



# ALASKA REGIONAL CONFERENCE

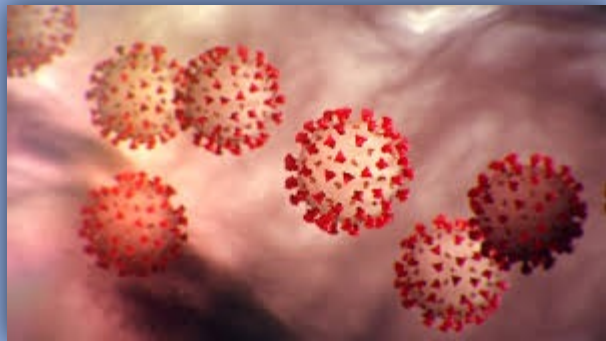
JUNE 20-23, 2022 — ANCHORAGE

ending Impacts to the Government Construction Contracting Industry

Edward DeLisle, Offit Kurman



# Trending Impacts to Government Construction Contracting



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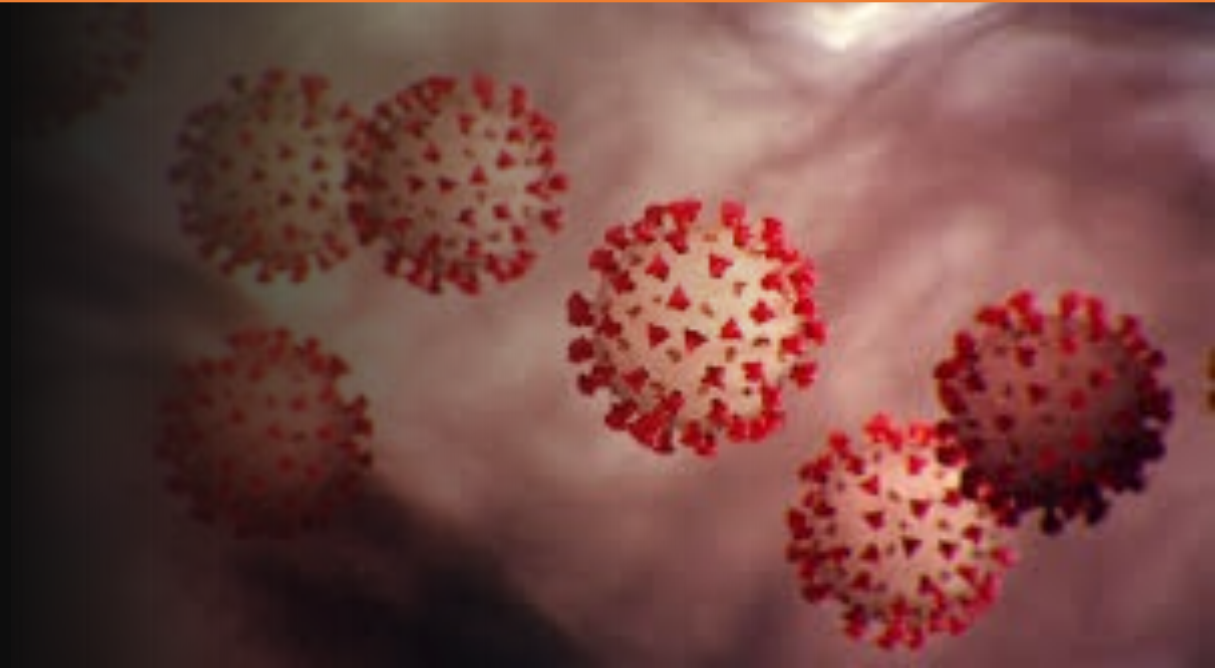
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- COVID
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COVID-19

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# Delays in Performance

- Self-Quarantines
- Shelter-in-Place Directives
- Closure of Government Facilities
- Reallocation of Government Personnel
- Inability to Effectively Progress through Telework

# Delays in Performance

- FAR 52-249.14, “Excusable Delay”
- Provides defense to default for impacts beyond control of contractor, including:
  - Epidemics
  - Quarantine Restrictions
  - BUT.....

