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Public Law 85-804

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I. Recent Inflationary Pressures and U.S. Department of Defense Response

According to data published by the U.S. Department of Labor October 13, 2022, the annual inflation rate for the United States was 8.2% for the 12 months ending September 2022. This historic inflation, coupled with extreme supply chain uncertainties and disruptions, has created immense uncertainty and challenges for contractors, particularly those performing under firm fixed priced contracts.

The Director of Defense Pricing and Contracting ("DPC"), on May 25, 2022, issued a memorandum entitled "Guidance on Inflation and Economic Price Adjustments." DPC in that memorandum instructed contracting officers not to consider REAs predicated on changed economic conditions. The memorandum also provided contracting officers meaningful guidance on establishing economic price adjustment (EPA) clauses.

DPC issued an additional memorandum on Friday, September 9, 2022 with the subject "Managing the Effects of Inflation with Existing Contracts." Consistent with the earlier memorandum, DPC reiterates that "Contractors performing under firm-fixed-price contracts that were priced and negotiated before the onset of the current economic conditions generally bear the risk of cost increases." Unlike the earlier memorandum, however, DPC acknowledges that some circumstances may allow for an "accommodation," such as to mitigate the "acute impacts on small business and other suppliers." DPC reminded contractors that Extraordinary Contractual Relief could be available under Public Law 85-804, as implemented by Federal Acquisition Regulation ("FAR") and Defense Acquisition Regulation Supplement ("DFARS") Part 50.

Given that Public Law 85-804 is a source of potential relief, it is critically important to understand Public Law 85-804, its history, and its requirements.

This presentation will not address EPA clauses or modifications based on consideration. Those are both important issues addressed in the DPC memorandum but are outside the scope of this discussion.

II. History of and Rationale for Extraordinary Contractual Relief

A. Title II of the First War Powers Act

Public Law 85-804 traces its origins to Title II of the First War Powers Act of 1941, PL 77-354, 55 Stat. 838, enacted on Dec. 14, 1941. Title II empowered the President to

> enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war.

The Act ensured that contractors could continue performing vital defense contracts notwithstanding changes in economic circumstances that endangered the viability of the companies as going concerns.

Nine days after its enactment, President Franklin Roosevelt delegated the power to grant relief under Title II to the War Department, Navy Department, and Maritime Commission. Executive Order 9001, 6 FR 6787.

After the Japanese surrender in 1945, agencies denied new or pending requests under Title II as such relief could no longer facilitate the prosecution of the war.

B. War Contractors Relief Act

On August 7, 1946, Congress enacted the War Contractors Relief Act ("WCRA"), 60 Stat. 902, also known as the Lucas Act or War Contract Hardship Claims Act. WCRA allowed contractors to submit claims incurred from September 16, 1940 to August 14, 1945 that would have been considered under the War Powers

Act but for the Japanese surrender. WCRA required contractors to file requests for relief before February 7, 1947.

The WCRA permitted the Government to compensate contractors, subcontractors, and suppliers for losses sustained in performing work or furnishing supplies to the Government between September 16, 1940 and August 14, 1945. President Truman published EO 9786 containing regulations implementing the WCRA. Agencies could grant equitable relief up to the net loss incurred without fault or negligence of contractors, subcontractors, and suppliers.

Unlike prior and subsequent version of the law, the WRCA granted jurisdiction to federal district courts to review agency determinations and "to determine the amount, if any, to which such claimant and petitioner may be equitably entitled."

C. Temporary Title II Extensions Due to Korean War

On December 16, 1950, President Truman declared a national state of emergency due to "events in Korea and elsewhere" after China intervened in the Korean War. 15 Fed Reg. 9029.

On January 12, 1951, Congress amended and reenacted Title II of the War Powers Act, replacing the phrase "the prosecution of the war" with "the national defense." 64 Stat. 1257. Accordingly, the President was empowered to:

> enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the national defense.

Congress and the President extended Title II a total of five times, with Title II finally expiring on June 30, 1958.

D. Public Law 85-804

Congress enacted Public Law 85–804 on August 28, 1958, shortly after the War Powers Act expired. President Eisenhower then issued Executive Order 10789 delegating authority to several agencies to grant relief under Public Law 85–804. Public Law 85-804, like its predecessors, permitted the President to:

> enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense.

Public Law 85-804, 50 U.S.C. § 1431.

E. Other Statutory and Regulatory Authorization to Grant Extraordinary Relief

Relief under Public Law 85–804, though extraordinary, is not unique. Although President Obama authorized the United States Agency for International Development ("USAID") to grant extraordinary relief under Public Law 85–804 in 2014,[1] USAID had previously been authorized to make contractual adjustments without consideration, correction of mistakes, and formalization of information commitments where the relief was "necessary to protect the foreign policy interests of the United States." *See* AIDAR 750.7101 (implementing EO 11233's delegation of authority under Foreign Assistance Act of 1961, 75 Stat. 454).

