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T3.10.7 Extraordinary Contractual Actions

A Extraordinary Contractual Actions

1 Authority

a. *Public Law 85-804 and Executive Order 10789.* Public Law 85-804, as amended, (referred to as the "the Act) and Executive Order 10789 (hereinafter referred to as the "the EO") grant the Administrator and the DOT Secretary authority to conduct extraordinary contractual actions (entering or modifying contracts) in support of the national defense.

(1) *Indemnification Approval Authority Reserved to the Department of Transportation Secretary.*

(a) One of the provisions of the ACT and the EO permits the FAA to indemnify contractors in situations that involve unusually hazardous or nuclear risks to protect them from undue risk incident to performing such contractual activities. The FAA may protect contractors from this type of risk through incorporation of Clause 3.10.7 or its Alternate I - "Indemnification Under Public Law 85-804" (the clause). These clauses must not be used in any other type of situation and must have the prior approval of the approving authority as specified the following (b).

(b) The DOT Secretary is the approving authority and his/her advance appoval is required prior to including the indemnification clause in a screening information request (SIR), contract or modification.

(2) *The Administrator as Approving Authority.* The Administrator is the approving authority for all other extraordinary actions that facilitate the national defenses except for those involving unusually hazardous or nuclear risks discussed in subparagraph (1) above. The Administrator may also delegate this authority to a Contract Adjustment Board. (See the following subparagraph (3) "Contract Adjustment Board".

(3) *Contract Adjustment Board.* The Administrator may establish and delegate his/her authority under subparagraph A.1.a to a contract adjustment board (the board). The board, by virtue of the delegation, has authority to approve, authorize and direct appropriate action and to make all appropriate determinations and findings. The determinations of the board are not subject to appeal; however, the board may reconsider and modify, correct, or reverse its previous determinations. The board will also establish its own procedures and has authority to take all actions necessary or appropriate to conduct its functions.

b. *Limitations.*

(1) The authority conferred by the Act and the EO may not be (i) used unless the approving authority finds that the action will facilitate the national defense and/or (ii) relied upon when other sufficient or adequate legal authority exists within the agency. The fact that losses occur under a contract is not sufficient basis for exercising the authority conferred by the Act. Whether appropriate action will facilitate the national

defense is a judgment to be made on the basis of all the facts of the case.

(2) The Act is not authority for:

(a) Using a cost-plus-a-percentage-of-cost system of contracting;

(b) Making any contract that violates existing law limiting profit or fees;

(c) Providing for other than reasonable access to contracts for supplies or services;

(d) Waiving any bid bond, payment bond, performance bond, or other bond required by law;

(e) Obligating the FAA for any amount over $25 million, unless the Senate and House Committees on Armed Services are notified in writing of the proposed obligation and 60 days of continuous session of Congress have passed since the transmittal of such notification.

c. Actions authorized under the Act and EO must be accomplished as expeditiously as practicable, consistent with the exercise of sound judgment appropriate to the use of such extraordinary authority. The Act and EO that every contract entered into, amended, or modified under this section contain:

(1) A citation of the Act and the EO;

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

(3) A description of the finding that the action will facilitate the national defense.

2 Guidance

a. *Types of Actions.* Most actions under this section fall into one of three categories. They are:

(1) *Modifications Without Consideration*.

(a) A modification without consideration may be allowed if a contractor, whose continued performance is essential to the national defense, is faced with an actual or threatened loss under a contract that would impair the contractor’s ability to continue its production capability. A modification may also be justified when a contractor suffers losses resulting from actions by the FAA which is acting as the other contracting party, even though the FAA is not directly liable under the contract.

