



Procedures for Processing Extraordinary Contractual Actions in accordance with AIDAR Part 750

A Mandatory Reference for ADS Chapter 302

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- A. **Background:** Section 633 of the Foreign Assistance Act (FAA) of 1961, as amended, provides that whenever the President determines it to be in the furtherance of the purposes of the Act, the functions authorized under the Act may be performed without regard to such provisions of law regulating the making, performance, amendment, or modification of contracts and the expenditure of funds as the President may specify. Pursuant to that authority, President Johnson on May 12, 1965 issued Executive Order No. 11223. The relevant authority is set forth in sections 3 and 4 of the Executive Order, 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.

AIDAR part 750 provides the regulatory basis for implementing these authorities in a manner that is analogous to FAR part 50. Certain 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. These examples are not intended to exclude other cases where the approving authority determines that the circumstances warrant action.

B. Determining the appropriate authority for an action: As is the case with the similar authorities in FAR part 50, AIDAR 750.7107 - Limitations upon exercise of authority only authorizes these authorities for use when other legal authority in the Agency is deemed to be lacking or inadequate (see AIDAR 750.7107(b)(2)). In each case, before proceeding with an action under AIDAR part 750, the Contracting Officer (CO) must determine whether another, more appropriate authority exists. If there is a question as to which authority is most appropriate for the circumstances, the CO should consult with the cognizant Regional Legal Officer (RLO)/General Counsel (GC) attorney and the Bureau for Management, Office of Acquisition and Assistance, Evaluation Division (M/OAA/E). Specifically, before using the authority at AIDAR 750.7106-3 – Mistakes, the CO must determine whether the action could be accomplished by administrative modification or resolved using the procedures in FAR part 33.2. FAR part 33.205 explains the relationship of the Disputes Act to the FAR part 50 authority that is analogous to the AIDAR authority. Similarly, COs may only proceed with formalization of an informal commitment under AIDAR part 750 for cases that cannot be ratified under the authority for ratification of unauthorized commitments at FAR subpart 1.602.

C. Approving Authority: The authority to approve actions under AIDAR 750 has been delegated by the Administrator to the M/OAA Director.

D. Processing cases:

Step One - Contracting Officer Review: The cognizant CO must review the contractor's request to ensure that it has all the required facts and evidence required to resolve the action. The CO or an authorized representative must make a thorough investigation to establish the facts necessary to decide the case. The facts and evidence must include signed statements of material facts where documentary evidence is lacking. The CO must also obtain audits where considered necessary to establish financial or cost related facts. The investigation must establish the facts essential to meet the standards for deciding the particular case.

Step Two - Contracting Officer Prepares an Action Memorandum: The CO must prepare an action memorandum that provides for approval or disapproval by the M/OAA Director.

The action memorandum must 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 attachments;

- d) The conclusions drawn from applying the standards for deciding cases, as specified in 750.7106, to the findings of fact;
- e) Compliance with the limitations on exercise of authority, as specified 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 for Acquisition and Assistance;
- g) Verification of funds availability and the CO'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 Executive Order No. 11223, the opinion of the CO that such action is necessary to protect the foreign policy interests of the United States; and
- i) The action memorandum must attach 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 must 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 CO; and
 - 7) Amount of request.

Step Three - Interagency Coordination: Where a case involves matters of interest to more than one department or U.S. Government (USG) agency, the Operating Unit, in consultation with M/OAA, must engage with other departments and agencies and take such joint action as may be proper under the circumstances, including holding joint meetings. Requests for adjustment within

any category, involving the funds of another department or agency, may not be approved until advice is requested and received from the department or agency whose funds are involved.

Step Four - Review by M/OAA/E: M/OAA/E is responsible for assuring that the case prepared by the cognizant CO makes a thorough investigation of all facts and issues relevant to each situation. The cognizant CO must submit cases for consideration by the M/OAA Director through M/OAA/E. M/OAA/E will review the action memorandum for accuracy and completeness.

Step Five - Processing by M/OAA Director: When the action memorandum has been determined to be as accurate and complete as possible, 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 CO.

E. Contractual Requirements:

For each contract modified pursuant to AIDAR part 750, the CO must include in the modification:

- A citation of the authorities - Section 633 of the Foreign Assistance Act (FAA) of 1961, as amended, and the relevant section of Executive Order No. 11223;
- A brief statement of the circumstances justifying the action; and
- A recital of the finding, with respect to cases falling within Section 4 of Executive Order No. 11223, that the action is necessary to protect the foreign policy interests of the United States.

F. Contract Files: The CO must place the fully executed action memorandum indicating approval/disapproval and a copy of the contractual document implementing any approved contractual action in the contract file.

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