

CLIENT ALERT

DoD Will Consider Contract Adjustments Addressing Inflation

September 12, 2022

On Friday September 9, 2022, the Principal Director for DoD Defense Pricing and Contracting (DPC) issued a Memorandum titled “[Managing the Effects of Inflation with Existing Contracts](#).” The Memorandum provides guidance to Contracting Officers about the range of approaches available to address the effects of inflation on the Defense Industrial Base. Of note, it highlights two paths contractors may pursue to recover for inflation under fixed-price contracts.

First, the Memorandum notes that the ability to recognize cost increases is largely dependent on contract type, asserting that “[c]ontractors performing under firm-fixed-price contracts that were priced and negotiated before the onset of the current economic conditions generally bear the risk of cost increases.” This is similar to [guidance](#) DPC issued in May encouraging Contracting Officers to consider including economic price adjustment (EPA) clauses in new contracts but expressing skepticism about contractors’ ability to recover for inflation under existing fixed-price contracts. However, the new Memorandum allows that “there may be circumstances where an accommodation [such as schedule relief or amended contract requirements] can be reached by mutual agreement of the contracting parties, perhaps to address acute impacts on small business and other suppliers.”

Second, the Memorandum states that DoD “will consider” contractor requests for “Extraordinary Contractual Relief”—including potential upward price adjustments under firm-fixed-price contracts—under Public Law 85-804. That law, as implemented at FAR Part 50, allows DoD (and other limited agencies) to amend contracts without consideration when doing so is essential to the national defense, when a contractor suffers a loss under a defense contract because of Government action, and/or to correct or mitigate the effect of mistakes. The Government’s authority under 85-804 is broad but has certain important limitations, including: (1) 85-804 authority may not be relied upon where other adequate legal authority exists; (2) the funding must not exceed appropriated amounts (except when used to approve indemnification agreements); (3) any amendment can only be to the “extent necessary to avoid such impairment to the contractor’s productive ability”; (4) the contractor must suffer a “loss,” and not merely a decrease in anticipated profits; and (5) the contractor must submit a request for contract amendment before all obligations under the contract have been discharged. The Memorandum notes that requests for Extraordinary Contractual Relief must satisfy “stringent criteria,” but the fact that DPC is encouraging such requests signals a potential willingness by DoD to meaningfully consider them and may provide hope for contractors struggling with the effects of inflation.

In light of this new guidance, contractors impacted by inflation should (1) continue to scrutinize their existing contracts for potential remedy granting clauses that would address inflation; (2) consider requesting both price and non-price accommodations; and (3) consider whether to seek Extraordinary Contractual Relief under Public Law 85-804.

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