> 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

[1] For some reason, AIDAR 750.000 still states that "USAID is not among the agencies named in [Public Law 85–804] or authorized by the President to take actions under it. . . ."

> 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 determines in each case that such action is necessary to protect the foreign policy interests of the United States.

Executive Order 11223, Relating to the Performance of Functions Authorized by the Foreign Assistance Act Of 1961, as Amended, 30 Fed. Reg. 6635 (May 12, 1965) (President Lyndon B. Johnson).

The implementing regulations in AIDAR state that "[e]xtra-contractual claims arising from foreign assistance contracts will be processed according to this subpart, which is similar to that utilized to process claims for extraordinary relief under (48 CFR) FAR part 50 as modified to meet the circumstances involved under the Foreign Assistance Act and the different authority involved."

Similar to the essentiality requirement (discussed below) under FAR 50.103-2(a)(1), contract adjustments without consideration under AIDAR 750.7106–2(a) require that the adjustment be "essential to protect the foreign policy interests in the United States."

III. Public Law 85-804

A. Purpose

The objective of Public Law 85-804 is not to satisfy claims against the United States, but instead, because granting relief to a contractor will facilitate the national defense. The Transportation Contract Adjustment Board explained: "The statutes now codified in 50 U.S.C. §§ 1431–1435 are not primarily intended to be a vehicle to satisfy claims against the United States. Rather, the purpose is to facilitate the national defense. . . . Relief is given, not because the recipient is legally entitled to it, but because the United States will receive some benefit." *Sw. Marine, Inc.*, 4 ECR ¶ 77 (Transportation Contract Adjustment Board) (Dec. 1, 1993).

B. Authorized Agencies

FAR 50.101-1(b) lists the agencies authorized to issue extraordinary contractual relief under Public Law 85-804 and under Executive Order 10789, 23 Fed. Reg. 8897 (Nov. 14, 1958):

- Government Publishing Office
- Department of Homeland Security
- Tennessee Valley Authority
- National Aeronautics and Space Administration
- General Services Administration
- Department of Defense
- Department of the Army
- Department of the Navy
- Department of the Air Force
- Department of the Treasury
- Department of the Interior
- Department of Agriculture
- Department of Commerce
- Department of Transportation Departments
- Department of Energy for functions transferred to that Department from other authorized agencies

FAR 50.101(b) includes the catchall phrase "and any other agency that may be authorized by the President." Agencies authorized to use Public Law 85–804 include:

- NASA
- Federal Aviation Administration
- Office of Civil and Defense Mobilization
- Atomic Energy Commission
- Department of the Interior
- Department of Veteran Affairs
- United States Agency for International Development (USAID)
- Department of Health and Human Services

C. Delegation of Authority and the Contract Adjustment Boards

Public Law 85-804 assigns authority to the President, who under E.O. 10789, delegated such authority to "the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, or the duly authorized representative of any such Secretary." The FAR provides that the head of an agency may delegate in writing such authority with the following conditions:

> (a) Authority delegated shall be to a level high enough to ensure uniformity of action.
>
> (b) Authority to approve requests to obligate the Government in excess of $75,000 may not be delegated below the secretarial level.
>
> (c) Regardless of dollar amount, authority to approve any amendment without consideration that increases the contract price or unit price may not be delegated below the secretarial level, except in extraordinary cases or classes of cases when the agency head finds that special circumstances clearly justify such delegation.
>
> (d) Regardless of dollar amount, authority to indemnify against unusually hazardous or nuclear risks, including extension of such indemnification to subcontracts, shall be exercised only by the Secretary or Administrator of the agency concerned, the Public Printer, or the Chairman of the Board of Directors of the Tennessee Valley Authority (see 50.104-3).

FAR 50.102-1. Additionally, an agency head may establish a contract adjustment board (CAB) authorized "to approve, authorize, and direct appropriate action under this subpart 50.1 and to make all appropriate determinations and findings." The board's decisions are not subject to appeal.

Neither the contracting officer nor any Board of Contract Appeals has authority to decide any requests for relief under Public Law 85-804. *See Centurion Elecs. Serv.*, ASBCA No. 51956, 03-1 BCA ¶ 32097 (Dec. 5, 2002) ("We are not empowered to grant relief under Pub. L. No. 85-804.").

In practice, the CABs are the primary entities adjudicating Public Law 85-804 requests. The DFARS define the CABs as follows:

> The Departments of the Army, Navy, and Air Force each have a contract adjustment board. The board consists of a Chair and not less than two nor more than six other members, one of whom may be designated the Vice–Chair. A majority constitutes a quorum for any purpose and the concurring vote of a majority of the total board membership constitutes an action of the board. Alternates may be appointed to act in the absence of any member.

DFARS 250.102-2.

