

PART 750 - EXTRAORDINARY CONTRACTUAL ACTIONS

Authority: Sec. 621, Pub. L. 87-195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

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750.000 Scope of part.

Subpart 750.70 [Reserved]

Subpart 750.71 - Extraordinary Contractual Actions To Protect Foreign Policy Interests of the United States

750.7100 Scope of subpart.

750.7101 Authority.

750.7102 General policy.

750.7103 Definitions.

750.7104 Types of actions.

750.7105 Approving authorities.

750.7106 Standards for deciding cases.

750.7106-1 General.

750.7106-2 Amendments without consideration.

750.7106-3 Mistakes.

750.7106-4 Informal commitments.

750.7107 Limitations upon exercise of authority.

750.7108 Contractual requirements.

750.7109 Submission of requests by contractors.

750.7109-1 Filing requests.

750.7109-2 Form of requests by contractors.

750.7109-3 Facts and evidence.

750.7110 Processing cases.

750.7110-1 Investigation.

750.7110-2 Office of General Counsel coordination.

750.7110-3 Submission of cases to the M/OAA Director.

750.7110-4 Processing by M/OAA Director.

750.7110-5 Contract files.

750.7110-6 Inter-agency coordination.

Parent topic: SUBCHAPTER G - CONTRACT MANAGEMENT

750.000 Scope of part.

USAID is not among the agencies named in the Act or authorized by the President to take actions under it; however, see Subpart 750.71 - Extraordinary Contractual Actions to Protect Foreign Policy Interests of the United States.

Subpart 750.70 [Reserved]

Subpart 750.71 - Extraordinary Contractual Actions To Protect Foreign Policy Interests of the United States

750.7100 Scope of subpart.

This subpart sets forth the standards and the procedures for disposition of requests for extraordinary contractual actions under Executive Order 11223.

750.7101 Authority.

Under section 633 of the Foreign Assistance Act of 1961, 75 Stat. 454 (22 U.S.C. 2933), as amended; Executive Order 11223, dated May 12, 1965 (30 FR 6635), as amended; and Executive Order 12163, dated September 29, 1979 (44 FR 56673), as amended, the Administrator of the U.S. Agency for International Development has been granted authority to provide extraordinary contractual relief. The Authority is set forth in sections 3 and 4 of Executive Order 11223, as follows:

Section 3. With respect to cost-type contracts heretofore or hereafter made with non-profit institutions under which no fee is charged or paid, amendments or modifications of such contracts may be made with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished, irrespective of the time or circumstances of the making, or of the form of the contract amended or modified, or of the amending or modifying contract and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof.

Section 4. With respect to contracts heretofore or hereafter made, other than those described in

section 3 of this order, amendments and modifications of such contracts may be made with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished, irrespective of the time or circumstances of the making, or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof, if the Secretary of State or the Director of the United States International Development Cooperation Agency (with respect to functions vested in or delegated to Director) determines in each case that such action is necessary to protect the foreign policy interests of the United States.

750.7102 General policy.

Extra-contractual claims arising from foreign assistance contracts will be processed in accordance with this subpart, which is similar to that utilized to process claims for extraordinary relief under (48 CFR) FAR part 50, as modified to meet the circumstances involved under the Foreign Assistance Act and the different authority involved.

750.7103 Definitions.

(a) The term *approving authority* as used in this subpart means an officer or official having been delegated authority to approve actions under the Executive Order. This authority is distinguished from authority to take appropriate contractual action pursuant to such approval.

(b) The term *the Executive Order* shall mean Executive Order 11223 (30 FR 6635) as amended, unless otherwise stated.

(c) The term *the Act* shall mean the Foreign Assistance Act of 1961, as amended.

750.7104 Types of actions.

Three types of actions may be taken by or pursuant to the direction of an approving authority under the Executive Order. These are contractual adjustments such as amendments without consideration, correction of mistakes, and formalization of informal commitments.

750.7105 Approving authorities.

All authority to approve actions under this subpart has been delegated to the M/OAA Director.

750.7106 Standards for deciding cases.

750.7106-1 General.

