



## The Impact of Budget Reductions on the Procurement Process

Jeff Newman

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### Introduction

- Actual and potential funding gaps/deficiencies and budget cuts will impact the procurement process, and affect existing and prospective government contracts and funding agreements
- Government has significant discretion as to how it will proceed in light of funding shortfalls and cuts
- Government's response will trigger varying counter-responses in the government contracting community

**However, do not sacrifice compliance!**

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### The Bottom Line

- Federal agencies intend to decrease contract spending by approximately \$60B next year
  - \$767B to \$700B, about an 8% decline
- **Biggest decrease:** Defense and aerospace, an anticipated 21% reduction (\$190B to \$148B)
  - Army will experience largest decline – \$14B or 38% from current year funding levels
  - A&E and construction services – 16% decline (\$32B to \$27B)
  - Commodities and IT – 14% decline (\$34B to \$29B)

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### The Bottom Line

- Reprogramming of funds to maintain existing infrastructure
- Areas of growth:
  - NASA – R&D contracts, 10% budget increase request, \$4B
  - Commerce – NOAA (support services and equipment), 18% increase over 2012 levels, \$870M
  - Military training and government health programs – expected increase of approximately 7%, (\$70B to \$75B in 2013)
  - DoD – Focus on cybersecurity, intelligence, unmanned systems and certain IT innovations

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### Increased Activity

- Mergers and Acquisitions
  - Shrinking domestic government and commercial business
  - Increase in non-military (DoD) business
    - Energy (DoE) – Renewable energy products
    - Health care (HHS/CMS) – evolution in the industry
  - Ability to access new markets (especially Asia and the Middle East)
  - Reduce uncertainty (“Fog surrounding the industry”)
  - Leverage cash that has been on the sidelines

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### Increased Activity

- Bid Protests
  - Reduction in contract awards has caused contractors to challenge agency source selection decisions more than any time since 1995 (2,500 cases filed)
  - Contractors filed 2,353 bid protests at GAO in FY 2011
    - Does not include agency-level protests or protests at the COFC
    - An increase of 18% from FY 2009, when 1,989 cases were filed at the GAO
  - Contractors are willing to exhaust all options to have another chance to obtain an award

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### Increased Activity

- DoD evaluating all major weapons and “big-ticket” programs
- Many will be targeted for elimination
- Acquisition reform will be a focus
  - Budget
  - Technical requirements
  - Performance success

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### Existing Contract Obligations

- Contract Changes
- Performance Period Delays
- Contract Termination

**All without incurring liability for breach of the contract or funding agreement**

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### Changes in Contract Scope

- Changes clauses (FAR 52.243-1 et. seq.)
- Permits the government to make certain changes to the contract deliverables
- Changes must be within the scope of the contract, i.e., the parties should have fairly and reasonably contemplated them at the time of contract execution
- “[t]he Contracting Officer may, at any time, by written order make changes within the general scope of this contract” to certain terms of the contract, such as:
  - the contract specifications,
  - the method or manner of performing the work,
  - any government-furnished property or services to be used in performing the contract,
  - the method of shipping or packing,
  - the place of delivery,
  - the time of performance for services, and
  - the place of performance for services

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### Changes in Contract Scope

- Construed broadly by courts and boards to (i) include the decision by an agency to purchase fewer items or services than initially contemplated; or (ii) make changes to the product's features or service offerings
- **Result:** When changes are within the scope of the Changes clause, the Government is entitled to a reduction in the contract price
 

*"[i]f any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract."*

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### Performance Period Delays

- Suspension of Work (FAR 52.242-14)
  - Applicable to construction contracts
  - Contractor compensation: Entitled to an adjustment for any increase in the cost of performing the contract if the delay is for an unreasonable period of time
  - Contractor has a duty to mitigate damages; damages exclude profit
  - This clause does not include a provision enabling the contractor to receive additional time as a result of the government-ordered delay
    - Contractors generally need to seek an extension of time under the Excusable Delays clause (FAR 52.249-14)

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### Performance Period Delays

- Stop-Work Order ("SWO") (FAR 52.242-15)
  - Applicable to contracts for non-construction goods and services
  - Applicable to "ordered" delays (i.e., pursuant to the SWO notice procedures under the contract)
    - Delay cannot be unreasonable
    - Permits stoppage of work for up to 90 days (and for any additional period as agreed to by the contracting parties)
    - Termination for convenience or default follows if SWO is not canceled
  - Contractor compensation: Equitable adjustment in contract price and/or delivery schedule (includes profit)
- Government Delay of Work clause for constructive delays (FAR 52.242-17)

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### Contract Termination

- Termination for Default (FAR 52.249-6 et seq.)
  - Occurs when contractor fails to perform its contract obligations
  - Detailed procedures set forth under the FAR
  - Contractor compensation
    - Fixed-price contracts
      - Generally, the contract price for completed supplies or work delivered and accepted
      - Can be charged the excess costs of reprocurement
      - Subject to common law damages
    - Cost-reimbursement contracts: Contractor may recover allowable costs, plus any proportionate fee and other costs set forth under the clause
  - Can be converted to a termination for convenience

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### Contract Termination

- Termination for Convenience (FAR 52.249-1 et seq.)
  - Government has the unilateral right to terminate (breach) the contract absent bad faith or an abuse of discretion
  - Detailed procedures set forth under the FAR
  - Contractor compensation
    - Fixed-price contracts
      - Costs of the work performed plus a reasonable profit thereupon
      - Costs of settling and paying termination settlement proposals
      - Other reasonable settlement costs
      - No anticipatory profit
    - Cost-reimbursement contracts: Contractor may recover allowable costs plus any applicable fee
- Contract Cancellation (FAR 52.217-2)

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### Prospective Contract Obligations

- Government has broad authority and discretion to avoid prospective obligations
  - Cancel a solicitation at any stage of the acquisition process
  - Non-exercise of a contract option to purchase supplies or order services
  - Limitations of funds clause: Failure of the Government to allocate funds to a cost-reimbursement contract (FAR 52.232-22)
  - Eliminating or limiting orders under IDIQ contracts

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### Cuts in Funding ≠ Cuts in Compliance

- Increase in contractor scrutiny
  - Dodd-Frank
  - IRS' Whistleblower Reward Program
  - False Claims Act
  - Mandatory Disclosure Requirements
- Code of Business Ethics and other internal controls
- Tone from the top
- Training

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### Sequestration

- Automatic reduction of agency spending triggered if Congress cannot get spending under control
- Draconian spending cuts across the board
- Procurement budgets would be decimated
  - Budget Control Act of 2011
  - Would take effect January 1, 2013
  - Applicable for FYs 2013-21

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