# Delays in Performance

- NOTIFICATION!!!
- Read your Contract!
- Certain clauses that provide for excusable delay have very specific notice requirements
  - FAR 52.249-10 (10 days from beginning of delay)
  - AND....
  - Successfully arguing application of these provisions avoids default and liquidated damages
  - It does NOT get you compensated for lost time



# Suspension or Stop Work

- FAR 52.242-14 Suspension of Work
- Period of Performance shall be extended AND contractor shall be entitled to increase costs of performance
- Contract must be extended for an “unreasonable period of time”
- NOTICE!!!
  - When constructive, costs incurred more than 20 days prior to formal notice are EXCLUDED
  - Must identify actual costs “as soon as practicable”

# Suspension or Stop Work

- FAR 52.242-15 Stop Work Order
- Pertains to WRITTEN ORDERS to stop all or any part of the work
- Requirement to immediately comply and MITIGATE any harm
- 90 day limitation, unless parties agree otherwise
- Back to work or termination thereafter
- Contractor entitled to equitable adjustment

# Changes

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- FAR 52.243-1 through 5 and 6
  - Government is permitted to issue changes to a contract in most instances
  - Bilateral or unilateral
  - Changes can be CONSTRUCTIVE
- 





# Changes

- Key when pressed to perform out of scope work:
  - NOTICE!!!

“The single biggest problem with communication is the illusion that it has taken place.” *George Bernard Shaw*

- Do NOT assume that a Contracting Officer understands the impacts COVID-19 is having on your ability to perform and the costs associated with that inability to perform
- Notice must be in WRITING!!

# Mitigating Harm

- Pick up the phone
- Written notification to the Contracting Officer and other contracting personnel
- Cost coding harm caused COVID-19 impacts
- Reviewing your contracts and subcontracts
- Communicating with subcontractors and suppliers
- Understanding status of your credit lines, cost savings opportunities
- Listening to “real news” government assistance

Sunday  
2:39 PM

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

March 20, 2020

MEMORANDUM TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

Margaret M. Weichert  
Deputy Director for Management



Managing Federal Contract Performance Issues Associated with  
Coronavirus (COVID-19)

Federal contractors play a vital role in helping agencies meet the need for critical response efforts to COVID-19. The health and safety of our Federal contractors, remains the top priority. This memorandum outlines how to ensure this safety while maintaining continued contract performance in the field wherever possible and consistent with the precautions issued by the Centers for Disease Control and Prevention (CDC). Achieving these important goals – the backbone of our Federal contracting base – requires continued communication with contractors, both small and large, and effective leveraging of flexibility.



# Mitigating Harm

- Executive Office of the President, Office of Management and Budget
- March 20, 2020 Memorandum to the Heads of Executive Departments and Agencies



# Mitigating Harm

- Memorandum provides “steps to help ensure [] safety while maintaining continued contract performance in support of agency missions.”
- “[A]gencies should be **FLEXIBLE** in providing extensions to performance dates if telework or other flexible work solutions...are not possible.”
- “Agencies should take into consideration whether it is beneficial to keep skilled professional of key personnel in **MOBLIE READY STATE** for activities the agency deems critical to national security **OR OTHER HIGH PRIORITIES.**”