The mere fact that losses occur under a Government contract is not, by itself, a sufficient basis for the exercise of the authority conferred by the Executive Order. Whether, in a particular case, appropriate action such as amendment without consideration, correction of a mistake or ambiguity

in a contract, or formalization of an informal commitment, will protect the foreign policy interests of the United States is a matter of sound judgment to be made on the basis of all of the facts of such case. Although it is obviously impossible to predict or enumerate all the types of cases with respect to which action may be appropriate, examples of certain cases or types of cases where action may be proper are set forth in sections 750.7106-2 through 750.7106-4. Even if all of the factors contained in any of the examples are present, other factors or considerations in a particular case may warrant denial of the request. These examples are not intended to exclude other cases where the approving authority determines that the circumstances warrant action.

750.7106-2 Amendments without consideration.

(a) Where an actual or threatened loss under a foreign assistance contract, however caused, will impair the productive ability of a contractor whose continued performance of any foreign assistance contract or whose continued operation as a source of supply is found to be essential to protect the foreign policy interests of the United States, the contract may be adjusted but only to the extent necessary to avoid such impairment to the contractor's productive ability.

(b) Where a contractor suffers a loss (not merely a diminution of anticipated profits) on a foreign assistance contract as a result of Government action, the character of the Government action will generally determine whether any adjustment in the contract will be made and its extent. Where the Government action is directed primarily at the contractor and is taken by the Government in its capacity as the other contracting party, the contract may be adjusted if fairness so requires; thus where such Government action, although not creating any liability on its part, increases the cost of performance, considerations of fairness may make appropriate some adjustment in the contract.

750.7106-3 Mistakes.

A contract may be amended or modified to correct or mitigate the effect of a mistake, including the following examples:

(a) A mistake or ambiguity which consists of the failure to express or to express clearly in the written contract the agreements as both parties understood them;

(b) A mistake on the part of the contractor which is so obvious that it was or should have been apparent to the contracting officer; and

(c) A mutual mistake as to a material fact.

Amending contracts to correct mistakes with the least possible delay normally will protect the foreign policy interests of the United States by expediting the procurement program and by giving contractors proper assurance that such mistakes will be corrected expeditiously and fairly.

750.7106-4 Informal commitments.

Informal commitments may be formalized under certain circumstances to permit payment to persons who have taken action without a formal contract; for example, where any person, pursuant to written or oral instructions from an officer or official of the Agency and relying in good faith upon the apparent authority of the officer or official to issue such instructions, has arranged to furnish or

has furnished property or services to the agency and/or to a foreign assistance contractor or subcontractor without formal contractual coverage for such property or services. Formalization of commitments under such circumstances normally will protect the foreign policy interests of the United States by assuring persons that they will be treated fairly and paid expeditiously.

750.7107 Limitations upon exercise of authority.

(a) The Executive Order is not authority for:

- (1) The use of the cost-plus-a-percentage-of-cost system of contracting;
- (2) The making of any contract in violation of existing law relating to limitation on profit or fees;
- (3) The waiver of any bid, payment performance or other bond required by law.

(b) No amendments, or modifications shall be entered into under the authority of the Executive Order:

- (1) Unless, with respect to cases falling within Section 4 of the Executive Order, a finding is made that the action is necessary to protect the foreign policy interests of the United States;
- (2) Unless other legal authority in the Agency is deemed to be lacking or inadequate;
- (3) Except within the limits of the amounts appropriated and the statutory contract authorization.

(c) No contract shall be amended or modified unless the request therefor has been filed before all obligations (including final payment) under the contract have been discharged.

(d) No informal commitment shall be formalized unless:

- (1) A request for payment has been filed within six months after arranging to furnish or furnishing property or services in reliance upon the commitment;
- (2) USAID has received the services satisfactorily performed, or has accepted property furnished in reliance on the commitment;
- (3) The USAID employees alleged to have made the informal commitment have accepted responsibility for making the informal commitment in question; and
- (4) USAID has taken appropriate action to prevent recurrence.

750.7108 Contractual requirements.

Every contract amended or modified pursuant to this subpart shall contain:

- (a) A citation of the Act and Executive Order.
- (b) A brief statement of the circumstances justifying the action;
- (c) A recital of the finding, with respect to cases falling within Section 4 of the Executive Order, that the action is necessary to protect the foreign policy interests of the United States.

750.7109 Submission of requests by contractors.

750.7109-1 Filing requests.

Any person (hereinafter called the "contractor") seeking an adjustment under standards set forth in 750.7106 may file a request in duplicate with the cognizant contracting officer or his/her duly authorized representative. If such filing is impracticable, requests will be deemed to be properly filed if filed with the Chief of the Bureau for Management, Office of Acquisition and Assistance, Evaluation Division (M/OAA/E) for forwarding to the cognizant contracting officer.

