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ARTICLE

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# The BDO GovCon Week Ahead - January 2023

January 30, 2023

## DoD Contractors May Soon Receive Relief for Increased Contract Costs due to Inflation

Congress recently passed the FY23 National Defense Authorization Act (“NDAA”). Section 822 of the NDAA amends Public Law 85-804 (50 U.S.C. 1431) to allow contractors to apply for contract pricing adjustments while also giving DoD much discretion to grant or deny requests. President Biden signed the FY23 NDAA on December 23, 2022.

The provisions of Section 822 include the following.

- ▶ Amends 50 U.S.C. § 1431 (Public Law 85-804) and expands the authorization for the President to empower agencies involved with the national defense “to enter into, amend, and modify contracts, without regard to other provisions of law [when] . . . such action

would facilitate the national defense.”

- ▶ Allows DoD to provide equitable adjustments to contractors dealing with increased costs “due solely to economic inflation.” This is especially important for contractors performing multi-year fixed price contracts.
- ▶ Increased the monetary thresholds above which senior agency official approval is required. Section 822 increases the applicable thresholds for secretarial level approvals to procurements in excess of \$500,000 and for congressional notice to \$150,000, up from \$150,000 and \$25,000 respectively. Thus, more contracts will fall under these thresholds making accessing relief easier.
- ▶ Important details including guidance on which types of contracts qualify and overall appropriated amounts for relief are yet to come and contractors should monitor the situation carefully.

The path to the provisions of Section 822 in the FY23 NDAA has been a long one. Here is some background:

In May 2022, DoD published memorandum, “Guidance on Inflation and Economic Price Adjustments” to provide guidance to contracting officers (COs) on treatment of cost increases due to economic conditions. In it, DoD reiterated that treatment is dependent on contract type.

1. Under cost reimbursable contracts, the Government bears the risk of increased costs.
2. Under fixed-price incentive (firm target) (FPIF) contracts, the contractor’s actual (allowable and allocable) costs are recognized up to the contract ceiling. To the extent the actual cost differs from the target cost, the target profit will be adjusted by application of the contract share ratio to the costs over or under the target cost.
3. Under fixed-price contracts with economic price adjustment (FPEPA), the EPA clause normally establishes a mechanism to mitigate specifically covered cost risks to both parties as a result of industry-wide contingencies beyond any individual contractor’s control; the Government will bear the cost risk up to the limit specified in the clause (if any).
4. Under firm-fixed-price (FFP) contracts the contractor generally must bear the risk of cost increases, including those due to inflation.

The memo discussed the use of requests for equitable adjustment (REAs) under FFP contracts to

address unanticipated inflation noting that REAs entail a contractor's proposal to the CO seeking an equitable adjustment to the contract terms based on a contracting officer's directed change within the scope of the contract. Since cost impacts due to unanticipated inflation are not a result of a contracting officer-directed change, COs should not agree to contractor REAs submitted in response to changed economic conditions.

For contemplated new FFP contracts, the May 2022 memo clearly states that an EPA clause may be an appropriate tool to equitably balance the risk of inflation between the Government and contractor and provides extensive guidance on the use of EPA clauses by contracting officers.

DoD updated this guidance in September 2022 in memorandum, "Managing the Effects of Inflation with Existing Contracts." DoD stated that there may be circumstances for contractors performing FFP contracts where an accommodation can be reached to address acute impacts on small business and other suppliers. Such an accommodation could take the form of schedule relief or amendment of other contractual requirements. The memo also noted that the Secretaries of the Navy, Army, and Air Force have access to Public Law 85-804, as implemented by Part 50 of the Federal Acquisition Regulation (FAR) and the Defense FAR Supplement (DFARS), to afford Extraordinary Contractual Relief though the law and regulation have stringent criteria for qualification for such relief.

## **FAR Climate Disclosures – Ensure Your Organization is Prepared for Upcoming Requirements**

The Federal Acquisition Regulatory Council (FAR Council) is considering an amendment under the Federal Supplier Climate Risks and Resilience Rule, requiring government contractors to begin disclosing their Greenhouse Gas (GHG) emissions, climate-related financial risks, and emissions targets and transition plans in order to be eligible for government contracts in coming years. While the final rule is not expected to be released until this summer, federal procurements have already begun giving proposal scoring preference to those organizations that have already started releasing their disclosures.

[Read our latest alert](#) for complete details on the proposed rule.

# January 17, 2023

## Big News for Small Businesses

Small businesses across the nation are about to receive some much-needed help during these uncertain economic times from the Small Business Administration (SBA). In November 2022, the SBA issued several rules to increase the SBA's size standards for inflation. These rules cover three main areas of adjustment: 1) receipts-based size standards; 2) economic disadvantage thresholds; and 3) the sole source dollar limitation.

Regarding the first adjustment, the SBA uses the North American Industry Classification System (NAICS) codes to classify businesses by size in terms of annual receipts or number of employees. For annual receipts, size status is calculated by averaging a company's receipts over the last five fiscal years. If the average falls below a certain dollar threshold, then the company is classified as a small business and is eligible for small business awards.

The new rule multiplies the current threshold by 1.1365, rounded to the nearest \$500,000. For example, if the current threshold is \$10 million, then the new threshold would be \$11.5 million. To arrive at this value we multiple \$10 million by 1.1365. This equals \$11,365,000. When rounded to the nearest \$500,000, the new threshold is \$11,500,000. This increase will allow companies to maintain their small business status longer and continue to compete for set-aside contracts for a longer time.

The second adjustment increases the threshold for Economically Disadvantaged Women-Owned Small Businesses. The adjustment increases the new net worth limit to \$850,000 (increased from \$750,000), the aggregate gross income limit to \$400,000 (increased from \$350,000) and the new total asset limit to \$6.5 million (increased from \$6 million). This will lead to greater involvement in SBA's programs.

The final adjustment increases the lifetime sole source award limit for small business from \$100 million to \$169.5 million. The SBA states the significant increase is due to the fact that no adjustments have been made to this threshold since the inception of the program.

These adjustments will help small businesses maintain their small size status and continue to benefit from competitive set-aside opportunities and exemption from compliance with Cost Accounting Standards.

For more information, [read the full article about these rule adjustments](#).

