



29TH ANNUAL OUNCE OF PREVENTION SEMINAR

Weathering the
Rough Seas of
Regulation



The Unprecedented Year and the Consequences of Austerity

Overview

- Congressional Budgeting by Sequester, Continuing Resolutions, and Debt-Ceiling Debates
- Executive Branch Issues and Implementation
- Impacts on Acquisition Policy, Business and the Marketplace
- Effects on Contract Administration and Disputes
- Labor/Employment Challenges
- Strategic Considerations for Appropriations

Budgeting by Sequester, Continuing Resolutions, and Debt-Ceiling Debates

Mike Gill

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Topics

- Budget Control Act of 2011 and American Taxpayer Relief Act of 2012
- 2013 Budget and Sequestration
- 2014 Budget and Sequestration
- Will This Get Fixed? How?

BCA and ATRA

- Budget Control Act of 2011
 - Required savings of \$1.2T (\$984B) over nine years
 - \$55B Defense (050) \$55B non-defense each year
- American Taxpayer Relief Act of 2012
 - Reduced 2013 sequester to \$85B
 - \$42B Defense (050) \$42B non-defense for 2013

2013 Budget and Sequestration

- ATRA reduced sequestration amount to \$85B
- Most pro-rated to 2014 – 2021 (further reduction in caps)
- Sequestration versus Downward Adjusted Caps
 - Sequestration affects 2013 non-exempt mandatory and discretionary spending
 - Sequestration affects 2013- 2021 non-exempt mandatory spending
 - Adjusted downward caps affect 2014 non-exempt discretionary spending

2014 Budget and Sequestration

- On April 10, 2013, OMB released the FY 2014 sequestration preview report that established the revised discretionary spending limits for 2014 and is the order for mandatory sequestration beginning October 1, 2013.
- 50% Defense (050), 50% Non-Defense
- Mandatory Spending
 - Sequestration of non-exempt mandatory spending will take place upon OMB confirmation
- Discretionary Spending
 - Congress must appropriate within caps
 - Congress can be very flexible in appropriations while under cuts
 - Sequestration if Congress does not appropriate within caps (across “PPA”)
 - Dilemma of unpopular programs / better to have sequestration?

Debt Limit Crisis Timeline

Dec. 31, 2012

Debt Limit Reached

U.S. hits \$16.4T debt limit; U.S. Treasury Secretary takes “extraordinary measures” to avoid default.

Jan. 1, 2013

Congress Passes American Taxpayer Relief Act

Sequester delayed by two months (March 1, 2013); Congress postpones debt reduction deal and negotiations to raise the debt ceiling

January 31, 2013

Congress Passes Bill to Suspend Debt Ceiling

Congress passes legislation to suspend the debt ceiling until May 18, 2013

April 10, 2013

OMB Releases 2014 Preview Report

OMB report establishes mandatory sequestration order for non-exempt established the revised discretionary spending limits for 2014 and is the order for mandatory sequestration beginning October 1st

May 19, 2013

U.S. Debt Ceiling Reinstated

The debt ceiling will come back into effect on May 19, at which point the Treasury will begin to take “extraordinary measures” to keep the government running.

Autumn, 2013

U.S. Faces Threat of Default

If no action is taken to suspend or raise the debt ceiling and Congress fails to reach a debt reduction deal, the U.S. could default on its debt obligations.

October 1, 2013

Sequestration of 2014 Non-Exempt Mandatory Programs Begins

Will This Get Fixed? How?

- Option 1: “Grand Bargain”
- Improving Economy provides impetus for renewed negotiations on structural reforms to spending and revenue.
- PAYGO Act of 2010
 - PAYGO limits new mandatory spending (4% Medicare limit)
 - BCA limits non-exempt mandatory and discretionary spending (2% Medicare limit)
- Resulting agreement leads to Congress enacting legislation nullifying the BCA.
 - But increased revenue alone does not nullify sequestration mechanics.

Will This Get Fixed? How?

- Option 2: “Responsible Government”
- Congress appropriates within caps for FY 2014 through 2021, cutting some programs substantially while preserving or increasing others.
- President utilizes ability to transfer between accounts.
 - But non-exempt mandatory spending still subject to sequestration (see Grand Bargain Solution)
 - But separation between defense and non-defense (2013 House Budget Not a Solution)

Will This Get Fixed? No.

- Option 3: “Punt”
 - Congress and President continue with budget gridlock.
 - BCA continues to affect all accounts, piecemeal adjustments (see FAA account shifting authority).

Questions?

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Executive Branch Issues Relating to Sequestration

Steve Rice

Executive Branch Issues

- Implementation of Sequestration
- Recent Developments
 - FY13 Appropriations
 - Increased Use of Incremental Funding

Implementation of Sequestration

- Sequester requires uniform cuts to each PPA
- PPA is not uniformly defined across government
- Led to speculation that cuts would apply down to the contract level
- Post-sequestration guidance indicates that this is not the case



UNCLASSIFIED

Fiscal Planning Guidance for Budgetary Uncertainty

16 January 2013

mitigation spend plans, you must take all possible steps to mitigate harmful effects associated with this budgetary uncertainty and to maintain a strong defense.

a. A Presidential order for Sequestration on 1 March 2013 will specify reductions to total budgetary resources in each budget account (appropriation) based upon estimates provided to the Office of Management and Budget (OMB) by the Under Secretary of Defense (Comptroller) [USD (C)]. The Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA) requires that this reduction be applied equally to each “Program, Project and Activity” (PPA) within these accounts. For the purposes of the BBEDCA, PPA is defined as the appropriation level for operating accounts and at the R-1, P-1 and C-1 budget line item level for investment accounts. The President has exempted Military Personnel accounts from targeted sequestration reductions in FY 2013. For planning, the budget reduction estimate for FY 2013 is approximately 10.5 percent. However, this estimate is likely to change depending on the date of the sequestration order and the amount of available resources given the rate of budget execution.

