

Subchapter 3050.1 Extraordinary Contractual Actions**3050.102 Delegation of and limitations on exercise of authority.****3050.102-1 Delegation of authority.**

The authority of the Secretary is retained at the agency head level, unless otherwise delegated within the limits of FAR 50.102-1.

3050.102-3 Limitations on exercise of authority.

(a) Pub. L. 85-804 is not authority for—

(1) Using a cost-plus-a-percentage-of-cost system of contracting. These contract types are prohibited by law. See FAR 16.102(c).

(2) Making any contract that violates existing law limiting profit or fees. The contracting officer shall not negotiate a price or fee that exceeds the statutory limitations imposed by 10 U.S.C. 3322(b) and 41 U.S.C. 3905. See FAR 15.404-4 and HSAM 3015.404-4.

(3) Providing for other than full and open competition for award of contracts for supplies or services, including modifications to add work outside of the scope of the contract (see HSAM 3006.304-71). Contracting without providing for full and open competition or full and open competition after exclusion of sources is a violation of statute, unless permitted by one of the exceptions in FAR 6.302. FAR Subpart 6.3 prescribes the policies and procedures and identifies the statutory authorities for contracting without providing for full and open competition.

(4) Waiving any bid bond, payment bond, performance bond, or other bond required by law.

(c)(70) Whenever there is a new DHS contract award, any existing Pub. L. 85-804 relief provided under a separate contract for the same or similar product or service does not apply to the new contract. This is the case whether or not the contractor (or supplies or services) under the new contract is the same as that for which extraordinary relief was previously granted. In addition, if a contract in which extraordinary contractual relief has been granted is modified for additional supplies or services that were not part of the original contract, a justification and approval is required in accordance with HSAM 3006. The approved extraordinary contractual relief does not extend to the modification.

3050.103 Contract adjustments.**3050.103-2 Types of contract adjustment.**

(a) *Amendments without consideration.*

(70) An amendment without consideration is predicated upon the basis of “essentiality.” In accordance with FAR 50.103-2(a)(1) and (2), to establish essentiality, a contractor must establish—

- (i) the contractor is essential to the national defense in the performance of a contract or as a source of supply;
- (ii) an actual loss or threatened loss under a defense contract; and
- (iii) the loss impairs the contractor’s “productive ability.”

A contractor may be deemed essential if the service or item procured is urgently needed for national defense, and the agency cannot accept the delay necessary to reprocure from another contractor. The failure to perform, however, must constitute more than an inconvenience.

(71) An amendment without consideration can also be used to compensate a contractor for a situation where a government action interferes in some manner with a contractor’s performance. To recover, a contractor must establish that—

- (i) it suffered an actual loss;
- (ii) the loss resulted exclusively from government action; and
- (iii) the action was “unfair.”

Generally, losses that are the result of business decisions taken by the contractor should not support relief. For example, relief is disfavored when the government action occurs prior to contract award, and the contractor knew, or should have known of such action, and the contractor voluntarily assumes related business risks.

(b) *Correcting mistakes.*

(70) Amending or modifying a contract to mitigate the effect of a mistake is limited to the three types of mistakes listed at FAR 50.103-2(b)(1):

- (i) A mistake or ambiguity in a contract so that the contract fails to clearly express the intention of the parties.
- (ii) An obvious unilateral mistake by the contractor.
- (iii) A mutual mistake as to a material fact.

(c) *Formalizing informal commitments.* Formalization of an informal commitment provides for compensation in instances where a contractor acts in response to a government official’s instructions and the official did not have the authority to bind the government. In accordance with FAR 50.102-3(d), any such request for relief must be made within 6 months, and at the time the contractor acted, it was “impracticable” to use normal procurement procedures. If the matter can be resolved using the ratification procedures at FAR Part 1, then relief under Pub. L. 85-804 is inappropriate.

3050.103-3 Contract adjustment.

(a) *Contractor requests.*

(70) The contracting officer must receive sufficient information to enable the contracting officer to determine whether the contractor's request for extraordinary contractual relief under Pub. L. 85-804 contains sufficient information to submit to the approving authority, or the official delegated to exercise this authority, for approval or disapproval. The contracting officer shall request any additional information from the contractor as necessary and as applicable under FAR 50.103-4, Facts and evidence.

(71) If expedited relief is sought, the contractor's request must contain a detailed discussion of what adverse consequences, if any, will result if the relief is not granted by the requested deadline. The contracting officer shall inform the contractor of the 60-day Congressional notification period when the relief sought meets or is expected to meet the threshold at FAR 50.102-3(b)(4).

3050.103-5 Processing cases.

