



# GovCon Regulatory Update

March 2023



## Recent Legislation

### Opportunities for industry under the Creating Helpful Incentives to Produce Semiconductors for America Act (CHIPS)

On August 9, 2022, the White House signed into effect the "Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act," legislation aimed at promoting and funding facilities to research, manufacture, and produce semiconductors.

The CHIPS Act provides funding over 5 years to the Secretary of Commerce for the promotion of building, expanding, and modernizing domestic semiconductor facilities. This funding will require interested parties to apply to the Secretary and will require applications to meet specific eligibility criteria that will be further clarified by the government at a later date.

Contractors should be aware that this grant funding will come with strict conditions (with an emphasis on domestic production) and increased oversight/scrutiny from the government. The program will offer opportunities for companies in this sector who are seeking federal funding in expanding their operations, but manufacturers should remain vigilant in staying up to date with their requirements before applying to any grant.

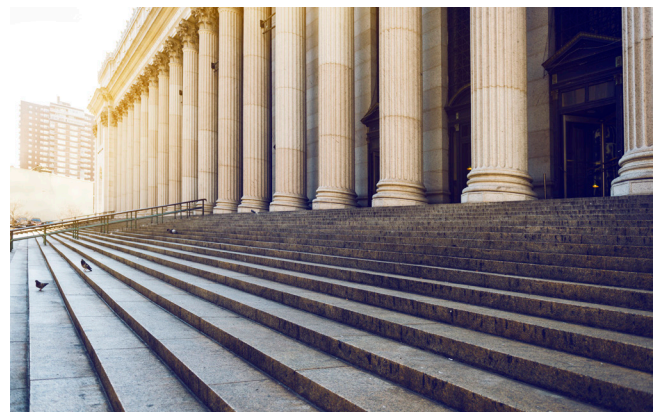
### Inflation Reduction Act (IRA)

The Inflation Reduction Act ("IRA" / "Act") is a multifaceted bill that was signed into effect on August 16th by the Biden Administration. The Act is an updated, reduced version of what was originally known as the "Build Back Better Act," which was proposed in 2021. This legislation is designed to reduce the deficit and lower inflation and implements

a number of major changes across corporate tax, health care, and green energy:

- Creation of a 15% alternative minimum corporate tax rate
- Increased funding and investment in the Internal Revenue Service through 2031 to bolster enforcement
- An extension of existing Affordable Care Act subsidies through 2025
- A significant focus in healthcare legislation, including the ability for the government to negotiate Medicare prescription drug pricing
- A \$300+ billion investment incentives for energy and climate programs, including tax credits for households, tax credits for domestic manufacturing of clean energy production and storage, and carbon emission tax credits

While the impact of the legislation on inflation remains to be seen, the Act will be monumental in reducing the deficit and promoting legislative change.



# Industrial Manufacturing/Aerospace and Defense



## **DFARS rule promotes maximum use of American Products-Implements EO 13881**

Effective June 23, 2022, the Department of Defense (DoD) has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Executive Order (EO) 13881, Maximizing Use of American-made Goods, Products, and Materials.

EO 13881 establishes that under the Buy American Act, a product is considered domestic if the cost of all domestic components used is 55% or more of the cost of all components. This EO strengthens the domestic preferences under the Buy American Act but maintains existing domestic exceptions such as nonavailability, unreasonable cost, public interest, and qualifying country production.

The DoD expects that the heightened domestic content requirements will benefit domestic contractors supplying domestic end products, but manufacturers should continue to review their domestic preference processes to ensure they remain compliant.

## **New interest rates effective July 1, 2022**

The Secretary of the Treasury has set the Prompt Payment Act and Contract Disputes Act interest rate at 4 percent per year, an increase from the prior period's rate of 1 5/8 percent. The new rate applies July 1, 2022, through December 30, 2022. The rate is used to calculate interest due on claims under both acts.

## **Stop price gouging the Military Act**

Sen. Warren and Rep. Garamendi introduced the following bills S.4374 and H.R. 8007 which was referred to the Committee on Armed Services for further action. The Stop Price Gouging the Military Act has four main sections that aim to close loopholes in current acquisition statutes and regulations.

The first section focuses on strengthening the Truth in Negotiations Act (TINA) provisions through requiring contractors to provide cost or pricing information even if there is adequate price competition that results in at least two responsive and responsible offers. This is a major shift that will certainly impact many commercial contractors that traditionally haven't had to provide certified cost or pricing data.

