

## The Path To NDAA Inflation Relief For Defense Contractors

By **Joshua Duvall and David Yang** (January 9, 2023, 5:52 PM EST)

On Dec. 23, 2022, President Joe Biden signed the National Defense Authorization Act for Fiscal Year 2023. Prior to the bill reaching the president's desk, the U.S. House of Representatives and Senate overwhelmingly approved it, which showed true bipartisan support for this \$858 billion piece of legislation.

While the FY 2023 NDAA naturally covers a host of issues important to national defense, one provision may have a profound impact on the defense industrial base: inflation relief under Section 822.

This is welcome news for contractors and subcontractors in firm-fixed-price contracts that are struggling to navigate contractual requirements under significantly increased inflationary and supply-chain pressures.

In this article, we discuss prior U.S. Department of Defense guidance regarding inflation relief, the contours and applicability of Section 822, and key takeaways for contractors that are considering seeking contractual relief from inflation.

### Prior Department of Defense Guidance

Section 822 builds upon the DOD's Sept. 9, 2022, guidance memorandum to contracting officers regarding the recent, unprecedented inflationary concerns affecting firm-fixed-price contracts.

The memorandum by Director of Defense Pricing and Contracting John Tenaglia acknowledged that contractors generally bear the risk of cost increases, including inflation, under firm-fixed-price contracts. As the memo also recognized, contractors are generally unable to charge those cost increases to the government absent a mechanism in the contract to do so or adequate consideration to support a bilateral contract modification.

Accordingly, due to the massive impact caused by inflation on the defense industrial base and supply chains, the memo reminded DOD contracting officers that, in extraordinary circumstances, inflation adjustments may be sought through the extraordinary contractual relief authority under Public Law 85-804, as implemented under Federal Acquisition Regulation Part 50.

Notwithstanding the DOD's guidance pointing to FAR Part 50 as an available avenue for inflation relief



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under firm-fixed-price contracts, neither FAR Part 50 nor Public Law 85-804 specifically contemplates inflation as a basis for such relief.

## **Section 822: Temporary Relief**

Section 822 changes the existing statutory landscape by formally recognizing inflation as a category that may warrant extraordinary contractual relief. The legislation does so not only by amending Public Law 85-804/Title 50 of the U.S. Code, Section 1431 to designate inflation as a statutory basis for extraordinary contractual relief in certain circumstances, detailed below, but also by increasing agency approval and congressional notification thresholds to \$500,000 and \$150 million, respectively.

In its joint explanatory statement on the FY 2023 NDAA, Congress acknowledged that "while it is important for the Department to uphold and enforce contractual terms and conditions, we believe the Department should be provided tailored authority to engage extraordinary measures to address extraordinary economic impacts."

Notably, in a departure from the DOD's Sept. 9 guidance, and consistent with congressional intent to provide extraordinary relief to the already overburdened defense industrial base, Section 822 makes clear that such relief will be available to contractors and subcontractors without requiring additional consideration.

As mentioned above, Section 822 amends Title 50 of the U.S. Code, Section 1431 to provide extraordinary contractual relief for both DOD contractors and subcontractors in the following ways:

- The DOD may amend or modify an eligible contract when, due solely to economic inflation, the cost to a prime contractor of performing an eligible contract is greater than the price of that eligible contract.
- Prime contractors may request an amendment or modification to an eligible contract when, due solely to economic inflation, the cost to a covered subcontractor of performing an eligible subcontract is greater than the price of that eligible subcontract.
- Covered subcontractors may also submit a request for inflationary relief, due solely to economic inflation, directly to a contracting DOD officer when the prime contractor does not do so.

In providing relief, Section 822 prohibits the DOD from requesting additional consideration — that is, more work — from a prime contractor. Where a prime contractor requests relief for a covered subcontractor, the prime contractor must certify both that it will "remit to such covered subcontractor the difference" between the original price and modified price and that it will not require the subcontractor "to pay additional consideration or fees related to such amendment or modification."

Section 822 provides definitions for "eligible contract" and "eligible subcontract." The former means a contract awarded to a prime contractor by the DOD, and the latter means a subcontract made under an eligible contract with a covered subcontractor.

Because covered subcontractor is defined as a "subcontractor who has entered into an eligible subcontract with a prime contractor," it appears that subcontractor requests will be limited to first-tier subcontractors.

In terms of guidance, the FY 2023 NDAA states that the DOD has 90 days from the enactment of the legislation to provide guidance implementing Section 822.

Notably, Section 822 inflation relief is only available on a temporary basis — that is, authority to grant relief will end on Dec. 31, 2023.

### **Contractor Takeaways**

Section 822 is welcome news for defense contractors and subcontractors in this uncertain economic environment, particularly fueled by overtaxed supply chains and sharply rising costs. While any inflationary relief is discretionary, as shown by the use of the word "may" in the legislation, the bill provides defense contractors, and particularly small businesses, with a much-needed formal avenue for seeking relief.

Section 822 also signals that the DOD considers inflation to be of paramount import to the DIB and may thus assist in any pending FAR Part 50 requests. As many important questions remain for the DOD to address in its forthcoming guidance, such as the meaning of "due solely to economic inflation," DOD contractors should closely monitor developments to ensure that they timely act to seek relief given the relatively short window within which to do so.

In the meantime, affected DOD contractors should prepare to avail themselves of this relief by considering the following issues:

1. Because extraordinary contractual relief is a discretionary remedy and one likely subject to funding availability, contractors should begin discussing potential requests with their DOD contracting officers at their earliest convenience. This will afford contractors the opportunity to address the importance of their request and how it facilitates the national defense. It also will provide the agency sufficient time to identify and evaluate potential funding sources to accommodate the request.
2. Contractors also should bear in mind that they will need to abide by the existing FAR Part 50 requirements for seeking a contract adjustment by way of extraordinary contractual relief.

These requirements include preparing the factual, chronological and other evidentiary bases for the adjustment, the precise adjustment sought, and a certification that the request is made in good faith and that the supporting data are accurate and complete to the best of the contractor's knowledge and belief.

As this effort shares many similarities with a request for an equitable adjustment, the same considerations such as assessing causation, schedule and quantum remain fully relevant to preparing and submitting a request for extraordinary contractual relief.

Further, contractors should be prepared to answer requests by the contracting officer for supplemental information about the contract involved. This could include documenting a lack of alternative remedies under the contract; the contractor's performance history and obligations; the support, calculations and any other analyses backing the amount sought; any actions taken by the contractor to mitigate losses; a list of knowledgeable witnesses; and any other contemporaneous evidence that supports the request, among other items.

In short, while contractors should submit as much information as possible upfront, they must be fully

prepared to defend and supplement their requests.

3. Finally, contractors should be aware that a request for extraordinary contractual relief may only be sought after all administrative remedies have been exhausted. That is, a request for extraordinary contractual relief is a remedy of last resort.

Thus, if a contractor has other potential grounds for relief, such as under the contract's disputes clause, it must first present those claims to the contracting officer and appeal any denials pursuant to the Contract Disputes Act before the contractor may pursue a request for extraordinary contractual relief.

As such, contractors should determine whether inflationary impacts can be segregated from any other bases for relief that may be actionable under other legal avenues, and if so, separately submit these inflation-based requests as soon as possible.

Time is of the essence: Section 822 will sunset on Dec. 31, 2023, leaving contractors with a limited period to pursue relief.

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