(b)(70) Upon receipt of a request for extraordinary contractual relief, the contracting officer shall—

(i) notify the Component or Program Office that the request for extraordinary contractual relief must be coordinated with other Government agencies with interests in the acquisition in accordance with FAR 50.103-5(b); and

(ii) request that the Component or Program Office determine whether such coordination is required.

In either case, the contracting officer shall request that the Component or Program Office provide its determination in writing; and, in cases where coordination is required, request that the Component or Program Office consult with the Government agency(ies) and obtain the Government agency(ies) written recommendation(s). The contracting officer shall include the Component's or Program Office's determination and the Government agency's recommendation in the Approval Request package described in HSAM 3050.103-570(b)(2).

3050.103-570 Agency control and compliance procedures.

(a) *Relief request submission deadline.*

(1) Requests for extraordinary contractual relief may take at least 90 days to process and may only be considered when the request for relief is submitted before all obligations (including final payment) under the contract have been discharged. When applicable, Congressional notification in accordance with FAR 50.102-3(b)(4) is required.

(2) If the request is submitted after all obligations, including final payment, under the contract has been discharged, DHS will not authorize retroactive application of Pub. L. 85-804.

(b) *Contracting Officer Responsibilities.*

(1) The contracting officer receiving the request shall review it in consultation with program officials and Component legal counsel to ascertain whether the request is timely, contains all required information, and to determine whether the requested relief satisfies the criteria at FAR Part 50 and HSAM Chapter 3050. When it is appropriate, the contracting officer or other agency official, shall request that the contractor support any requests made under this Chapter and FAR 50.103-3 with any of the information at FAR 50.103-4. For all requests exceeding \$10,000,000.00, the contracting officer shall obtain an audit opinion from the Defense Contract Audit Agency regarding the validity of the amount requested.

(2) The contracting officer shall prepare a Pub. L. 85-804 Approval Request package that includes:

(i) a memorandum detailing the content at FAR 50.103-6 and HSAM 3050.103-6, including any reasons the approving authority, or the official delegated to exercise this authority, should consider for denying the request; the amount and type of relief recommended and the basis for the recommendation;

(ii) the Program Office or Component's written concurrence (including whether coordination with interested Government agencies is required in accordance with HSAM 3050.103-5(b)(70));

(iii) interested Government agency(ies) recommendation, if applicable (see HSAM 3050.103-5(b)(70));

(iv) the Component legal counsel's clearance;

(v) the Component's plan for executing the contractor's request for extraordinary relief, in accordance with FAR subparts 50.103-2 and HSAM 3050.103-2, should the approving authority, or the official delegated to exercise this authority, approve the contractor's request for relief. For example, if the contractor is seeking a contract amendment without consideration, the contracting officer shall specify the planned contract modification reflecting the changes to the contract based on the relief sought;

(vi) any other relevant supporting documentation, including a summary of any relevant audit opinion; and

(vii) an HCA transmittal memorandum to the DHS Chief Procurement Officer (CPO).

(c) Head of the Contracting Activity (HCA) Responsibilities.

(1) The HCA is responsible for reviewing the Pub. L. 85-804 Approval Request package prepared by the contracting officer to ensure the package complies with this Chapter before it is submitted to the DHS CPO.

(2) If the HCA concludes the package contains all the required documentation, the HCA shall sign the transmittal memorandum to the DHS CPO as “*Recommended for Chief Procurement Officer Review*”.

(3) The HCA shall submit the approval request package to the Office of the Chief Procurement Officer as far in advance as possible of the date the contractor requested the extraordinary contractual relief to be effective.

(4) The HCA responsibilities are nondelegable.

(d) *DHS Office of the Chief Procurement Officer (OCPO) Responsibilities.*

(1) Upon receipt, the OCPO shall coordinate the approval request package with the DHS Office of General Counsel, for a legal sufficiency determination, Program Accountability and Risk Management (PARM) for analysis of the value of the relief in supporting the Department’s mission, other appropriate organizations to assess the likelihood that the relief will have the intended effect, and the DHS Office of the Chief Financial Officer (OCFO) to ensure the relief amount does not exceed the limits of the amounts appropriated and the statutory contract authorization (except where an indemnification agreement is approved by the Secretary (see HSAM 3050.104-1).

(2) If the OCPO determines that the package complies with this Chapter and has received a legal sufficiency determination from the OGC, the OCPO shall prepare three (3) draft approval memoranda, as appropriate, as follows:

(i) a CPO Action Memorandum for the DHS Office of Management (MGMT);

(ii) an Under Secretary for Management Memorandum of Decision, containing the content at FAR 50.103-6 and HSAM 3050.103-6, that does not contain any information classified as “Confidential” or higher; and

(iii) a Secretarial Memorandum of Decision, containing the content at FAR 50.103-6 and HSAM 3050.103-6, that does not contain any information classified as “Confidential” or higher.