Source: U.S. Dep’t of the Army, *Fiscal Planning Guidance for Budgetary Uncertainty* at 14 (Jan. 16, 2013).

Implementation (cont'd)

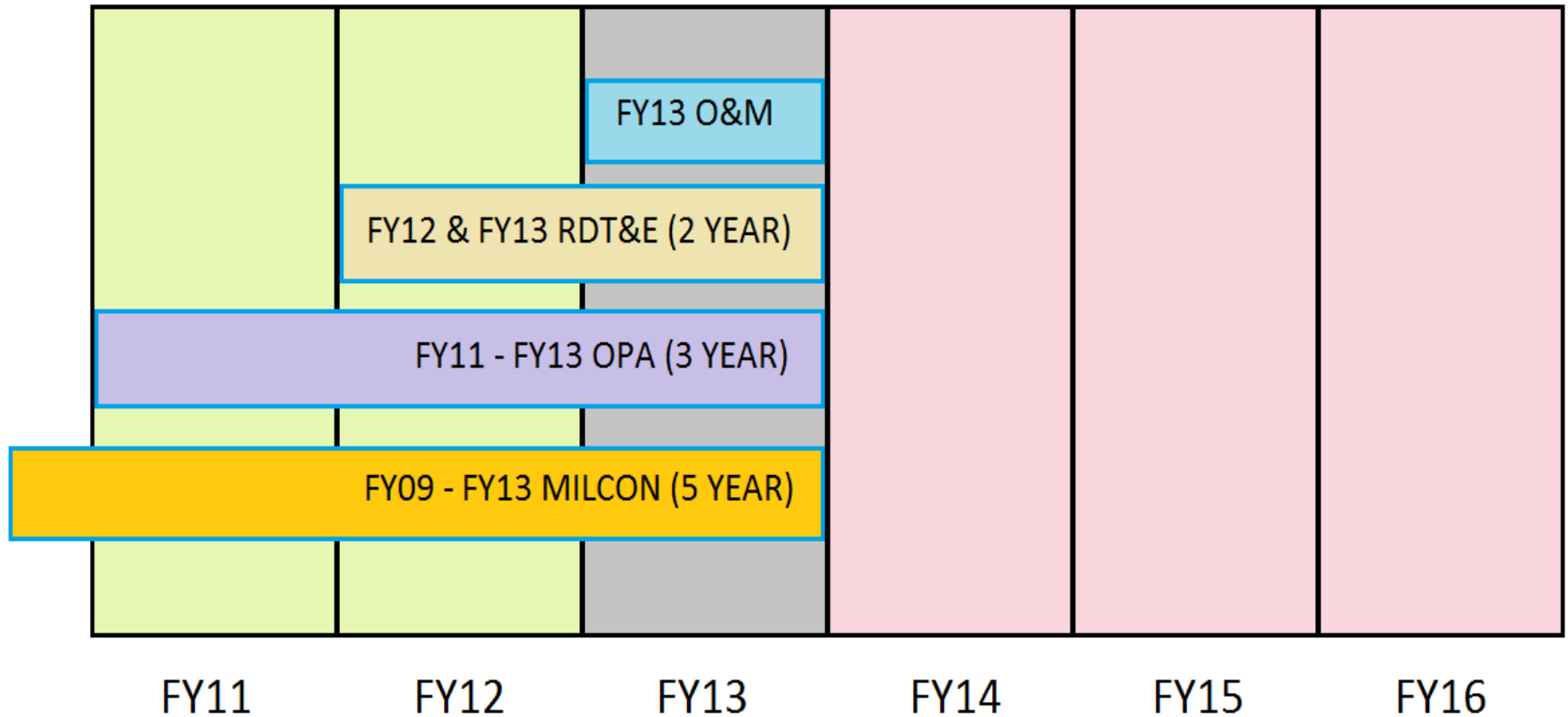
- Only 18 operating accounts in all of DoD, so sequestration for these accounts is applied at a very high level
 - E.g., O&M, Army; O&M, Air Force; O&M, Navy; etc.
- Thousands of P-1, R-1, and C-1 budget line items, but still a very high programmatic level to apply cuts (example below)

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Line
  No      Item Nomenclature
Budget Activity 01: Proc Ammo, Navy
Navy Ammunition
  1 General Purpose Bombs
  2 Airborne Rockets, All Types
  3 Machine Gun Ammunition
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Implementation (cont'd)

