract as options. Options are a unilateral right which the Government may exercise to purchase additional supplies or services or extend the term of the contract. FAR 2.101. Options are optional, and the Government is *not* required to exercise one or more options. This means that the CO may simply decline to exercise an option (and perhaps find another way to meet the need, or go without).
4. **Reprice options.** Before exercising an option, a CO may request a contractor to reprice the option. The CO may advise the contractor that his budget will not permit exercise at the current contract price, and only if the contractor rescopes and reprices will the CO exercise the option.
5. **Cancel multi-year contracts.** Multi-year contracts (such as those for large weapon systems, where the contract is not based on a number of options) include the clause at FAR 52.217-2, Cancellation Under Multi-Year Contracts. This clause permits the cancellation if funds are not available for contract performance for any subsequent program year, and for other reasons.
6. **Limit orders under indefinite quantity contracts, as long as minimum ordering requirements are met.** An indefinite quantity contract provides for an indefinite quantity, within stated limits or supplies or services, during a fixed period. The Government places orders for individual requirements, however, the contract must require the Government to order at least a stated minimum quantity—and it must be more than a “nominal quantity.” FAR 16.504. The most popular type of contract is the IDIQ (indefinite delivery, indefinite quantity). Once the minimum quantity has been ordered, the CO is free to order nothing, or to order substantially less than might have been expected from the solicitation. This could yield significant savings to an agency. Note that all General Service Administration Federal Supply Schedule contracts are IDIQ.
7. **Use clauses that limit funding or cost.** In cost-reimbursement contracts, the Government is generally required to pay the contractor’s costs up to the amount specified in the contract. However, the Limitation of Cost clause, FAR 52.232-20 (for fully funded contracts) and the Limitation of Funds clause, FAR 52.232-22 (for incrementally funded contracts) provides that the Government may stop funding if there is an overrun.
8. **Use the changes clause to revise the scope of the contract.** The Changes Clause, FAR 52.243-1, 2, 3, 4, permits the CO to make “at any time, by written order...changes within the general scope of the contract” (including changes in designs or specifications, place or time of delivery and method of shipment). Of course, the contractor may request an equitable adjustment for any cost or time impact. However, a diligent CO may substantially whittle down the scope and price or cost of any contract.

- 9. Use the changes clause to stretch out the period of performance (postpone deliverables).** As noted above, the changes clause can be used to change time of delivery. Once again, such a change in the contract might significantly reduce its price, and the government would be entitled to a reduction.

- 10. Use stop work or suspension of work clauses.** Stop work and suspension of work clauses permit the government to order delays or stoppages in the work. See FAR 52.242-14 (Suspension of Work), FAR 52.242-15 (Stop Work Order) and FAR 52.242-17 (Government delay of work). Any use of these clauses may ultimately increase the Government's cost, but could result in short term savings and a short term stoppage of work, possibly leading up to a termination for convenience.

- 11. Terminate or partially terminate contracts for convenience of the government.** Under the termination for convenience clause, FAR 52.249-2, the Government may terminate performance in whole or in part if the "CO determines that a termination is in the Government's interest." This also includes terminating portions of a contract. Clearly, sequestration would cause terminations for convenience, and may be the simplest and cleanest way to reduce contract spending for sequestration.

- 12. Accelerate cure actions and terminate contracts for default.** While the Government may only terminate contracts for default where contractors fail to deliver the supplies or perform the services, or fail to make progress, the simple fact is that many contractors are not in full compliance with their contracts at all times. Even though a contractor may prefer a convenience termination, the Government could accelerate cure notices (where required), and engage in significant default terminations of contracts in order to save money required by sequestration.

There you have it—twelve unpleasant ways the government may use your contract to save money if there is a sequestration or if there is a budget deal that calls for significant reductions. All methods are viable, permitted by regulation, and can have a significant effect on your contract. There probably is not a lot that a contractor can do to prevent many of these actions.