

Congress Offers Limited Monetary Relief to Certain Defense Contractors Battling Inflation

As part of the FY23 National Defense Authorization Act (NDAA) passed in December 2022, Congress granted the Department of Defense (DoD) new authority to modify existing fixed-price contracts to compensate defense contractors for increased costs arising from inflation. Section 822 of the NDAA, entitled “Modification of Contracts to Provide Extraordinary Relief Due to Inflation Impacts,” amended Public Law 85-804¹ to permit contractors to apply for contract adjustments while also giving the DoD wide discretion to grant or deny such requests. Increases are likely to include labor, material, and equipment costs.

Congress also instructed the DoD to issue guidance for implementing this new authority within 90 days after Congress appropriates related funds. The Cozen O’Connor team will issue an updated client alert once this guidance issues. Below is an overview of the new relief.

Background of Public Law 85-804

Public Law 85-804 allows the President to authorize government agencies to enter or modify contracts to “facilitate the national defense” in cases where “other legal authority...is deemed to be lacking or inadequate[.]”² The law includes two monetary restrictions to agencies’ discretion, limiting both the relief amount that may be authorized without approval by an official at the secretarial level and the relief amount that may be disbursed without prior notice to Congress.

The Amendments to Public Law 85-804

Section 882 of the FY23 National Defense Authorization Act amends Public Law 85-804 in two key ways:

First, Section 882 grants the DoD the authority to modify existing fixed-price contracts when, “due solely to economic inflation,” the cost of performing the contract outstrips the price of the contract. The relief is contingent upon continued performance and can only account for the actual cost of performance (including indirect costs “as the Secretary of Defense determines appropriate”). Both prime and subcontractors are permitted to request equitable relief. The DoD is permitted to fund this relief only with appropriations specifically identified for fulfilling the purpose of Section 882.

Second, Section 882 increased the above-referenced monetary restrictions to account for the impact of recent inflation. The amount of relief that may be authorized without approval by an official at the secretarial level was increased from \$50,000 to \$500,000. And the amount of relief that may be authorized without prior notice to Congress was increased from \$25 million to \$150 million.

Key Caveat

It is important to note that this new statutory relief is limited to contracts within the DoD (i.e., it does not appear to apply to contracts with civilian agencies like the General Services Administration, Department of Energy, etc.). Nonetheless, there may be opportunities to pursue claims with those non-DoD agencies for increased costs due to inflation via related theories.

Conclusion

This grant of new relief is exciting news to many defense contractors fighting inflation under multi-year, fixed-price contracts. However, questions remain, including:

- What is the procedure for requesting relief?



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- Which types of contractors qualify for the relief?
- How will the DoD determine which costs are “due solely” to economic inflation?
- Which indirect costs qualify for the relief?

We are hopeful that the eagerly-anticipated guidance will answer these questions.

This relief is authorized only until December 31, 2023, and we anticipate that the DoD will be flooded with requests. Contractors with potential claims should therefore begin preparing and submitting claims without delay.

Please contact us with any questions or inquiries you may have.

¹ 50 U.S.C. § 1431

² See FAR Subpart 50.1 *et seq.*