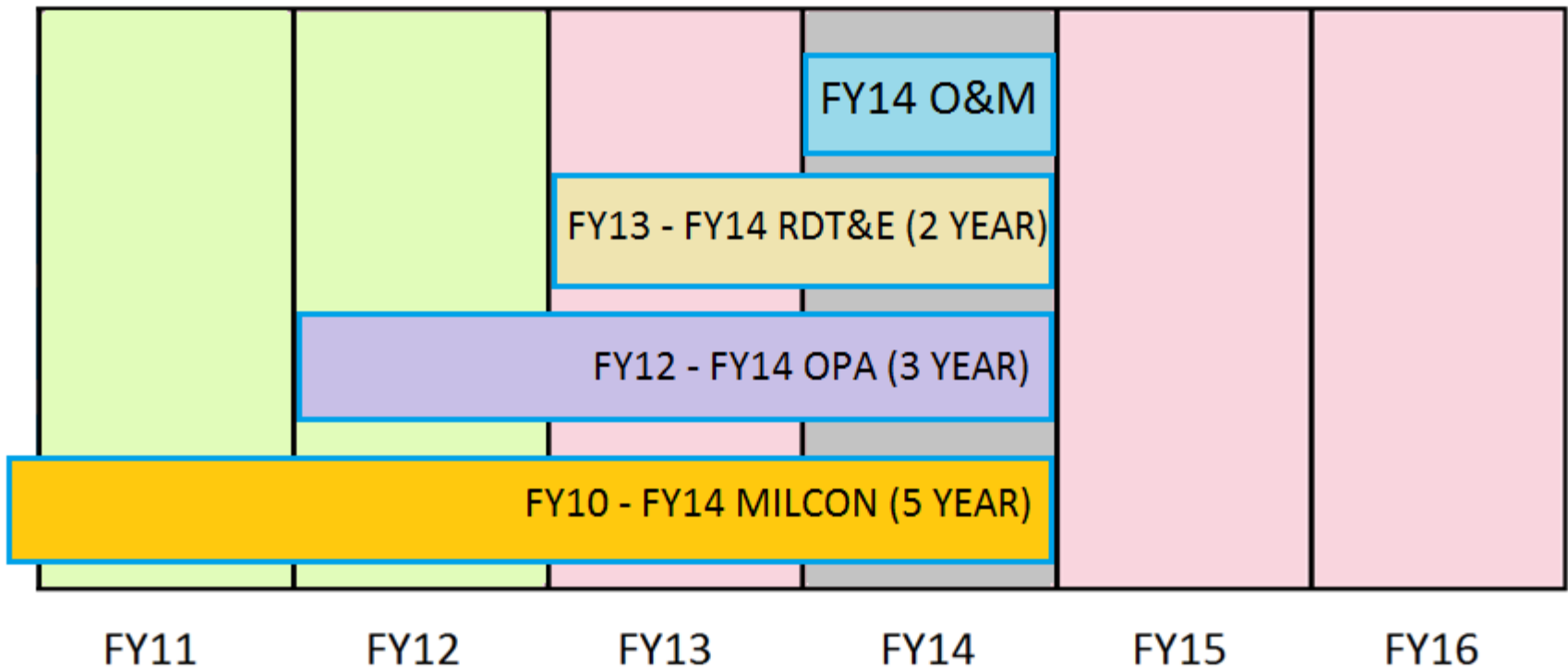
- Impacts to date have been modest
 - Sequester requires reduced spending over the course of the year, not all at once
 - Impacts lessened by FY13 Consolidated & Further Continuing Appropriations Act
 - DoD has used reprogramming authority
- Impacts will likely be felt hardest in 4Q13 and beyond
 - 4Q13: Agency FY13 appropriations begin to run dry
 - FY14 and beyond: Multi-year appropriations expire

Example – Army Impacts in 4Q13



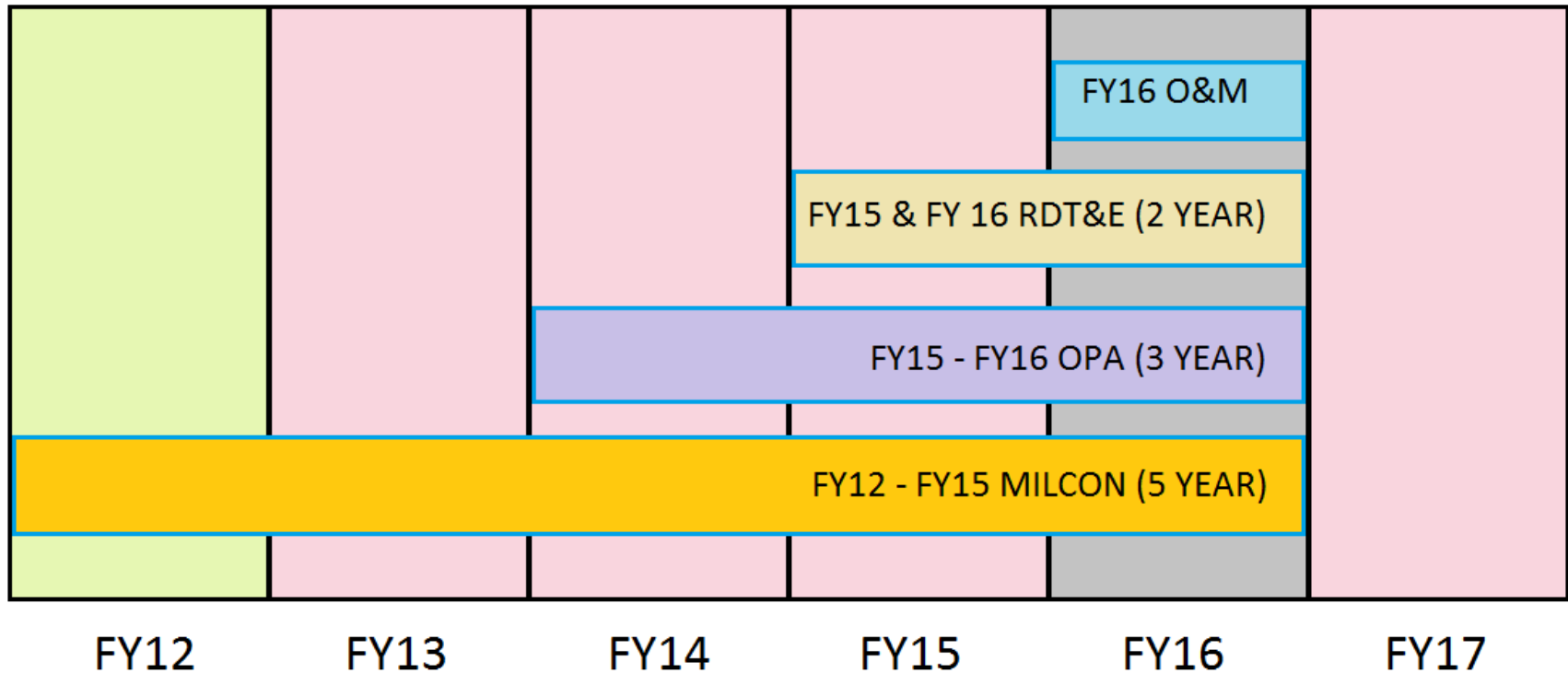
In FY13, significant funding is still available from prior years, and this prior-year funding was not subject to sequester cuts.