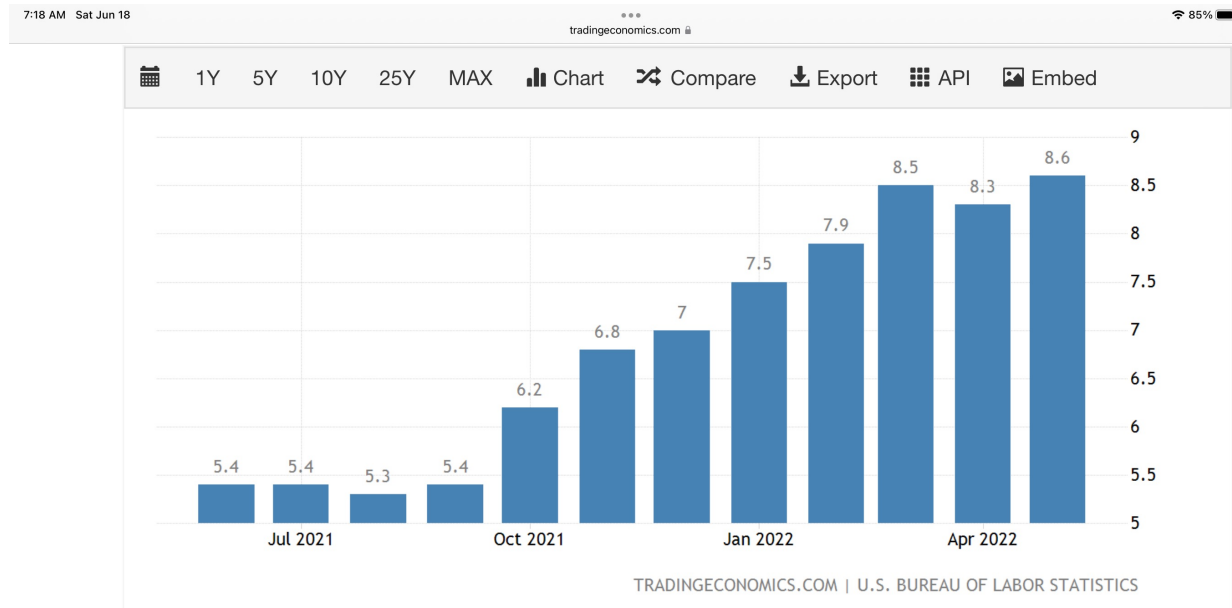
Two Years Later

# Conclusion

- Now is NOT the time to bury your head in the sand!
- We are still feeling the lingering impacts of COVID
- World events are likely to exacerbate what we've been experiencing
- Be proactive and communicate with government contracting personnel



# Inflation/Material Price Escalation



Calendar	GMT	Reference	Actual	Previous	Consensus	TEForecast
2022-05-11	12:30 PM	Apr	8.3%	8.5%	8.1%	8.2%
2022-06-10	12:30 PM	May	8.6%	8.3%	8.3%	8.3%
2022-07-13	12:30 PM	Jun		8.6%		



ACQUISITION  
AND SUSTAINMENT

OFFICE OF THE UNDER SECRETARY OF DEFENSE  
3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

MEMORANDUM FOR COMMANDER, UNITED STATES CYBER  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES SPECIAL OPERATIONS  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
DEPUTY ASSISTANT SECRETARY OF THE ARMY  
(PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY  
(PROCUREMENT)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE  
(CONTRACTING)  
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Guidance on Inflation and Economic Price Adjustments

The current economic environment requires we understand the impacts of inflation to existing contracts and consider various approaches to manage risk of inflation to prospective Department of Defense (DoD) contracts. We acquire a wide range of goods and services to fulfill the Department's mission requirements; inflation is impacting several segments of our economy in varying degrees. Against this backdrop, DoD contractors and contracting officers (COs) alike have expressed renewed interest in using economic price adjustment (EPA) clauses. This memorandum provides guidance to assist COs to understand whether it is appropriate to





**FAR** FAC Number: 2022-06  
Effective Date: 05/26/2022

Part 16

Subpart

Section



## 16.203 Fixed-price contracts with economic price adjustment.

### 16.203-1 Description.

(a) A fixed-price contract with economic price adjustment provides for upward and downward revision of the stated contract price upon the occurrence of specified contingencies. Economic price adjustments are of three general types:

(1) *Adjustments based on established prices.* These price adjustments are based on increases or decreases from an agreed-upon level in published or otherwise established prices of specific items or the contract end items.

