

## Agency for International Development

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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-percent-age-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

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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.

[49 FR 13257, Apr. 3, 1984, as amended at 50 FR 16088, Apr. 24, 1985; 53 FR 4982, Feb. 19, 1988]

## 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

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filing is impracticable, requests will be deemed to be properly filed if filed with the Chief of the Office of Procurement, Evaluation Division (M/OP/E) for forwarding to the cognizant contracting officer.

[49 FR 13257, Apr. 3, 1984, as amended at 50 FR 50303, Dec. 10, 1985; 55 FR 6802, Feb. 27, 1990; 56 FR 67225, Dec. 30, 1991; 59 FR 33446, June 29, 1994]

## 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 FAR 50.303.

## 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 FAR 50.304.

[49 FR 13257, Apr. 3, 1984, as amended at 62 FR 40469, July 29, 1997]

## 750.7110 Processing cases.

### 750.7110-1 Investigation.

The Evaluation Division of the Office of Procurement (M/OP/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/OP Director to approve the request.

[62 FR 40469, July 29, 1997, as amended at 64 FR 42042, Aug. 3, 1999]