Army Example – FY14 (cont'd)



Each year after FY13, there will be less funding available from the pre-sequestration era, so there will be a smaller pool of prior-year un-sequestered funds to ease impacts.

Army Example – FY16 (cont'd)



Each year after FY13, there will be less funding available from the pre-sequestration era, so there will not be a pool of prior-year un-sequestered funds to ease impacts.

Recent Developments (cont'd)

- FY13 Consolidated & Further Continuing Appropriations Act
 - Provides FY13 funding for DoD, Commerce, DOJ, DHS, MILCON, VA, and science agencies
 - Act had the effect of lifting the CR prohibition on DoD “new starts”
 - Prohibition against “new starts” appears in most CRs
 - Prohibited DoD from spending CR money for new production, increases in production, or the initiation, resumption, or continuation of any project for which funds and authority did not exist in FY12
 - Meant that DoD projects requiring specific authorization and appropriations were stalled during CR (e.g., military construction)
 - Lifting of “new starts” prohibition likely responsible in part for spike in DoD contract awards at end of March
 - \$12.1B in 1/13 → \$23.1B in 2/13 → \$39.4B in 3/13

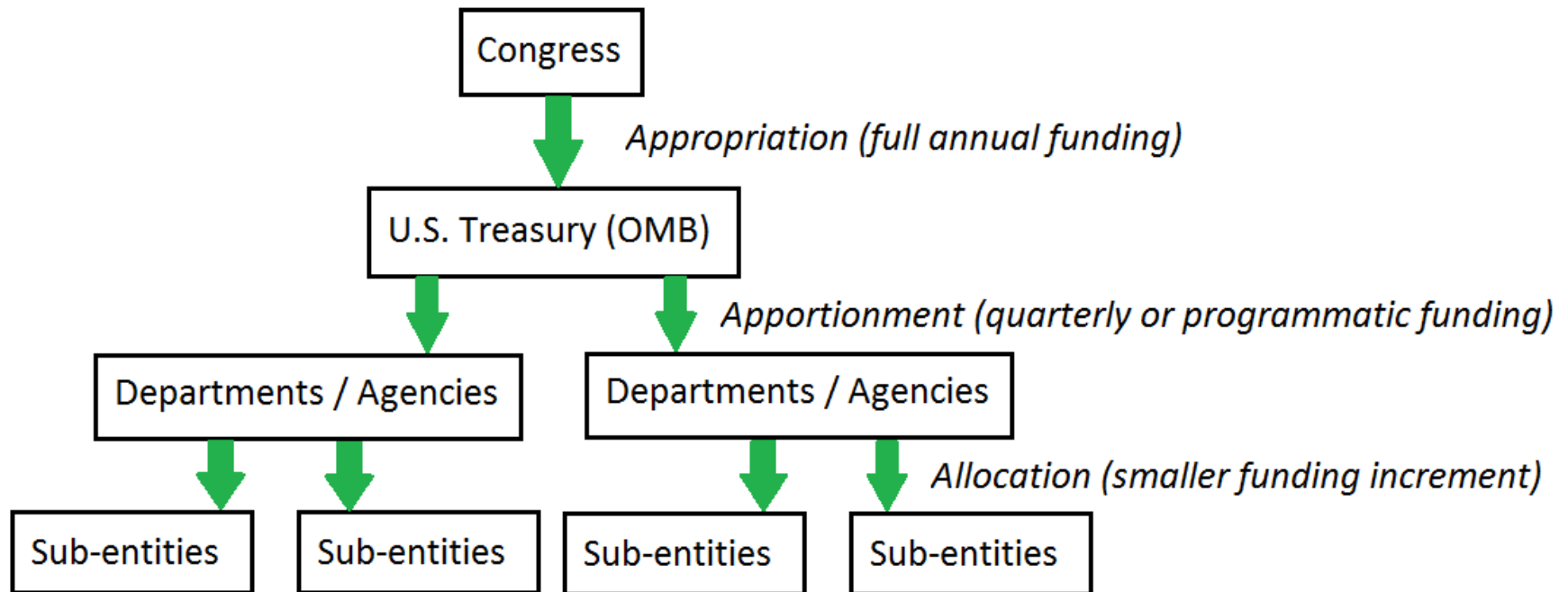
Recent Developments (cont'd)

- Increased Use of Incremental Funding
 - General rule is that agency must obligate full funding at time of contract award
 - Incremental funding is exception that allows agency to obligate funding for single contract in multiple steps
 - Typically used in cost-reimbursement contracts for high-cost projects over multiple years
 - But now, DoD is using incremental funding authority (FAR 52.232-22) to make multiple obligations for single contract *within the same year*

Recent Developments (cont'd)

- Increased Use of Incremental Funding (cont'd)
 - Likely owes to the way the money flows within government
 - Congress *appropriates* funds to U.S. Treasury annually
 - OMB then *apportions* funds from U.S. Treasury to Departments on quarterly or programmatic basis
 - Departments then *allot* funds down to subordinate agencies
 - End result is that agencies typically have only a fraction of full-year funding on hand at any time
 - Apportionments and allotments likely stingier in recent months to ensure that agency spending stays within (1) CR limits and (2) sequestration limits
 - Takeaway: Money for same-year incrementally funded contracts is there; it just may not have made it down to the agency yet

Recent Developments (cont'd)



Recent Developments (cont'd)

- Increased Use of Incremental Funding (cont'd)
 - Will likely result in spike in FAR 52.232-22(c) notifications (required when costs projected in next 60 days exceed 75% of amount allotted to the contract to date)
 - Frustrates government's ability to conduct long-term planning

Questions?