(2) *Adjustments based on actual costs of labor or material.* These price adjustments are based on increases or decreases in specified costs of labor or material that the contractor actually experiences during contract performance.

(3) *Adjustments based on cost indexes of labor or material.* These price adjustments are based on increases or decreases in labor or material cost standards or indexes that are specifically identified in the contract.

(b) The contracting officer may use a fixed-price contract with economic price adjustment in conjunction with an award-fee incentive (see [16.404](#)) and performance or delivery incentives (see [16.402-2](#) and [16.402-3](#)) when the award fee or incentive is based solely on factors other than cost. The contract type remains fixed-price with economic price adjustment when used with these incentives.

### 16.203-2 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. Price adjustments based on labor and material costs should be limited to contingencies beyond the contractor's control. For use of economic price adjustment in sealed bid contracts, see [14.408-4](#).

(a) In establishing the base level from which adjustment will be made, the contracting officer shall ensure that contingency allowances are not duplicated by inclusion in both the base price and the adjustment requested by the contractor under economic price adjustment clause.

(b) In contracts that do not require submission of certified cost or pricing data, the contracting officer shall obtain adequate data to establish the base level from which adjustment will be made and may require verification of data submitted.

### 16.203-3 Limitations.



FAC Number: 2022-06  
Effective Date: 05/26/2022

Part 52

Subpart

Section



## 52.216-2 Economic Price Adjustment-Standard Supplies.

As prescribed in [16.203-4\(a\)](#), insert the following clause:

### ECONOMIC PRICE ADJUSTMENT-STANDARD SUPPLIES (Nov 2021)

(a) The Contractor warrants that the unit price stated in the Schedule for \_\_\_\_\_ [*offeror insert Schedule line item number*] is not in excess of the Contractor's applicable established price in effect on the contract date for like quantities of the same item. The term "unit price" excludes any part of the price directly resulting from requirements for preservation, packaging, or packing beyond standard commercial practice. The term "established price" means a price that-

- (1) Is an established catalog or market price for a commercial product sold in substantial quantities to the general public; and
- (2) Is the net price after applying any standard trade discounts offered by the Contractor.

(b) The Contractor shall promptly notify the Contracting Officer of the amount and effective date of each decrease in any applicable established price. Each corresponding contract unit price shall be decreased by the same percentage that the established price is decreased. The decrease shall apply to those items delivered on and after the effective date of the decrease in the Contractor's established price, and this contract shall be modified accordingly.

(c) If the Contractor's applicable established price is increased after the contract date, the corresponding contract unit price shall be increased, upon the Contractor's written request to the Contracting Officer, by the same percentage that the established price is increased, and the contract shall be modified accordingly, subject to the following limitations:

- (1) The aggregate of the increases in any contract unit price under this clause shall not exceed 10 percent of the original contract unit price.
- (2) The increased contract unit price shall be effective-
  - (i) On the effective date of the increase in the applicable established price if the Contracting Officer receives the Contractor's written request within 10 days thereafter; or
  - (ii) If the written request is received later, on the date the Contracting Officer receives the request.
- (3) The increased contract unit price shall not apply to quantities scheduled under the contract for delivery before the effective date of the increased contract unit price, unless failure to deliver before that date results from causes beyond the control and without the fault or negligence of the Contractor, within the meaning of the Default clause.
- (4) No modification increasing a contract unit price shall be executed under this paragraph (c) until the Contracting Officer verifies the increase in the applicable established price.
- (5) Within 30 days after receipt of the Contractor's written request, the Contracting Officer may cancel, without liability to either party, any undelivered portion of the contract items affected by the requested increase.

