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

Parent topic: PART 750—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

750.7100 Scope of subpart.

This subpart specifies the standards and the procedures relating to 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, as amended; and Executive Order 12163, dated September 29, 1979, as amended, the Administrator of the U.S. Agency for International Development has authority to provide extraordinary contractual relief.

750.7102 General policy.

Extra-contractual claims arising from foreign assistance contracts will be processed similarly to claims for extraordinary relief under FAR part 50, and in consideration of the circumstances and authorities granted by the Foreign Assistance Act.

750.7103 [Reserved]

750.7104 Types of actions.

The types of actions that may be taken pursuant to the direction of the approving authority under the Executive Order 11223 are: contractual adjustments such as amendments without consideration, correction of mistakes, and formalization of informal commitments.

750.7105 Approving authority.

All authority to approve actions under this subpart is delegated to the M/OAA Director. The cognizant contracting officer will take appropriate contractual action pursuant to the decision of the M/OAA Director.

750.7106 Standards for deciding cases.

750.7106-1 General.

The mere fact that losses occur under a contract is not, by itself, a sufficient basis for the exercise of the authority conferred by Executive Order 11223. Whether, in a particular case, an action will protect the foreign policy interests of the United States is fact specific. Examples of the types of cases where action may be proper are set forth in 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 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) A contract may be amended or modified to correct or mitigate the effect of a mistake, including in the following situations:

(1) A mistake or ambiguity in the contract that results from the failure to clearly express the agreement as understood by both parties;

(2) 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

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

(b) Amending contracts to correct mistakes with the least possible delay normally will protect the foreign policy interests of the United States by expediting the program and by giving contractors proper assurance that such mistakes will be corrected expeditiously and fairly. An action that can be accomplished by administrative modification or resolved using the procedures in FAR subpart 33.2 should not be resolved using the authority and procedures of this subpart.

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) Executive Order 11223 does not provide authority for:

(1) The award of a cost-plus-a-percentage-of-cost contract;

(2) The payment of profit or fees in excess of applicable limitations; or

(3) The waiver of any requirement to post a bid, payment, performance, or other bond required by law.

(b)

(1) Executive Order 11223 does not authorize the issuance of a modification, unless:

(i) With respect to cases falling within Section 4 of Executive Order 11223, the approving authority determines that the action is necessary to protect the foreign policy interests of the United States; and

(ii) No other legal authority authorizes issuance of such modification.

(2) A modification under paragraph (b)(1) of this section must be within the limits of the amounts appropriated and the statutory contract authorization as referenced in FAR 50.102-3.

(c) No contract shall be modified unless the contractor submits a request prior to all obligations (including final payment) under the contract having been discharged.

(d) An informal commitment must not be formalized unless:

(1) The contractor submits a written request for payment within six months after furnishing, or arranging to furnish, supplies 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 employee alleged to have made the informal commitment has affirmatively acknowledged responsibility for making the informal commitment in question; and

(4) USAID has taken appropriate action to prevent recurrence.

750.7108 Contractual requirements.

Every contract modified pursuant to this subpart shall contain:

(a) A citation of the Act and Executive Order 11223;

(b) A brief statement of the circumstances justifying the action; and

(c) With respect to cases falling within section 4 of Executive Order 11223, a statement 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.

A contractor seeking an adjustment under the standards set forth in 750.7106 may file a request with 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 necessary, require the contractor to furnish facts and evidence supporting the request, as described in FAR 50.103-4.

750.7110-750.7110-6 [Reserved]