(b) When a contract modification without consideration becomes a factor, the CO should obtain additional information such as the following in addition to that specified in subparagraph d. "Facts and Evidence" to conduct an investigation:

(i) Statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances, and profit;

(ii) A statement and evidence of the contractor's present estimate of total costs under the contracts involved if it is enabled to complete them, broken down between costs accrued to date and completion costs, and between costs paid and those owed;

(iii) A statement and evidence of the contractor's estimate of the final price of the contract, taking into account all known or contemplated escalation, changes, extras, and the like;

(iv) A statement of any claims known or contemplated by the contractor against the Government involving the contracts, other than those stated in response to the foregoing subparagraph (c) of this section;

(v) An estimate of the contractor's total profit or loss under the contract(s) if it is enabled to complete them at the estimated final contract price, broken down between profit or loss to date and completion profit or loss;

(vi) An estimate of the contractor's total profit or loss from other Government business and all other sources, from the date of the first contract involved to the estimated completion date of the last contract involved;

(vii) A statement of the amount of any tax refunds to date, and an estimate of those anticipated, for the period from the date of the first contract involved to the estimated completion date of the last contract involved;

(viii) A detailed statement of efforts the contractor has made to obtain funds from commercial sources to enable contract completion;

(ix) A statement of the minimum amount the contractor needs as a modification without consideration to enable contract completion, and the detailed basis for that amount;

(x) An estimate of the time required to complete each contract if the request is granted;

(xi) A statement of the factors causing the loss under the contracts involved;

(xii) A statement of the course of events anticipated if the request is denied;

(xiii) Balance sheets, preferably certified by a certified public accountant, (i) for the contractor's fiscal year immediately preceding the date of the first contract, (ii) for each subsequent fiscal year, (iii) as of the request date, and (iv) projected as of the completion date of all the contracts involved (assuming the contractor is enabled to complete them at the estimated final prices), together with income statements for annual periods subsequent to the date of the first balance sheet. Balance sheets and income statements should be both consolidated and broken down by affiliates. They should show all transactions between the contractor and its affiliates, stockholders, and partners, including loans to the contractor guaranteed by any stockholder or

partner; (xiv) A list of all salaries, bonuses, and other compensation paid or furnished to the principal officers or partners, and of all dividends and other withdrawals, and of all payments to stockholders in any form since the date of the first contract involved.

(2) *Correction of Mistakes.*

(a) Correction of a mistake involves such things as failure to express the intent of the parties in the contract, an obvious mistake by the contractor that was overlooked by the contracting officer, or a mutual mistake as to a matter of fact. An upward adjustment of a contract price may be granted under these conditions.

(b) When a request involves possible correction of a mistake, the contractor may be asked to furnish, in addition to the facts and evidence listed in subparagraph (d) "Facts and Evidence", any of the following information:

(i) A statement and evidence of the precise error made, ambiguity existing, or misunderstanding arising, showing what it consists of, how it occurred, and the intention of the parties.

(ii) A statement explaining when the mistake was discovered, when the contracting officer was given notice of it, and whether this notice was given before completion of work under, or the effective termination date of, the contract.

(iii) An estimate of profit or loss under the contract, with detailed supporting analysis.

(iv) An estimate of the increase in cost to the Government resulting from the adjustment requested, with detailed supporting analysis.

(3) *Formalization of an Informal Commitment.*

(a) The third category of contractual adjustments, formalization of an informal commitment, is authorized in order to permit payment to persons who have taken action without a formal contract. For instance, a contractor, acting in good faith and relying on the apparent authority of an FAA official, may have carried out work for which there was not a proper contractual arrangement.

(b) When a request involves possible formalizing of an informal commitment, the contractor may also be asked to furnish the following information in addition to those specified in subparagraph d. "Facts and Evidence":

(i) Copies of any written instructions or assurances (or a sworn statement of any oral instructions or assurances) given the contractor, and identification of the Government official who gave them.

(ii) A statement as to when the contractor furnished or arranged to furnish the supplies or services involved, and to whom.

(iii) Evidence that the contractor relied upon the instructions or assurances, with a full description of the circumstances that led to this reliance.

(iv) Evidence that, when performing the work, the contractor expected to be compensated directly for it by the Government and did not anticipate recovering the costs in some other way.

(v) A cost breakdown supporting the amount claimed as fair compensation for the work performed.