(d) During the time allowed for the cancellation provided for in paragraph (c)(5) of this clause, and thereafter if there is no cancellation, the Contractor shall continue deliveries according to the contract delivery schedule, and the Government shall pay for such deliveries at the contract unit price, increased to the extent provided by paragraph (c) of this clause.

(End of clause)

^ Top

# Inflation/Material Price Escalation

- Current Contract Options
  - Impossibility or Commercial Impracticability
  - Implication of Changes Clause (OMB/DoD Memos)
    - Notice, Directive to Proceed
  - FAR Part 50, Extraordinary Contractual Action

# Supply Chain Delays



# Supply Chain Delays

- “Just in Time” vs. “Just in Case”
  - Payment for Stored Material
  - Value Engineering
- FAR 52-249.14, “Excusable Delay”
- Changes Clause



Frances Perkins  
Building



United States  
Department  
of Labor

Labor  
Shortages



# Labor Shortages

- The Great Resignation
- FAR 52-249.14, “Excusable Delay”
- Changes Clause

# World Events



# World Events

- Ukraine/Oil prices, embargoes
  - Commercial Impracticability
  - Changes
  - OMB/DoD Memoranda
  - FAR Part 50
  - EPA Clause
- Opportunities (European Renewable Energy)

# Infrastructure Investment and Jobs Act (IIJA)

PUBLIC LAW 117-58—NOV. 15, 2021

135 STAT. 429

Public Law 117-58  
117th Congress

## An Act

To authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.

Nov. 15, 2021  
[H.R. 3684]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Infrastructure  
Investment and  
Jobs Act.

### SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

23 USC 101 note.

(a) SHORT TITLE.—This Act may be cited as the “Infrastructure Investment and Jobs Act”.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. References.

#### DIVISION A—SURFACE TRANSPORTATION

- Sec. 10001. Short title.
- Sec. 10002. Definitions.
- Sec. 10003. Effective date.

#### TITLE I—FEDERAL-AID HIGHWAYS

##### Subtitle A—Authorizations and Programs

- Sec. 11101. Authorization of appropriations.
- Sec. 11102. Obligation ceiling.
- Sec. 11103. Definitions.
- Sec. 11104. Apportionment.
- Sec. 11105. National highway performance program.
- Sec. 11106. Emergency relief.
- Sec. 11107. Federal share payable.
- Sec. 11108. Railway-highway grade crossings.
- Sec. 11109. Surface transportation block grant program.

# Infrastructure Investment and Jobs Act (IIJA)

## KEY TAKEAWAYS

- The Infrastructure Investment and Jobs Act was signed into law by President Joe Biden on Nov. 15, 2021.
- Generally referred to as the bipartisan infrastructure bill, this law authorizes \$1.2 trillion in total spending, including \$550 billion of new spending on hard infrastructure.
- The law also addresses climate change as it pertains to surface transportation.
- It revises Buy America procurement procedures for highways, mass transit, and rail.
- It implements new safety requirements for all modes of transportation.
- It directs the Department of Transportation (DOT) to establish a program to ensure the long-term solvency of the Highway Trust Fund.

# Infrastructure Investment and Jobs Act (IIJA)



- \$66 billion to upgrade and maintain the country's passenger and freight rail systems
- \$65 billion to update power lines, prevent hacking of the power grid, and provide clean energy
- \$65 billion to expand broadband in rural areas and in low-income communities
- \$55 billion for lead pipe replacement, chemical cleanup, and clean drinking water in tribal communities
- \$50+ billion to protect infrastructure from cybersecurity attacks and address flooding, wildfires, coastal erosion, other extreme weather events
- \$39 billion to upgrade public transit, create new bus routes, and increase accessibility for seniors and the disabled
- \$25 billion for upgrades and expansions of U.S. airports, control towers, and control systems
- \$21 billion to clean up superfund and brownfield sites, abandoned mines, and old oil and gas wells
- \$17 billion for port infrastructure and truck emissions at ports
- \$11 billion to address highway, pedestrian, pipeline, and other safety areas
- \$8 billion for western water infrastructure including mitigating drought conditions
- \$7.5 billion for a nationwide network of electric vehicle charging stations
- \$5 billion for electric school buses, primarily in low-income, rural, and tribal communities





