

## Sequestration Equals Doomsday Scenario

Written by Nick Sanders  
Tuesday, 17 July 2012 00:00

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Whether you call it [CASE NIGHTMARE GREEN](#) or Mutually Assured Destruction, the upcoming “sequestration” looks like a doomsday scenario for defense contractors—and perhaps for all government contractors.

The law firm Wiley Rein has a good synopsis of the danger posed by sequestration, right [over here](#). The Wiley Rein attorneys wrote—

Under the Budget Control Act of 2011 (the Act), sequestration is the automatic reduction of spending triggered if Congress approves spending levels that exceed certain ‘caps’ set out by the Act. Although certain programs-Social Security, Medicaid, federal retirement programs and Medicare-are protected from the full impact of sequestration, spending reductions would occur largely across the board under the Act. The Budget Control Act calls for sequestration of spending from FY 2013 through 2021 and, unless Congress otherwise acts to limit spending, it takes effect January 1, 2013.

If sequestration occurs, \$1.2 trillion in spending reductions are required from FY 2013 through 2021. Approximately \$1.1 trillion of these reductions will come from reductions in both Department of Defense (DoD) and non-DoD program expenditures. Sequestration can be avoided under the Act if Congress otherwise acts to implement spending limitations deep enough to avoid the Act's triggers. On February 14, 2012, President Obama proposed a FY 2013 budget that, according to the Office of Management and Budget, avoids the statutory trigger. It does so by, among other things, proposing cuts that will reduce or eliminate altogether spending on a number of well-known federal programs, including numerous DoD contracts.

Thus, in the current economic climate, federal contractors must prepare for budget

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cuts—whether those cuts are imposed by sequestration or by the reduced spending necessary to avoid it.

The Wiley Rein folks predicted dire consequences if sequestration comes to pass—or even if deep budget cuts are made. Among the consequences they predicted are reduced government personnel and reduced customer responsiveness to contractor needs. But according to the Wiley Rein attorneys, the “most concerning issue” for Federal contractors is the “downsizing or elimination of key programs.” They wrote—

This prospect is not purely hypothetical. In November 2011, Secretary of Defense Leon Panetta outlined some of these potential impacts in a letter ... Among other potential effects, Secretary Panetta cites short-term effects on such programs as Joint Strike Fighter (JSF), and the long-term prospect of multiple program cancellations.

The Wiley Rein attorneys offered some good advice for contractors concerned about the upcoming doomsday scenario. Among the pieces of advice:

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Check contract status now and submit Requests for Equitable Adjustment (REAs) if appropriate before sequestration kicks-in.

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If your fixed-price contracts are impacted by sequestration (either from “Stop Work” notices or other government-imposed changes) then be prepared to quantify impacts from the changes and submit REAs.

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If you have cost-type contracts, be ready to respond to impact caused by deductive changes and/or partial terminations.

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For all contracts, be ready to handle terminations for convenience. Have good people standing by, ready to advise and manage the situation. Consider contingency planning.

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This [recent article](#) by Sarah Chacko at Federal Times forecasts “costly legal disputes [and] contractor payouts” from sequestration impacts. The article quotes William Roberts, an attorney at Wiley Rein, as follows: “There’s no planning going on to speak of within the government. They’re going to get caught flat-footed and have to deal with what programs to cut, what contracts to partially terminate.”

Another thing predicted by Roberts is that the government will hold contractors to the strict letter of the contract. For example, contractors that fail to strictly comply with Limitation of Cost/Limitation of Funds clause requirements may see their entitlement to additional funding be lost. Roberts was quoted as saying: “if you give the customer any legal way of saying, ‘You failed to provide proper notice, we’re not going to pay you,’ I think you can reasonably expect much stricter enforcement.”

The article also contained predictions by Alan Chovtkin, of the [Professional Services Council](#), that the Obama Administration’s emphasis on use of fixed-price contracts was going to backfire, and end up costing taxpayers more than if cost-plus types had been used. The article quoted Chovtkin as saying—

Under fixed-price contracts, the government pays a set cost for a product or service. Because the contractor bears more risk if there are cost overruns, these contracts often provide sizeable payouts to companies if the contract is ended early.

Cost-reimbursement contracts — where the government pays the contractor for costs incurred — can be more easily adjusted because the scope of work can be changed without rewriting contract terms.

‘The irony is the public policy support for greater use of fixed price contracts may end up reducing the agencies’ flexibilities should there be a sequestration,’ Chvotkin said.

So here’s the thing. We are about five months away from sequestration hitting contractors the way that Fat Boy hit Hiroshima. A lot could happen between now and then. Certainly recent history leads us to expect a last-minute deal that would avoid the worst of the doomsday impacts. But we can’t count on that happening and neither should you. Sticking your head in the sand and crossing your fingers, hoping for the best, is no way to engage in contingency planning.

In this article, we’ve pointed to some reasonable steps one might take to prepare for sequestration, courtesy of Wiley Rein, Federal Times, and the Professional Services Council.

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We're quite sure that there are other things you ought to be doing. For starters, why not create an ExCom team consisting of HR, Ops/Program Management, Finance, and other management functions to start thinking—and discussing—the unthinkable?

Note that the Wiley Rein attorneys didn't think much of the Federal government's proactive stance on the matter. So the bar has been set extremely low. Why not go ahead and beat it?