

DoD releases updated guidance for firm-fixed-price contractors grappling with inflation

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SEPTEMBER 26, 2022

With continued inflation putting pressure on the defense supply chain, the Department of Defense (DoD) has released guidance encouraging contracting officers to provide mutually agreeable relief to fixed-price contractors facing untenable costs.

The latest guidance acknowledges that firm-fixed-price contractors face the burden and risk of cost increases due to inflation.

DoD's guidance, dated September 9, 2022,¹ follows a similar guidance earlier this summer which recommended that contracting officers consider including economic price adjustment clauses in new solicitations. We previously wrote about that guidance.²

The latest guidance acknowledges that firm-fixed-price contractors face the burden and risk of cost increases due to inflation. Through this guidance, DoD expresses sympathy for contractors in this situation, and as a potential remedy, encourages contracting officers to work with contractors to combat the impacts of rising costs by "mutual agreement."

For example, DoD provides that contract amendments could be executed to the benefit of both parties, such as schedule adjustments for contractors in exchange for "adequate consideration" for the government. It is not entirely clear what is meant by adequate consideration — nor is it clear how a schedule extension would alleviate rising costs. However, the latest guidance provides support for contractors in difficult situations to approach their contracting officers and seek a negotiated solution.

The guidance also indicates that DoD contracting officers may account for current economic conditions by granting requests for "Extraordinary Contractual Relief" under Public Law 85-804, as implemented by Subpart 50.1 of Federal Acquisition Regulation.³

Although this authority can only be used "to facilitate the national defense" when "other legal authority ... is deemed to be lacking or

inadequate" to remedy the situation — amongst other "stringent criteria" that must be met — it ultimately allows for the amendment of contracts *without consideration*.

DoD's invocation of Public Law 85-804 is a promising sign for contractors, and it remains to be seen how DoD will use this authority. Public Law 85-804 has traditionally been invoked, for example, to provide indemnities to contractors working on hazardous projects.

While this guidance isn't exactly a homerun for firm-fixed-price contractors, it is slightly more optimistic than DoD's previous guidance.

But it has a broader potential application in cases affecting the national defense, and it is welcome news for the contractor community to see the Department recognizing this in the current economic climate. The memorandum also provides that DoD will be collecting all Public Law 85-804 requests related to inflation.

While this guidance isn't exactly a homerun for firm-fixed-price contractors, it is slightly more optimistic than DoD's previous guidance, which primarily denied remedies for contractors under firm-fixed-price contracts and instead focused on language that could be included to avoid a similar fate under future contracts.

Even for contractors that ultimately decide against submitting a Public Law 85-804 request, this slightly more sympathetic tone from DoD may encourage contracting officers to take a harder look at requests for equitable adjustments or find common ground for a contractual amendment.

Notes

¹ <https://bit.ly/3LD9OMM>

² <https://bit.ly/3Sv6GEO>

³ <https://bit.ly/3LH4M1N>

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This article was published on Westlaw Today on September 26, 2022.

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