# Increased Funding for Public Transportation



# Infrastructure Investment and Jobs Act (IIJA)

## President Biden, U.S. DOT Announce \$2.9 Billion of Bipartisan Infrastructure Law Funding for Major Infrastructure Projects of Regional or National Significance

Wednesday, March 23, 2022

*Unique Combined Funding Opportunity to Streamline Process for State, Regional and Local Governments*

Transportation Secretary Pete Buttigieg announced \$2.9 billion of funding now available for major infrastructure projects through a combined Notice of Funding Opportunity (NOFO) under President Biden's Bipartisan Infrastructure Law. Combining three major discretionary grant programs into one Multimodal Projects Discretionary Grant opportunity reduces the burden for state and local applicants and increases the pipeline of "shovel-worthy" projects that are now possible because of the Bipartisan Infrastructure Law. These investments will create good-paying jobs, grow the economy, reduce emissions, improve safety, make our transportation more sustainable and resilient, and expand transportation options in rural America and other underserved communities. Thanks to the Bipartisan Infrastructure Law, this funding will help enable more communities to build vital infrastructure projects that also strengthen supply chains and reduce costs for American families.

"President Biden's Bipartisan Infrastructure Law is a once-in-a-generation opportunity to fix our outdated infrastructure and invest in major projects for the future of our economy," said Secretary Buttigieg. "Until now, we had limited ability to make awards beyond a certain level, or to support projects with funding from multiple federal grant programs. ~~Under this approach and with a major infusion~~ of new funding, we have the capacity to green-light

# Alaska



## Alaska Highlights in the Infrastructure Investment and Jobs Act

*\*Note: unless otherwise noted, numbers are nationwide program funding over five years.*

### **Roads/Bridges:**

- Authorizes \$273 billion in Federal-aid highway formula funding that will provide roughly \$3.5 billion in highway funding for Alaska over five years to construct, rebuild, and maintain its roads and highways.
- Provides \$40 billion in funding for bridge construction, maintenance and repair. Of that, \$27.5 billion will be apportioned by formula to ensure every state's bridges are provided with needed resources, and Alaska should receive \$225 million to address more than 140 bridges considered to be "structurally deficient".
- This includes \$1 billion for the replacement of culverts, like the Schoenbar Creek culvert in Ketchikan.
- There is an additional \$11 billion for highway and pedestrian safety programs, including significant investment in the Safe Streets Program, which aims to prevent death and serious injury to cyclists on roads and streets.
- Of almost \$65 billion in total funding for Federal Transit Administration, Alaska is expected to receive \$362 million over five years for a mix of transit formula grants.
- Authorizes funding for reconstruction of the Shakwak Highway, the Alaska Highway from the Alaska border at Beaver Creek, Yukon Territory, to Haines Junction in Canada and the Haines Cutoff Highway from Haines Junction in Canada to Haines, Alaska, in support of the U.S.'s agreement with Canada.
- Authorizes funding for Bureau of Indian Affairs road maintenance by reinstating the Tribal Transportation Program (TTP) Bridge Program and increases funding for the TTP Safety Funds by requiring better crash report data and forms.
- Aligns the Department of the Interior's process for expediting NEPA reviews for tribal transportation safety projects.
- Creates a new set-aside within the Surface Transportation Block Grant (STBG) for projects in rural areas. Of the amount apportioned to a State, up to 15 percent may be used on eligible projects, including maintenance of ice roads, or transferred to the Denali Commission. In rural Alaska, ice roads are critical infrastructure, serving as an important link between remote villages during the winter.

# THANK YOU

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