(vi) A statement and evidence of the impracticability of providing, in an appropriate contractual instrument, for the work performed..

b. *Contractor's Responsibility.* It is the contractor' responsibility to seek contract adjustment when appropriate. The contractor should do this in a written request to the contracting officer. The request should include all the information necessary for the contracting officer to conduct an investigation such as the following:

(1) The precise adjustment requested:

(2) The essential facts, summarized chronologically in narrative form;

(3) The contractor's conclusions based on these facts, showing when the contractor considers itself entitled to the adjustment; and

(4) Whether or not

(a) All obligations under the contracts involved have been discharged;
(b) Final payment under the contracts involved has been made;
(c) Any proceeds from the request will be subject to assignment or other transfer, and to whom; and

(d) The contractor has sought the same, or a similar or related, adjustment from the General Accounting Office or any other part of the Government, or anticipated doing so.

c. *Contracting Officer's Responsibilities.*

(1) *Gather Information.* The contracting officer is responsible to gather information necessary to conduct an initial investigation. Information such as that specified in subparagraphs A.2.a.(1) - "Modifications Without Consideration", A.2.a.(2) - "Correction of Mistakes", A.2.a.(3) - Formalization of an Informal Commitment", and A.2. d. "Facts and Evidence" are examples of the types of information that may be useful to establishing the facts. The contracting officer should assemble a case file containing all the pertinent documentation including information submitted by the contractor. The case file will serve as a basis for review and approval or rejection of the case and should be well-organized to facilitate review by the product team, legal, and if necessary, the approving authority. The contracting officer should maintain complete records of all actions taken under this

 as part of the case file, whether approved or denied.

(2) *Perform the Initial Investigation.* The contracting officer in concert with legal and the product team will make a thorough initial investigation to establish the facts necessary to decide a given case. Facts and evidence, including signed statements of material facts within the knowledge of individuals when documentary evidence is lacking, and audits if considered necessary to establish financial or cost facts, shall be obtained from contractor and Government personnel. As part of this initial investigation, the contracting officer should ascertain if other Government agencies are involved - see the following subparagraph (3) "Liaison With Other Agencies". This initial investigation will determine whether to reject the case or process it further. If rejection is warranted at this juncture, the contracting officer will notify the contractor in writing.

(3) *Involve Affected Agencies.* When a case involves matters of interest to more than one Government agency, the contracting officer should do the following:

(a) Maintain liaison with affected agencies to determine whether joint action should be taken.

(b) Assure availability of funds required from other agencies. When additional funds are required from another agency, the contracting agency may not approve adjustment requests before receiving advice that the funds will be available. The request for this advice shall give the contractor's name, the contract number, the amount of proposed relief, a brief description of the contract, and the accounting classification or fund citation. If the other agency makes additional funds available, the agency considering the adjustment request shall be solely responsible for any action taken on the request.

(c) When essentiality to the national defense is an issue, agencies considering requests for amendment without consideration involving another agency shall obtain advice on the issue from the other agency before making the final decision. When this advice is received, the agency considering the request for amendment without consideration shall be responsible for taking whatever action is appropriate.

(4) *Submit Cases to the Administrator as Approving Authority.* The contracting officer will submit cases that have merit through appropriate channels to the approving authority. The contracting officer should include a memorandum for the signature of the approving authority that contains key the following information.:

(5) *Insert Contract Information.* The contracting officer should include the following information in contract(s) entered into or modified under the Act and the EO:

(a) A citation of the Act and the EO

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

(c) A recital of the finding that the action will facilitate the national defense.