(3) The OCPO shall submit the approval request package to MGMT as soon as practicable.

(e) *Under Secretary for Management (USM) Responsibilities.*

(1) The USM will have an advisory committee that will review Pub. L. 85-804 Approval Request packages submitted by the DHS CPO if the relief requested is for a contract supporting an acquisition program. The committee will consist of the Deputy Under Secretary for Management (DUSM) as the Chair, and at least four other members, consisting of the DHS CPO, Director of Program Accountability and Risk Management,

the Deputy Chief Financial Officer, and a representative from the Office of General Counsel. The DUSM may appoint alternate members or additional members as needed.

(2) The advisory committee shall review packages as expeditiously as practicable.

(3) If the advisory committee determines additional information is needed or that revisions are necessary, the advisory committee shall provide direction to the appropriate offices to obtain the additional information or changes.

(4) The advisory committee shall provide the committee's recommendation on granting relief and the nature of the relief to the USM.

(5) Unless the Secretary delegates authority to the USM to approve requests that will not obligate the Government in excess of \$75,000, in accordance with FAR 50.102-1(b), the USM shall forward to the Secretary the request package, the advisory committee's recommendation, and any other information needed for the Secretary to make an informed decision on whether to grant relief, the amount of the relief, and the nature and the conditions of the relief.

(f) *Secretarial Approval.* The Secretary of DHS is the approving authority for the Department and is the only individual that may authorize a request for extraordinary contractual relief under Pub. Law 85-804, unless the Secretary delegates authority within the limitations of FAR 50.102-1(b), or establishes a contract adjustment board, pursuant to FAR 50.102-2, to approve, authorize and direct appropriate action under FAR subpart 50.1.

(g) *Contract file.* Every contract entered into, amended, or modified as a result of Pub. Law 85-804, shall contain the required content at FAR 50.103-7. When the approving authority, or the official delegated to exercise this authority, denies a contractor's request for adjustment, the contracting officer shall include a memorandum outlining the details required under FAR 50.103-6 and HSAM 3050.103-6, in the contract file.

3050.103-6 Disposition.

(c)(70) No relief may be granted that would —

(i) result in exceeding the limits of the amounts appropriated and the statutory contract authorization, except where an indemnification agreement is approved by the Secretary (see HSAM 3050.104-1). Thus, the approving authority, or the official delegated to exercise this authority, may approve relief that is different from what the contractor requested, provided the relief is within the limits of appropriations and authorization acts;

(ii) increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder, if the contract was negotiated under FAR 14.404-1(f); and

(iii) formalize an informal commitment unless the circumstances at FAR 50.102-3(d) exist;

(71) The approving authority, or the official delegated to exercise this authority, may direct that the relief be conditioned upon the terms the agency determines best in the interest of national defense. For example, the Secretary may require that, as a condition of relief, —

- (i) the contractor release the agency of any liability under the contract;
- (ii) funds be placed in a separate account requiring contracting officer authorization for withdrawal; and
- (iii) reversion to the government of any unused funds.

(d)(70) The statement justifying the decision shall include an analysis of other legal authority available to the Department that could remedy the situation, and why those alternatives are lacking or inadequate. The contracting officer shall confer with Component legal counsel to prepare this analysis;

3050.103-7 Contract requirements.

(a)(70) *Submission requirements.* Components shall submit the contract adjustment action for CPO approval not later than 14 calendar days prior to execution and Congressional notification, if applicable. The contract adjustment shall be reviewed and approved by the Component legal counsel and the HCA prior to submission to the OCPO.

3050.104 Residual powers.

3050.104-1 Standards for use.

Indemnification under Pub. L. 85-804 applies to unusually hazardous or nuclear risks, and does not apply to supplies or services that have been, or could be, designated by the Secretary of Homeland Security as a qualified anti-terrorism technology unless the circumstances at FAR 50.102-3(f) exist.

Generally, it is DHS's policy not to authorize indemnification to contractors or subcontractors against unusually hazardous or nuclear risks, pursuant to Pub. L. 85-804 (National Defense Contract Authorization Act), as amended, and FAR Subpart 50.1. Contracting officers shall not include in solicitations or contracts the clause at FAR 52.250-1, Indemnification Under Public Law 85-804, unless specifically authorized by the Secretary. Components shall direct all requests for indemnification through the Component's legal counsel, and then forward the request to the Office of the Chief Procurement Officer for appropriate coordination with the DHS Office of the General Counsel before transmittal to the Secretary.