750.7109-2 Form of requests by contractors.

The contractor's request shall normally consist of a letter to the contracting officer providing the information specified in (48 CFR) FAR 50.103-3.

750.7109-3 Facts and evidence.

The contracting officer or the approving authority may, where considered appropriate, request the contractor to furnish the facts and evidence as described in (48 CFR) FAR 50.103-4.

750.7110 Processing cases.

750.7110-1 Investigation.

The Bureau for Management, Office of Acquisition and Assistance, Evaluation Division (M/OAA/E) shall be responsible for assuring that the case prepared by the cognizant contracting officer makes a thorough investigation of all facts and issues relevant to each situation. Facts and evidence shall be obtained from contractor and Government personnel and shall include signed statements of material facts within the knowledge of the individuals where documentary evidence is lacking and audits where considered necessary to establish financial or cost related facts. The investigation shall establish the facts essential to meet the standards for deciding the particular case and shall address the limitations upon exercise of the authority of the M/OAA Director to approve the request.

750.7110-2 Office of General Counsel coordination.

Prior to the submission of a case to the M/OAA Director recommending extraordinary contractual relief, the claim shall be fully developed by the cognizant contracting officer and concurrences or comments shall be obtained from the Office of General Counsel for the proposed relief to be granted. Such concurrences or comments shall be incorporated in or accompany the action memorandum submitted for consideration to the M/OAA Director in accordance with 750.7110-3.

750.7110-3 Submission of cases to the M/OAA Director.

Cases to be submitted for consideration by the M/OAA Director shall be prepared and forwarded by the cognizant contracting officer through M/OAA/E to the M/OAA Director by means of an action memorandum. M/OAA/E will review the action memorandum for accuracy and completeness. The action memorandum shall provide for approval or disapproval by the M/OAA Director of the disposition recommended by the contracting officer. The action memorandum shall address:

- (a) The nature of the case;
- (b) The basis for authority to act under section 750.7101;
- (c) The findings of fact essential to the case (see 750.7109-3) arranged chronologically with cross references to supporting enclosures;
- (d) The conclusions drawn from applying the standards for deciding cases, as set forth in 750.7106, to the findings of fact;
- (e) Compliance with the limitations upon exercise of authority, as set forth in section 750.7107 (for informal commitments, include statements addressing each of the limitations in paragraph (d) of 750.7107);
- (f) Concurrences or comments obtained from the Office of General Counsel;
- (g) Verification of funds availability and the contracting officer's determination of cost/price reasonableness when the disposition recommended requires payment to a contractor;
- (h) The disposition recommended and, if contractual action is recommended with respect to cases falling within Section 4 of the Executive Order, the opinion of the contracting officer that such action is necessary to protect the foreign policy interest of the United States; and
- (i) The action memorandum shall enclose all evidentiary materials, including the reports and comments of all cognizant Government or other officials, and a copy of the contractor's request. The action memorandum should provide the following information related to the contractor's request, as applicable:
 - (1) Date of request;
 - (2) Date request received by USAID;
 - (3) Contract number;
 - (4) Contractor's name and address;
 - (5) Name, address, and phone number of contractor's representative;
 - (6) Name, office symbol, and phone number of cognizant contracting officer;
 - (7) Amount of request.

750.7110-4 Processing by M/OAA Director.

When the action memorandum has been determined to be as accurate and complete as possible and has been prepared in accordance with this subpart, M/OAA/E will forward the action memorandum to the M/OAA Director. The M/OAA Director will sign and date the action memorandum indicating approval or disapproval of the disposition recommended by the contracting officer.

750.7110-5 Contract files.

The fully executed action memorandum indicating approval/disapproval and a copy of the contractual document implementing any approved contractual action shall be placed in the contract file.

750.7110-6 Inter-agency coordination.

(a) *General.* Where a case involves matters of interest to more than one department or agency, USAID should maintain liaison with other departments and agencies of the Government and take such joint action as may be proper under the circumstances, including holding joint meetings.

(b) *Cases involving funds of other departments or agencies.* Requests for adjustment within any category, involving the funds of another department or agency, shall not be approved by USAID until advice is requested and received from the department or agency whose funds are involved.