The next section looks to revise the definition of "commercial product by removing the term "of a type." In theory, this would restore market dynamics to the definition and tie to whether a good or service is actually sold to other customers to include commercial customers. This revision was previously floated in 2015 but was adopted due to industry concerns.

The third section initiates a DoD pilot program previously proposed, to tie back progress payments to performance by lowering advance payments for companies to 50% versus the customary 80% for large businesses and up to 90% for small businesses. However: the contractors would have to opportunity to receive payments up to 95% if they were to meet certain conditions such as: meeting program schedules and milestones 95% of the time, having required business systems, timely responses to requests to provide certified cost or pricing data, and not having major outstanding corrective action requests.

The last section would require large defense contractors to share annually any changes in volume of goods and services sold, as well as changes in the average price and gross margins with the Under Secretary of Defense for Acquisition and Sustainment. This is similar to disclosures already made by publicly traded companies. However: there are provisions to protect proprietary information by delaying the public information by a year.

## **Change to DCMA acquisition review board**

The Defense Contract Management Agency (DCMA) released Policy-Type Memorandum (PTM) 21-001, "Acquisition Review Board (ARB)" on July 6, 2022. The PTM replaces PTM 18-006 "Acquisition Review Board (ARB);" though the policy, responsibilities, and procedures remain mostly unchanged. ARB approval is required for supply or service requirements that have a total cost greater than the Simplified Acquisition Threshold (SAT). ARB meetings are held on the last Wednesday of every month to review and approve that the acquisition of supplies or services represents, and agency need and complies with applicable procurement regulations.

The new memo increases the lead time that the requestor must submit the requirements package to the ARB Coordinator prior to the pre-ARB meeting, from 5 to 10 business days. Additionally, the memo amends Table 1. "Required ARB Submission Dates" table to remove the lead time requirements for Solicitations, Awards, and Contract Extensions or Increases in Scope Modifications. The PTM leaves in exemptions for certain type of acquisitions and still allows for justification of Out-of-Cycle ARB reviews. The PTM is effective immediately and will remain in effect for one year.

### **FAR Case 2016-005 Effective Communication between the Government and Industry**

In July, the DoD, GSA, and NASA has entered final rule stage on FAR Case 2016-005 Effective Communication Between Government and Industry. The case is set to implement section 887 of the NATIONAL DEFENSE AUTHORIZATION ACT (NDAA) for FY 2016.

Section 887 dictates that the US Comptroller General is to submit a report on the use of contractors to perform work supporting contingency operations. The rule requires the Comptroller General to include the following in his/her report:

- (1) An evaluation of the nature and extent to which the Department of Defense has used contractors to perform such work, including the type of operation or exercise, the functions performed by a contractor, the place of performance, and contract obligations.
- (2) An evaluation of the processes for tracking and reporting on the use of such contractors.
- (3) An evaluation of the extent to which recommendations made by the Wartime Contracting Commission established in section 841 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 122 Stat. 230) have been implemented in policy, guidance, education, and training, as appropriate; and
- (4) Any other issues the Comptroller General determines to be appropriate.

No related action is required by contractors at this time, as the possible FAR implementation of this NDAA section is meant to increase transparency and encourage responsible and constructive communication between the Government and industry.

### **Guidance on Inflation and Economic Price Adjustments-DoD Defense Pricing and Contracting-UPDATE**

The DoD Defense Pricing and Contracting (DPC) office on May 25, 2022, issued clarifying guidance to the

contracting officers (CO's) and the DoD contracting community as to whether it is appropriate to recognize cost increases due to inflation under existing contracts. In addition, offer considerations for the proper use of the economic price adjustments (EPA) when entering into new contract actions. For contracts being developed or negotiated during this period of unusually high inflation, an EPA clause may be an appropriate tool to equitably balance the risk of inflation between the Government and contractor.

The memo referenced DFAR PGI 216.203-4 which cites the Bureau of Labor Statistics (BLS) Producer Price Index series; the Employment Cost Index for wages and salaries, benefits, and compensation costs for aerospace industries; and the North American Industry Classification System (NAICS) Product Codes, as indices that could be used by the CO or contractors for measurement of inflation in EPA clauses.

The memo does not direct the COs to grant all requests for REAs under fixed price contracts but provides COs guidance in when to recognize cost increases due to inflation under existing contracts and when not to offer considerations while directing the COs to be fair to all parties to the contract.

