



# **NDAA Section 822 & Alternative Solutions to Mitigate the Risks of Inflation**



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## Introduction

- What Challenges Are Federal Construction Contractors Facing?
- Applicability/Usefulness of the Economic Price Adjustment Clause
- Recent DOD & GSA Guidance
- Alternative Legal Remedies and Practical Advice





## Challenges for Contractors and Government

- Inflationary Pressure, Post Covid Supply Shortages, and the Lag between Contract Award and Performance Lead to Massive Cost Escalation, for Which There are Few Remedies.
- What if the Federal Government Doesn't Reach a Debt Ceiling Deal in the Future?
- Compensation to the Contractor is Usually NOT Given for the Escalation.
- Very little Case Law and NOT Very Positive for Contractors.





# Various Price Escalation Clauses

## Economic Price Adjustment

- FAR 52.216-4 Economic Price Adjustment – Labor and Material
  - Must provide Contracting Officer 60 days notice of increase or decrease
  - Requires at least 3% increase or decrease
  - 10% increase cap
  - No decrease cap
  - Requires “schedule” of prices
  - CO must issue a formal contract modification





# Economic Price Adjustment Clause

- FAR 16.203-2 (Fixed-price Contracts with Economic Price Adjustment) – Application
  - “A fixed-price contract with economic price adjustment may be used when (i) ***there is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance***, and (ii) ***contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract***. Price adjustments based on established prices should normally be restricted to industry-wide contingencies.”





# Economic Price Adjustment Clauses

- FAR 16.203-3 (Fixed-price Contracts with Economic Price Adjustment) – Limitations
  - “A fixed-price contract with economic price adjustment shall not be used unless the contracting officer determines that it is necessary either to protect the contractor and the Government against significant fluctuations in labor or material costs or to provide for contract price adjustment in the event of changes in the contractor’s established prices.”





# The General Services Administration (GSA)

- Guidance on Addressing Inflation in GSA Contracts (9/12/2022)
  - Provides Economic Price Adjustment Considerations
  - Highlights Importance of Speed in Acquisition
  - Shares Benefits of Shorter Contracts





# The U.S. Department of Defense (DoD)

- Initial Memorandum: Guidance on Inflation and Economic Price Adjustments (5/25/2022)
  - “contractors performing under firm-fixed-price (FFP) contracts generally must bear the risk of cost increases, including those due to inflation.”
  - “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.”





# The U.S. Department of Defense (DoD)

- Memorandum: Managing the Effects of Inflation with Existing Contracts (9/09/2022)
  - “[T]here may be circumstances where an accommodation can be reached by mutual agreement of the contracting parties, perhaps to address acute impacts on small business and other suppliers.”
  - “For extraordinary circumstances where contractors have sought or may seek an upward adjustment to the price of an existing firm-fixed-price contract to account for current economic conditions, each of the Secretaries of Defense, Army, Navy and Air Force has authority under 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.”





# Section 822 of the 2023 National Defense Authorization Act (NDAA)

- Section 822 of the NDAA (Modification of contracts to provide extraordinary relief due to inflation impacts)
  - Amends Public Law 85-504
  - Allows the DoD to “make an amendment or modification to an eligible contract when, due solely to economic inflation, the cost to a prime contractor of performing such eligible contract is greater than the price of such eligible contract.”
  - Adjustments may “account only for the actual cost of performing such eligible contract or such eligible subcontract, but may account for indirect costs of performance, as the Secretary of Defense determines appropriate.”
  - Effective through December 31, 2023





### DoD's Guidance was Expected:

- “Not later than 90 days after the date of the enactment of an Act providing appropriations to carry out section 1 of Public Law 85-804 (50 U.S.C. 1431) (as added by subsection (a)), the Under Secretary of Defense for Acquisition and Sustainment shall issue guidance implementing the authority under subsections (b) through (d) of section 1 of Public Law 85-804 (50 U.S.C. 1431)(as added by subsection (a)).”
- The 2023 NDAA was enacted on December 23, 2022. Therefore, DoD's guidance on implementing inflation adjustments under Section 822 was due by March 23, 2023.
- Current Status: ?





# Alternative Legal Remedies

- Force Majeure
- Changes Clause
- Commercial Impracticability/ Cardinal Change
- Suspension of Work Clause
- Concealed or Unknown Conditions
- Termination Clause
- Acceleration





# Commercial Price Escalation Clauses

## Commercial Contracts

- **ConsensusDocs 200.1 Material Price Escalation Amendment**
  - Allows parties to set a baseline price
- **AIA A201-2017 § 3.8 Allowances**
  - “whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order....”





# What To Do For Contractors

- Talk with Suppliers and Subcontractors about Early Purchasing
- Proactively engage with Manufacturers and Understand their Current Situation
- Work with AGC to share solutions and resources
- Document the Impact of Inflation





# What To Do For Government

- Include the “Economic Price Adjustment” clause
- Pay Contractors for Stored Materials
- Provide Allowances in Contracts
- Make Strategic Contracting Strategies and Continuously Communicate with Contractors across Projects
- Consider Commodities
- Prioritize Projects and Review Early Purchases





Questions?



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