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Impacts on Acquisition Policy, Business and the Marketplace

W. Stanfield Johnson

Impacts on Acquisition Policy

- Expect more risk allocation to contractors and intensification of current acquisition reforms to protect scarce funds. For example:
 - Fixed Price Contracting, plus special risk allocation clauses (including in cost reimbursement contracts)
 - Competition – Low Price Technically Acceptable
 - “Tailored” Commercial Item Contracts, plus required cost information

Impacts on Acquisition Policy

- More Oversight, including Business System Reviews and withholds; “do not pay” mentality
- Reduced Service Contracting
- Strategic Sourcing, with IT as a commodity
- But don't expect rebuild of competent acquisition workforce

Impacts on Acquisition Policy

- Key Features of FY 2013 NDAA:
- §802 – Review and justification of pass-through contracts
- §804 – Review and modification of profit policy
- §811 – Limit on use of cost type contracts for production of MDAPs (exceptions, but for portions of contracts)

Impacts on Acquisition Policy

- Key Features of FY 2013 NDAA:
- §823 – Life-cycle management and product support requirements
- §824 – Government performance of critical acquisition functions
- §825 – Competition in acquisition of major subsystem and subassemblies – alternative of “breakout” and GFE

Impacts on Acquisition Policy

- Key Features of FY 2013 NDAA:
- §831 – Guidance and training for evaluation of price reasonableness
- §832 – DCAA access to internal audit reports for “evaluation of contractor business systems”
- §851 – Database on price trends of items and services under Federal contracts

Impacts on Acquisition Policy

- Key Features of DoD Better Buying Power 2.0:
- Mandate affordability; enforce affordability caps; control requirements
- “Should cost” management – “set cost targets below independent cost estimates”
- Reassess contractor profitability and incentives
- “Appropriate contract types” – refining BBP 1.0 (“one sizes does not fit all”); FPI in “early stages of transition from development to production”

Impacts on Acquisition Policy

- Key Features of DoD Better Buying Power 2.0:
- Define value in “best value” competitions
- In LPTA, define TA to ensure needed quality
- “Superior supplier” incentive program
- Maintain competitive environments, and develop IP strategy “while competition still exists”
- Leverage Industry’s IR&D
- Increase small business opportunities

Impacts on Acquisition Policy

- Key Features of DoD Better Buying Power 2.0:
- Improve tradecraft in services acquisitions; “greatest potential for cost reduction”; define and prevent “creep” of requirements
- Improve professionalism in “total acquisition workforce,” increase “cost consciousness”
- Reduce “backlog” of DCAA audits
- Eliminate non-value added requirements and processes
- Increase “defense exportability features” in initial designs

Impacts on Acquisition Policy

- Government panelist at Professional Service Council's Marketview 2012. "We have decided that the vast majority of what we buy is appropriately bought on a low price, technically acceptable basis." "We are going to require that any component that seeks to use a 'best value' approach justify their reasons for doing so." "If you're thinking about margins, you're thinking about the wrong thing. The fiscal environment is such that you should only be thinking about booking revenue, not margins" (as quoted by Stan Soloway in Washington Technology, April 13, 2012).

Business and Marketplace Impacts

- DoD Dear “Industry Partner” Letter (Mar. 4, 2013)
- “The reality of sequestration is now upon us....Given the uncertainty we face, the Department will take action in the near term to mitigate budget execution risk to the extent possible; however, damage to the Department and to industry is unfortunately inevitable at this point....Defense industry companies should anticipate that the automatic across-the-board cuts will cause the Department to reduce both the quantities of equipment and the level of service that we acquire for the balance of this Fiscal year and perhaps beyond.”

Business and Marketplace Impacts

- One consequence of the extreme program instability associated with this funding uncertainty, is the impossibility of sound business planning. With programs uncertain and incumbency devalued in an intense competitive environment, a contractor that relies on “anticipated” work is at risk. This may require particular care by publicly held companies, but it poses problems for all contractors.

Business and Marketplace Impacts

- The Obvious Bottom Lines:
- Downsizing of procurement budgets will mean less government business
- Programs and contracts will be deferred, interrupted, abandoned, cancelled, terminated, and reduced
- Though the Government demand will remain substantial, the existing supply exceeds the funded demand

Business and Marketplace Impacts

- The result will be a reduced and damaged contractor base
- The result will also be a much less desirable government customer and marketplace.
- 2013 begins the difficult, disruptive transition period to the downsized marketplace.

Business and Marketplace Impacts

- The specific impacts of this transition on the government's contractor base is complex because it is composed of many different sectors and difficult to predict because the combination of circumstances is unprecedented. However, here are some observations:

Business and Marketplace Impacts

- Impacts on Contractor Base
- Disruption and loss of talented, trained workforce; disputes
- Supply chain disruption and loss; disputes
- Cost of disruption and potential loss of quality
- Lack of resources for R&D; freezing of innovation
- Unabsorbed infrastructure and overhead costs

Business and Marketplace Impacts

- Impacts on Contractor Base
- Reduced profitability and risk of loss
- New requirements for independent financing
- Reduced valuations
- No horizontal consolidation, but search for new, profitable business (targeted acquisitions, make-instead of buy, foreign sales)

Business and Marketplace Impacts

- DoD Industrial Base Policy*
- “Committed to maintain the health and productivity of the industrial base”; needs to “adapt its industrial base considerations and actions to the emerging fiscal realisms.”
- Not concerned about major primes; but “this vast majority” of the base “act as suppliers”; “companies at any tier, and of any size, may offer critical or hard-to-value products”
- “We do expect some niche firms to face difficulty due to decreased demand” and will “attempt...if necessary, to mitigate these issues.”