**UPDATE** -On September 9, 2022, the DoD Defense Pricing and Contracting (DPC) office issued a memorandum "*Managing the Effects of Inflation with Existing Contracts*" providing guidance to CO's updating them about the range of approaches to them previously outlined in the May 25th DoD memo. Specifically, detailing that there may be circumstances where an accommodation can be reached by mutual agreement of the contracting parties under firm-fixed-priced contracts previously negotiated. This could be offered to address acute impacts on small business and other suppliers. An accommodation may take the form of schedule relief or otherwise amending contractual requirements provided that there is adequate consideration is obtained by the Government.

Each DoD Secretary has authority under FAR Part 50 and DFARS to afford Extraordinary Contractual Relief. Public Law 85-804 has stringent criteria, against which DoD will consider contractor requests to employ this authority where an upward adjustment to the price of an existing firm-fixed-price contract to account for current economic conditions is warranted.

The memo concludes with a statement that DPC will continue to adapt their approach to meet the DoD's mission requirements.

## Managing the Effects of Inflation with Existing Contracts

Based on feedback from the Department's acquisition executives about how inflation is presently affecting the Defense Industrial Base and contractors' ability to perform under existing firm-fixed-price contracts, this guidance advises Contracting Officers about the range of approaches available to them. As indicated in my guidance memo dated May 25, 2022, the ability to recognize any cost increases is largely dependent on contract type. Contractors performing under firm-fixed-price contracts that were priced and negotiated before the onset of the current economic conditions generally bear the risk of cost increases. However, there 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 example, provided adequate consideration is obtained for the Government, such an accommodation may take the form of schedule relief or otherwise amending contractual requirements. 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. While the law and regulation have established stringent criteria, the Department will consider contractor requests to employ this authority, subject, of course, to available funding. To ensure the Defense Acquisition Executive is made aware of any such Public Law 85-804, Part 50 requests that are attributed to inflation, DoD Components shall forward any such request within 10 business days of contractor submission to Defense Pricing and Contracting via [osd.pentagon.ousd-a-s.mbx.asda-dp-c-contractpolicy@mail.mil](mailto:osd.pentagon.ousd-a-s.mbx.asda-dp-c-contractpolicy@mail.mil).<sup>2</sup> As conditions warrant, we will continue to adapt our approach to meet the Department's mission requirements through the current economic environment, considering information from the Components.

## Engineering and Construction



### Construction Contract Administration-FAR Case 2018-020-UPDATE

A proposed rule would implement section 855 of the NDAA for FY 2019. Section 855 requires agencies to provide, with solicitations for construction contracts anticipated to be awarded to small businesses, information about the agency's policies or practices in complying with FAR requirements related to the

timely definitization of REAs resulting from change orders under construction contracts. The notice must include data regarding the time it took the agency to definitize REAs for the three-year period preceding issuance of the notice.

The proposed solicitation provision adds a standardized way for COs to provide the required notice. The notice requirement would apply to contracts at or below the simplified acquisition threshold, but not to contracts for the acquisition of commercial items. The comment period has closed. The draft final FAR rule from the FAR analyst has been submitted to OFPP, who is currently reviewing.

**UPDATE** – On July 28, 2022, the FAR Secretary received the Final rule for preparation of the Federal Acquisition Circular.

## Use of Project Labor Agreements for Federal Construction Projects-Executive Order 14063-UPDATE

Executive Order (EO) 14063 was issued in February 2022 and requires certain federal construction contractors and subcontractors to “negotiate or become party to a project labor agreement (PLA) with one or more appropriate labor organizations.” The use of project labor agreements applies to “large-scale construction projects,” to include domestic federal construction projects that exceed \$35 million. For construction projects less than \$35 million the respective federal agencies may require PLAs. The EO applies to construction projects procured by the U.S. Army Corps of Engineers, General Services Administration, Naval Facilities Engineering Systems Command, and other federal agencies that directly procure federal construction contracts. Minimum terms that must be included in the PLA include:

- Guarantees against strikes, lockouts, and similar job disruptions
- Effective, prompt and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreements
- Other mechanism for labor management- cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health.

Senior federal agency officials have the ability to grant an exception to the PLA requirement, however, that is only under a very narrow set of circumstances.

**UPDATE** – On August 18, 2022, the FAR Council issued a proposed amendment to the FAR implementing Executive Order 14063.

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