

Government Contracts Alert

FEBRUARY 20, 2013

Sequestration: Responding to Government Contract Delays and Changes

BY [JONATHAN T. CAIN](#)

Recent hardening of the rhetoric between Congressional Republicans and the White House is leading to growing acknowledgment that across-the-board reductions in federal agency budgets are likely to be imposed, at least temporarily, beginning March 1st. Government contractors serving nearly every federal agency can expect to be affected by delays, stop-work orders, and/or contract changes to postpone or reduce the government's cost of contract performance.

Federal contracts give the government the right to impose schedule delays in contractor performance, direct work stoppages, and order changes in the delivery schedule, but the government does not have the right to impose the costs of those actions on contractors – provided the contractors take timely action to preserve their rights to compensation for those increased costs.

The clause most likely to be employed is the stop-work order. This clause is included in federal contracts for supplies, services, and R&D, and in both fixed-price and cost-reimbursement contracts. It permits the contracting officer to issue a written order to the contractor to stop all or any part of the contract work for up to 90 days. Within that 90-day period, or any additional extension of the 90-day period to which the contractor has agreed, the contracting officer must either revoke the stop-work order or terminate the contract for the government's convenience. If the stop-work order is lifted, the contractor has 30 days *after the end of the work stoppage* to submit a written claim for increased costs. The contracting officer must allow all timely submitted, reasonable costs incurred by the contractor for the stoppage. If the agency terminates the contract for convenience, the contractor is entitled to recovery of all reasonable costs of termination plus profit on all work completed.

Fixed-price supply and service contracts for non-commercial items also will include a Government delay of work clause. Under this clause, the contractor is entitled to recover for increased costs resulting from delays or interruptions in the performance of the work caused by any overt act of the contracting officer or the failure of the contracting officer to take a contractually required action in a timely manner. Recovery of costs for government delay of work do not require a written order by the contracting officer. A delay caused, for example, by a decision of the customer agency to send government employees home on furlough may cause a contractor serving that agency to incur a costly delay. Such costs are recoverable under the delay of work clause. In the case of a delay of work, the contractor may only recover costs incurred within the 20 days *before* the contractor gives written notice of the cause of the delay to the contracting officer. If a contractor suffers a government-caused delay, it should immediately calendar its notice deadlines and file written notices to preserve its right to recover delay costs.

Contracts that are not for commercial items and services also will contain a changes clause that gives the government the unilateral right to change certain terms of the contract, including in the case of services, the time of performance. The contractor is entitled to an equitable adjustment to the contract price, schedule, or both to compensate for the change. Changes may occur as a result of an express contract modification or constructively as a result of other government actions. In either case, the contractor is entitled to an equitable adjustment to the contract for all changes, provided that it has given written notice to the contracting officer within 30 days after the

change is imposed. If a contractor does experience an express or constructive change to the contract, it also must immediately begin to separately account for all its incurred, segregable costs that are allocable to the change. Failure to do so will make recovery of those costs more difficult, if not impossible.

Commercial item contracts for goods and services are not required to contain a delay or stop-work clause, though many do. The standard changes clause in a commercial item contract requires mutual agreement of the government and the contractor to any modification, though it is not uncommon for that clause to be replaced with a non-commercial changes clause. Each contract should be reviewed to determine the steps required of the contractor to preserve its right to recover for government delays and changes resulting from even a short period of sequestration.

If you experience a contract work stoppage, delay, or change as a result of sequestration, we invite you to contact the undersigned or your Mintz Levin relationship attorney for further advice.

* * *

Share:    

View Mintz Levin's Government Contracts attorneys.

Boston · London · Los Angeles · New York · San Diego · San Francisco · Stamford · Washington

www.mintz.com

Follow Us



Copyright © 2013 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

This communication may be considered attorney advertising under the rules of some states. The information and materials contained herein have been provided as a service by the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; however, the information and materials do not, and are not intended to, constitute legal advice. Neither transmission nor receipt of such information and materials will create an attorney-client relationship between the sender and receiver. The hiring of an attorney is an important decision that should not be based solely upon advertisements or solicitations. Users are advised not to take, or refrain from taking, any action based upon the information and materials contained herein without consulting legal counsel engaged for a particular matter. Furthermore, prior results do not guarantee a similar outcome.

2672-0213-NAT-GOV