– *Brett Lambert, HASC Testimony, November 20

Business and Marketplace Impacts

- “Commercial” Suppliers may withdraw due to reduced, unstable demand, on top of the degradation of 1990s “commercial item” policies designed to encourage their participation.

Business and Marketplace Impacts

- Service Contractors will feel the biggest impact of budget austerity, because of flexibility of cuts in O&M funding as well as pre-existing criticism of perceived excessive outsourcing and undisciplined contracting.

Business and Marketplace Impacts

- Small Business is promised a substantial piece of the reduced market (by legislation and policy) but budget limitations, coupled with objections from non-small business suppliers, may have a chilling effect on these policies. In addition, the planned strategic sourcing initiatives threaten small business opportunities.

Business and Marketplace Impacts

- Loss of a major contract or expected business, reducing resources and the base over which a contractor's overhead is spread, will impair its ability to win future business in the expected price-driven competitions. For contractors dependent on government business, the new competitions, will essentially be battles for business base. It is predictable that many contractors will take the necessary risks and bid seeking revenues, not margins.

Questions?

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Enhanced Challenges For Contract Administration and Dispute Resolution

J. Chris Haile

Challenges for Industry

- Increased Focus on Fraud and Oversight
- Cancellations, delays, and restructuring
- Pressure to provide concessions after performance begins
- Incremental funding and funding gaps
- Constraints and burdens on Government personnel
- Scarce funding for negotiated equitable adjustments

Impacts on Investigation Policy

- Expect further intensification of programs against procurement “fraud, waste, and abuse” to protect and reclaim scarce funds. For example:
- Increased coordination of “fraud” remedies between DOJ/IGs and acquisition officials
- Significant IG influence
- More requirements for disclosures, cooperation, and certifications
- Aggressive DOJ FCA interpretations (implied certifications and fictitious damages)
- FAPIIS and past performance
- Automatic and aggressive “fact-based” suspension and debarment

Increased Regulation And Oversight

- Example: FY 2013 NDAA
- §827-828 – Enhancement of whistleblower protections for contractor employees; pilot program
- §829 – Extension of contractor conflict of interest limits
- §848 – Special provisions concerning overseas contingency operations-responsibilities of CIGIE and Lead Inspector General
- §852 – FAPIIS information to include information on any parent, subsidiary, or successor entities
- §853 – Ensuring inclusion of past performance information for source selection decisions
- §861 – Requirements for SDOs of DOD, DHS, and USAID, including documenting “the basis for any final decision taken pursuant to a formal referral” and “policies” for considering

Cancellations, Delays, and Contract Restructuring

- The Government will continue to address budget challenges in part by slowing, restructuring, or terminating contract work.
- Those most likely to see substantial impacts are lower-priority, higher-cost, and underperforming projects. But contractors are seeing the effects more broadly.

Cancellations, Delays, and Contract Restructuring

- Impacts are taking a variety of forms:
 - performance delays / stretch outs
 - Requests for concessions
 - Deductive changes
 - Terminations for convenience
 - Termination for default

Delays

- Standard form contracts give the Government the right to issue a Stop Work Order for 90 days (or more by agreement) and give the contractor an equitable adjustment remedy. FAR 52.242-15.
- When the period ends the contractor is required to resume work or the Contracting Officer is required to terminate the work covered by the order, either for default or convenience. The contractor is also given a remedy for Government delay of work, but without profit. FAR 52.242-17.
- Projecting the impacts and calculating the costs of delay will be complicated and more likely disputed by a customer seeking to conserve funds.

Bilateral Agreements - Risks

- The Government has sought bilateral agreements to change or restructure contracts in order to save (or at least reduce the cost of) programs.
- Risks for contractors include waiver and/or release of claims. See *Amertex Enterprises, Ltd. v. U.S.*, 1997 WL 73789 (Fed. Cir. 1997) (unpublished), reh'g denied, 108 F.3d 1372, cert. denied, 522 U.S. 1075 (1998) (agreement to perform waived damages remedy for cardinal change, even without a release); *Bell BCI Co. v. U.S.*, 570 F.3d 1337, reh'g denied (Fed. Cir. 2009), (modification interpreted as releasing cumulative impact claim).
 - Contractors agreeing to perform on restructured terms should consider reserving rights with respect to, or not assume the risk of, unaddressed potential impacts and damages, as well as to preserve any pre-existing claims.

Bilateral Agreements - Coercion

- What if the Government says: “sign this deal or we will cancel your contract.” May the contractor later plead economic coercion or duress?
- Avoiding releases based on duress may require an extremely high burden of proof.
 - Compare: *Systems Technology Assoc., Inc., v. U.S.*, 699 F.2d 1383 (Fed. Cir. 1983) (coercive threat “violates notions of fair dealing”) to *Am-Pro Protective Agency v. U.S.*, 281 F.3d 1234 (Fed. Cir. 2001) (indicating subjective bad faith is required)

Termination For Convenience

- With a fixed price contract, recovery of performance costs and profit is limited by the total contract price.
- In the termination settlement of a loss contract, no profit is recovered, and cost recovery is subject to reduction based on the loss percentage.
- These put greater emphasis on the need to address contract changes promptly during performance.