(6) *Reports to Congress*. The EO requires the submission of an annual report to Congress by March 15, listing actions taken on requests for relief, including indemnity, under the Act's authority. The contracting officer should provide input as follows for the report:

(a) The total number of requests, total dollar amount requested and the total dollar amount approved or denied; and

(b) For each approved request that involves actual or potential cost to the FAA in excess of $50,000, the report should include the name of the contractor, the actual cost or estimated potential cost, a description of the property or services involved, and a statement of the circumstances justifying the action. The report should omit any information classified 'Confidential' or higher.

d. *Facts and Evidence.*

(1) *General. The following should be included:*

(a) Description and information of the contract(s) such as key dates, modifications, items acquired, price or prices, schedules, special provisions;

(b) History of performance such as when work began, progress made, exact statement of contractor's remaining obligations, and the contractor's expectations regarding completion;

(c) Statement of payment received, due, yet to be received or to become due, including advance and progress payments, amounts withheld by the FAA and information as to any obligations of the FAA yet to be performed under the contract(s);

(d) A detailed analysis of the request's monetary elements, including precisely how the actual or estimated dollar amount was determined and the effect of approval or denial on the contractor's profits before Federal income taxes;

(e) A statement of the contractor's understanding of why the request's subject matter cannot now, and could not at the time it arose be disposed of under the contract's terms;

(f) The best supporting evidence available to the contractor, including contemporaneous memorandums, correspondence, and affidavits;

(g) Relevant financial statements, cost analyses, or other such data, preferable certified by a certified public accountant, as necessary to support the request's monetary elements;

(h) A list of persons connected with the contract(s) who have factual knowledge of the subject matter, including when possible, their names, offices or titles, addresses and telephone numbers;

(i) A statement and evidence of steps taken to reduce losses and claims to a minimum; (j) Any other relevant statements or evidence that may be required.

e. *Indemnification Requests.* Contractors that request inclusion of the indemnification clause should supply information such as the following to the contracting officer. The information should be adequate for the contracting officer to ascertain the validity of the request. Information such as the following is generally relevant:

(1) Identification of the contract for which the indemnification clause is requested;

(2) Identification and definition of the unusually hazardous or nuclear risks for which indemnification is requested, with a statement indicating how the contractor would be exposed to them;

(3) A statement, executed by a corporate official with binding contractual authority, of all insurance coverage applicable to the risks to be defined in the contract as unusually hazardous or nuclear, including

(a) Names of insurance companies, policy numbers, and expiration dates;

(b) A description of the types of insurance provided (including the extent to which the contractor is self-insured or intends to self-insure), with emphasis on identifying the risks insured against and the coverage extended to persons or property, or both;

(c) Dollar limits per occurrence and annually, and any other limitation, for relevant segments of the total insurance coverage;

(d) Deductibles, if any, applicable to losses under the policies;

(e) Any exclusions from coverage under such policies for unusually hazardous or nuclear risks; and

(f) Applicable workers' compensation insurance coverage.

(4) The controlling or limiting factors for determining the amount of financial protection the contractor is to provide and maintain, with information regarding the availability, cost, and terms of additional insurance or other forms of financial protection.

(5) Whether the contractor's insurance program has been approved or accepted by any Government agency; and whether the contractor has an indemnification agreement covering similar risks under any other Government program, and, if so, a brief description of any limitations.

(6) If the contractor is a division or subsidiary of a parent corporation,--

(a) A statement of any insurance coverage of the parent corporation that bears on the risks for which the contractor seeks indemnification and

(b) A description of the precise legal relationship between parent and subsidiary or

division.

f. Disposition. When approving or denying a contractor's request, the approving authority will sign and date a Memorandum of Decision containing--

(1) The contractor's name and address, the contract identification, and the nature of the request;

(2) A concise description of the supplies or services involved;

(3) The decision reached and the actual cost or estimated potential cost involved, if any;

(4) A statement of the circumstances justifying the decision;

(5) Identification of any of the foregoing information classified "Confidential" or higher (instead of being included in the memorandum, such information may be set forth in a separate classified document referenced in the memorandum); and

(6) If some adjustment is approved, a statement in substantially the following form: "I find that the action authorized herein will facilitate the national defense." The case files supporting this statement will show the derivation and rationale for the dollar amount of the award. When the dollar amount exceeds the amounts supported by audit or other independent reviews, the approving authority will further document the rationale for deviating from the recommendation.

B Clauses

view contract clauses

C Forms

view procurement forms