



Mechanical Contractors Association of America

Restoring Fairness to Federal Construction Projects Impacted by Pandemic

- I. **Performing Federal Construction Projects During the COVID Pandemic:** Prime contractors and subcontractors on direct federal fixed-price construction projects that were bid and awarded pre-COVID are being performed under unforeseen – and costly – pandemic work protocols.
 - A. *Claims Adjustment Provisions Did Not Contemplate COVID:* While the government gets the benefit of their pre-COVID fixed-price bargain, construction costs have increased dramatically during COVID. To operate safely, contractors must adhere to social distancing requirements, place fewer workers on a job, and incorporate other safety protocols, all of which leads to increased costs. Yet, standard claims adjustment provisions did not anticipate a once-in-a century pandemic. The result? Costs are increasing yet contractors cannot get relief as they're working under narrow contract claims adjustment provisions.
 - B. *Contractors Need Relief:* Contractors are getting the short end of the stick. Without relief, businesses will fail, skilled craft workers will suffer unemployment, project claims and disputes will escalate, project completion and agency missions will be compromised, and the skilled building industry – large, small and DBE firms – that the government relies on for infrastructure rebuilding will be compromised for the future.
- II. **Possible Solutions:**
 - A. *Legislative Fix:* Congress could – in a COVID stimulus bill or elsewhere – enact a construction-specific equitable adjustment fund, administered separately from specific project budgets and claims procedures, to ensure equitable COVID cost increase recovery for fixed price contracts awarded pre-COVID and performed under radically different, unforeseen, and more expensive work performance conditions during the pandemic.
 - B. *Regulatory Relief:* Contractors could ask the Administrative Conference of the US for an analysis of the issue, that is the unfairness of taking the benefit of a



fixed-price bargain struck pre-COVID and allowing the agencies to take the benefit of that bargain post-COVID while denying equitable recovery for big unforeseen conditions and cardinal changes to work performance protocols.



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Imperative Need for a COVID Cost Recovery Fund on Direct Federal Construction Contracts in the Next COVID Recovery Legislative Relief Measure

1. **OMB/OFPP Policy Directive** – The Federal Contracting Title in the HEROES Act should be expanded to direct the Office of Management and Budget, Office of Federal Procurement Policy to issue a policy directive to Contracting Officers to make full equitable COVID impact cost recovery on direct Federal construction contracts bid and awarded pre-COVID and performed under radically different site conditions post -COVID.

This legislative and regulatory equitable remedy for cardinal unforeseen changes in work performance site conditions under these fixed-price contracts would fully implement the established Federal procurement policy of allowing equitable adjustment for cardinal changes to pre-COVID fixed-price construction contracts still being performed post-COVID.

2. **Separately Administered COVID Cost Recovery Fund Implemented by a Special Master** – The remedy should be funded with a separately administered recovery fund (roughly 20% of labor costs on construction projects awarded pre-COVID and performed post-COVID), and those funds should be administered by an expert administrative panel – a special master – separate and apart from the specific Federal contract budget and claims and disputes process. The actual COVID impact cost increase award would depend on specific elements of proof for each specific claim on specific projects. The elements of proof of claim would apply as in all specific project requests for equitable adjustments.

3. **Specific Project Contract Amendment Option To Be Offered To Affected Prime Contractors And Subcontractors On Eligible Contract To Access The Separate Administrative Claims Procedure** – OMB/OFPP should publish a specific contract claims amendment form that would allow specific eligible project prime contractors and subcontractors to opt in to the separate equitable adjustment COVID cost recovery procedure. It is expected the special master would implement an expedited equitable recovery hearing procedure for these specific claims, and access to that procedure would require a waiver of resort to any other contract claims procedure as a condition for access to the special master procedure.

4. **COVID Labor Cost and Productivity Loss Impacts Will Vary by Specific Type Of Project and Area of Performance** – Similarly, the special master would set out specific elements of proof for specific sets of eligible contracts based on



workforce conditions for those types of projects. For example, a large urban building project with a high number of separate trade workers at peak times of performance on the work site would likely incur much greater direct COVID impact costs and productivity loss, as compared with a rural civil works project with a relative low number of workers on the site performing less labor-intensive tasks even at peak project workloads.

5. *The Separate COVID Impact Cost Recovery Fund Is an Equitable Remedy Demanded by Principles of Fairness in Federal Contracting* –

While cardinal change allowances have traditionally been restricted to direct proprietary action by the purchasing agency on specific projects, the COVID circumstances demand a more flexible approach to equitable remedies, as the government agencies have taken the full benefit of the bargain under the fixed-price award pre-COVID, but yet would, in the absence of separate recovery fund, reserve the benefit of the bargain and the specific direction to continue essential work on the government project, while at the same time denying full equitable relief for the unforeseen workforce and project conditions that prevailed at the time of project award. In fact, by directing essential work to continue on government projects post-COVID, under unforeseen and expensive work protocols issued by government agencies, the contracting agency takes the full benefit of the pre-COVID fixed price bargain while at the same time potentially failing to recognize the mixed government policy/proprietary action in accepting work on these projects post-COVID without extending full equitable time extension and cost impact recovery on those projects.

6. *A Separate COVID Cost Recovery Fund Is Not Only Fully Equitable, It Is a Good-Government Proactive Federal Contracting Policy Initiative As Well.*

In the absence of Congressional legislative relief calling for equitable recovery, COVID impact claims will nevertheless be presented on the class of direct Federal construction contracts covered. Those claims are being assembled and are unavoidable. The adverse consequences of not anticipating the myriad adverse consequences of shifting the COVID performance burden wholly onto the private sector is bad purchasing policy. Project performance most surely will suffer, as prime contractors and subcontractors may fail as a consequence of high unanticipated costs, and project schedules and budgets will suffer as a consequence. Project budgets may be depleted, and legitimate claims will be denied as a result. Contracting Officers on specific projects will have administrative inconvenience, claims and disputes overhead and other adverse consequences from administering these claims under each specific contract's claims and dispute procedures. Overall government overhead will increase. Many direct Federal prime contractors and many more subcontractors, including many small and disadvantaged business enterprises, will suffer adverse consequences and potentially exit the Federal construction market permanently – damaging necessary Federal contracting industry



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capacity in advance of the physical infrastructure rebuilding the Nation so badly needs.

7. A Separate Direct Federal Construction Contract COVID Cost Recovery Fund Is Not a Big Business Bailout, and it Doesn't Impair Contracting Officer Discretion With Respect to These Claims – Under this separate dedicated COVID claims procedure, the full equitable recovery mechanism benefits prime contractors and the pass-through claims of many subcontractors, many of which are small and disadvantaged business enterprises, which are otherwise favored (not taken advantage of) in good government construction contracting policy. By avoiding a possible inequitable cost shifting of unanticipated COVID costs wholly onto the private sector firms, Contracting Officer discretion is not impaired – rather it is relieved by creating a separately funded and administered recovery fund taking considerable financial and administrative stress off of specific projects. Congress and procurement agencies should not be allowed to take the benefit of their pre-COVID fixed-price contract bargain, while at the same time reserving discretion to deny legitimate and fully proven COVID claims. And all this even in the context of Congress providing badly needed specific relief for other industries based on solely economic necessity, even outside the particular context of fixed-price construction contract equitable adjustment policy established in government contracting policy for unforeseen conditions and cardinal changes of the very magnitude experienced under the COVID crisis.

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