Termination For Convenience – Contracts Subject to Funding

- Contracts with “Limitation of Cost” or “Limitation of Funds” provisions require contractor notice where funds are running out and put the risk of continued performance on the contractor.
- Relieves the Government of liability for “costs incurred in excess of” allotted funding “[e]xcept as required by other provisions of this contract, specifically citing and stated to be an exception to this clause.”

Performing in the Absence of Funding

- The need to keep programs going may persuade contractors to perform in the absence of, or in advance of appropriations, particularly where a limitation of funding clause permits subsequently appropriated funds to be applied to prior performance. FAR 52.232.20(f).
- The Anti Deficiency Act prohibits the “acceptance of voluntary services,” 31 U.S.C. §1342, and encouraging a contractor to perform in the absence of funds violates the Act. 48 CFR §32.704(3); see also DoD IG D-2008-079 (AF Management of Incremental Funds).

Partial Terminations/Deductive Changes

- A de-scoping of contracts to save funds will raise the issue whether such action should be treated as a partial termination or a deductive change.
 - This is a fact dependent issue, but a usual guideline is whether a line item or quantity is deleted or a specification is deleted.
 - Often, if the deleted requirement is profitable, the contractor would prefer a deductive change, because the price would be reduced on an actual cost basis.
 - The issue may be complicated by potential downstream performance impacts of the work deletion. Impacts on subcontract pricing and supplier chain complications must be considered with respect to these and other government actions.

Default Termination Issues

- The Government is increasingly likely to terminate for default when the contractor is delinquent or deemed unlikely to perform to contract requirements.
- The Government may avoid termination costs and even reclaiming scarce funds.

A Contractor's Duty to Proceed

- The government's required program changes and "restructuring" to fit available funding may exceed its unilateral contract rights, such as the limits of the Changes clause, either the listed items that can be changed or the "general scope of the work." See FAR 52.243-1.
- Prior to the Contract Disputes Act, a "cardinal change" was deemed a breach, the resulting dispute was not seen as "arising under the contract," and thus the contractor was not obligated to perform. But see *Alliant Techsystems, Inc. v. U.S.*, 178 F.3d 1260, reh'g denied, 186 F.3d 1379 (1999) (change to option delivery schedule rendered exercise ineffective, but contractor was required to perform under Disputes clause because option change was not a cardinal change).

A Contractor's Duty to Proceed

- Many contracts likely to be restructured contain the alternate “all disputes” clause adopted in the regulatory implementation of the CDA. FAR 52.233-1, Alternate I (disputes “relating to the contract”).

Constraints and Burdens on Government Personnel

- Staffing constraints increase burdens on contracting personnel
- Slower response times
- Challenges to obtaining necessary focus
- Periods of budget uncertainty can paralyze contracting personnel and processes

Challenges To REA Settlements

- Contracting officers have diminished ability to fund settlement of meritorious requests for equitable adjustment.
- This may slow or stop the negotiations process.
- In some cases, resolution by submission of a claim and resort to the Judgment Fund may be the only viable option for recovery.

Payment From the Judgment Fund

- The Judgment Fund, is a “permanent, indefinite appropriation” to pay judgments and awards under the Tucker Act and the Contract Disputes Act, 31 U.S.C. §1304.
- Under current practice, settlements by procuring agencies are paid from the Judgment Fund when a Board of Contract Appeals, having jurisdiction, embodies the settlement in an award.

Payment From the Judgment Fund (cont'd)

- Payment from the Judgment Fund is not a violation of the Anti Deficiency Act.
 - See, e.g., *Samish Indian Nation v. U.S.*, 657 F.3d 1330 (Fed. Cir. 2011) (Judgment Fund “established to pay monetary damage judgments against the Government when other funds are unavailable”). The Circuit cited *Ferris v. U.S.*, 27 Ct. Cl. 542 (1892) (an appropriation “merely imposes limitations upon the government’s own agents; ...its insufficiency does not...cancel its obligations, nor defeat the rights of other parties.”).
 - See also, the Supreme Court decision in *Salazar v. Ramah Navaho Chapter*, (June 18, 2012).
 - The procuring agencies’ obligation under the CDA to reimburse the fund, 41 U.S.C §612, is an internal government issue; lack of appropriation for this purpose does not affect the rights of contractors. See GAO-08-295R, Judgment Fund Reimbursements (February 2008) (reporting failure to reimburse CDA judgments).

Questions?

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Labor / Employment Challenges

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WARN Act Issues

- Triggering Events
 - Mass layoff
 - ‘plant closing’
- Conditional Notice
- Litigation Issues
- Particular concerns for unionized employers

Reductions in Force

- Begin with the end in mind
 - Determine goal (e.g. reduce X headcount, reduce X dollars, eliminate particular programs, etc.)
 - Establish selection process from the outset
 - Appropriate decisional units and OWBPA notices
- Adverse impact analyses
 - Race (minorities and individual races), gender, age, other?
 - Conducted pursuant to attorney-client privilege
 - Preserve final RIF documentation and justifications

Whistleblower Protection Laws

- Increased focus on whistleblower protection
 - FCA, SOX, Dodd Frank, ARRA, PPACA
 - 20+ other federal whistleblower laws enforced by OSHA
 - State whistleblower protection laws
- NDAA revisions
 - Extends to civilian contractors and subcontractors
 - Internal reporting included in protected activity
 - Expansion of protected disclosures
 - Reprisal at agency's request is not a safe harbor
 - Employee notification required

Regulatory Initiatives

- Department of Labor (DOL):
 - Independent contractor/employee misclassification
 - Wage hour enforcement
- Equal Employment Opportunity Commission (EEOC)
 - new emphasis on class wide systemic employment issues
 - Challenges to employer wellness programs

Regulatory Initiatives (cont'd)

- National Labor Relations Board (NLRB)
 - New concerns even for non-union employers
 - Code of Conduct policies
 - Social media policies

Questions?

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Strategic Considerations for Appropriations

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Protect the Line

We saw real impacts on defense contractors with the release of the FY 2014 President's budget. Contracts were terminated early. Whole programs were cancelled. This is just the beginning in a tough budget environment. If you aren't at the table, you are on the menu.

- Precision Tracking Space System (PTSS): **terminated**
- Expeditionary Combat Support System (ECSS): **terminated**
- Standard Missile-3 Block IIB (SM-3 IIB): **restructured** "to focus on common kill vehicle technology"
- Ground Combat Vehicle (GCV): **restructured** with the lengthening of the Technology Development (TD) and Engineering, Manufacturing, and Development (EMD) phases



http://www.gpo.gov/fdsys/pkg/CREC-2013-03-11/pdf/CREC-2013-03-11.pdf

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7	AH-64 APACHE BLOCK IIIA REMAN Unjustified unit cost increase	577,115	527,115 -50,000
8	AH-64 APACHE BLOCK IIIA REMAN (AP-CY) Excess advance procurement	107,707	101,707 -6,000
9	AH-64 APACHE BLOCK IIIB NEW BUILD Additional aircraft	153,993	224,993 71,000
10	AH-64 APACHE BLOCK IIIB NEW BUILD (AP-CY) Excess advance procurement	146,121	135,421 -10,700
13	UH-60 BLACKHAWK (MYP) Program increase - only for the Army National Guard	1,107,087	1,306,087 199,000
15	CH-47 HELICOPTER Additional aircraft	1,076,036	1,186,036 110,000
18	MQ-1 PAYLOAD - UAS Army requested transfer to RDTE,A line 131 for EMAARS	231,508	184,608 -46,900
23	CH-47 CARGO HELICOPTER MODS Cargo on/off loading system with ballistic protection	39,135	87,935 48,800
26	UTILITY HELICOPTER MODS UH-60 A to L conversion - only for the Army National Guard	73,804	183,804 110,000
27	KIOWA WARRIOR OH-58 recap Cockpit and sensor upgrade program - ahead of need	192,484	119,584 -37,200 -35,700
32	RQ-7 UAV MODS Ahead of need	104,339	29,265 -75,074

Done



PLUS the Line

In spite of a shrinking defense budget, a well executed political strategy coupled with addressing a programmatic need has brought to light the “new” earmark.

	Budget Request	Commerce
1 UNIVERSITY RESEARCH INITIATIVES	113,690	133,690
Program increase - cooperative based university research program		20,000
3 DEFENSE RESEARCH SCIENCES	473,070	482,070
Nanotechnology research		9,000
4 POWER PROJECTION APPLIED RESEARCH	89,189	99,189
Program increase - power projection applied research		10,000
5 FORCE PROTECTION APPLIED RESEARCH	143,301	209,301
Alternative energy research		40,000
Materials research and technology		13,000
Power generation and storage research		13,000
10 OCEAN WARFIGHTING ENVIRONMENT APPLIED RESEARCH	49,635	64,635
Program increase - AGOR mid-life refit		15,000
19 ELECTROMAGNETIC SYSTEMS ADVANCED TECHNOLOGY	54,858	63,858
Advanced radar research		9,000
FUTURE NAVAL CAPABILITIES ADVANCED TECHNOLOGY DEVELOPMENT	256,382	288,382
Technology transition - restore unjustified reduction		32,000
23 WARFIGHTER PROTECTION ADVANCED TECHNOLOGY	3,880	42,580
Program increase - bone marrow registry program		31,500
Program increase - tactical athlete program		7,200
24 UNDERSEA WARFARE ADVANCED TECHNOLOGY	0	10,000
Program increase - ASW research		10,000
35 SURFACE AND SHALLOW WATER MINE COUNTERMEASURES	190,622	188,622
Excess to need		-2,000
43 SURFACE ASW	6,704	4,504
Program execution		-2,200



CREATE the Line

- Introduce new technology solutions to unanswered or emerging DOD needs (obesity, orphan diseases, cybersecurity)
- Identify legislative vehicles to craft and support the military need
- Identify willing program managers
- Leverage support of Congressional Champions
- Introduce to prime defense contractors and develop coordinated outreach plan with prime contactors
- Request/support changes to SOW augmentation plan, contracts, and other documents

FY 2013 NDAA: SEC. 216. ADVANCED ROTORCRAFT INITIATIVE.

(a) In General- Not later than 180 days after the date of the enactment of this Act, the Under Secretary of Defense for Acquisition, Technology, and Logistics shall, in consultation with the military departments and the Defense Advanced Research Projects Agency, submit to the congressional defense committees a report setting forth a strategy for the use of integrated platform design teams and agile prototyping approaches for the development of advanced rotorcraft capabilities.

(b) Elements- The strategy required by subsection (a) shall include the following:

(1) Mechanisms for establishing agile prototyping practices and programs, including rotorcraft X-planes, and an identification of the resources required for such purposes.

(2) The X-Plane Rotorcraft program of the Defense Advanced Research Projects Agency with performance objectives beyond those of the Joint Multi-role development program, including at least two competing teams.

(3) Approaches, including potential competitive prize awards, to encourage the development of advanced rotorcraft capabilities to address challenge problems such as nap-of-earth automated flight, urban operation near buildings, slope landings, automated autorotation or power-off recovery, and automated selection of landing areas.

Questions?

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