D. Congress' Veto Power

In 1973, Congress amended the statute to provide for congressional veto of relief the Executive branch otherwise grants under Public Law 85-804:

> Sec. 807. (a) the first section of [Public Law 85-804] is amended by adding at the end thereof the following: "the authority conferred by this section may not be utilized to obligate the united states in any amount in excess of $25,000,000 unless the ***committees on armed services of the senate and the house of representatives*** *have been* ***notified in writing*** of such proposed obligation and ***60 days of continuous session of congress have expired*** following the date on which such notice was transmitted to such committees and ***neither house of congress has adopted***, within such 60–day period, a ***resolution disapproving*** such obligation.

PL 93–155, Nov. 16, 1973, 87 Stat 605 (emphasis added). The notification requirement is now triggered for actions in excess of $35 million. FAR 50.102-3(4). FAR 50.104-3 exempts indemnification from the congressional veto.

E. Procedural Requirements

1. Contractor Submissions

A contractor seeking an adjustment under Public Law 85-804 must submit a written request, in duplicate, to the contracting officer or authorized representative stating at a minimum:

> (1) The precise adjustment requested;
>
> (2) The essential facts, summarized chronologically in narrative form;
>
> (3) The contractor's conclusions based on these facts, showing, in terms of the considerations set forth in 50.103-1 and 50.103-2, when the contractor considers itself entitled to the adjustment; and
>
> (4) Whether or not-
>
> > (i) All obligations under the contracts involved have been discharged;
> >
> > (ii) Final payment under the contracts involved has been made;
> >
> > (iii) Any proceeds from the request will be subject to assignment or other transfer, and to whom; and
> >
> > (iv) The contractor has sought the same, or a similar or related, adjustment from the Government Accountability Office or any other part of the Government, or anticipates doing so.

FAR 50.103-3.

Similar to claims under the Contract Disputes Act, a contractor that seeks an adjustment that exceeds the simplified acquisition threshold ($250,000) must include a certification by an authorized person that "(1) The request is made in good

faith; and (2) The supporting data are accurate and complete to the best of that person's knowledge and belief." *Id.*

i. Additional Data Requirements

The FAR permits the Government to request the following additional information, where appropriate:

> (1) A brief description of the contracts involved, the dates of execution and amendments, the items being acquired, the price or prices, the delivery schedules, and any special contract provisions relevant to the request.
>
> (2) A history of performance indicating when work under the contracts or commitments began, the progress made to date, an exact statement of the contractor's remaining obligations, and the contractor's expectations regarding completion.
>
> (3) A statement of payments received, due, and yet to be received or to become due, including advance and progress payments; amounts withheld by the Government; and information as to any obligations of the Government yet to be performed under the contracts.
>
> (4) 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.
>
> (5) 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 terms.
>
> (6) The best supporting evidence available to the contractor, including contemporaneous memorandums, correspondence, and affidavits.

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

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

(9) A statement and evidence of steps taken to reduce losses and *claims* to a minimum.

(10) ***Any other relevant statements or evidence that may be required.***

FAR 50.103-4(a).

If ***essentiality to the national defense*** is a factor for a requested amendment without consideration, the Government may also request the following information:

(1) A statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances, and profit.

(2) 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.

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

(4) A statement of any *claims* known or contemplated by the contractor against the Government involving the

contracts, other than those stated in response to paragraph (b)(3) of this subsection.

(5) An estimate of the contractor's total profit or loss under the contracts 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.

(6) 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.

(7) 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.

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

(9) A statement of the minimum amount the contractor needs as an amendment without consideration to enable contract completion, and the detailed basis for that amount.

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

(11) A statement of the factors causing the loss under the contracts involved.

(12) A statement of the course of events anticipated if the request is denied.

(13) 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.

(14) 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.

When the request is for an amendment without consideration because of Government action and essentiality to the national defense is not a factor, the contractor may be required to furnish the following information:

(1) A clear statement of the precise Government action that the contractor considers to have caused a loss under the contract, with evidence to support each essential fact.

(2) A statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances, and profit.

(3) The estimated total loss under the contract, with detailed supporting analysis.

(4) The estimated loss resulting specifically from the Government action, with detailed supporting analysis.

When the request involves correcting a mistake, the contractor may be required to provide:

> (1) 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.
>
> (2) 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.
>
> (3) An estimate of profit or loss under the contract, with detailed supporting analysis.
>
> (4) An estimate of the increase in cost to the Government resulting from the adjustment requested, with detailed supporting analysis.

When the request involves formalizing an informal commitment, the contractor may be asked to provide:

> (1) 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.
>
> (2) A statement as to when the contractor furnished or arranged to furnish the supplies or services involved, and to whom.
>
> (3) Evidence that the contractor relied upon the instructions or assurances, with a full description of the circumstances that led to this reliance.
>
> (4) 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.

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

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

2. Agency Determinations

i. Processing Cases

The contracting officer must conduct a thorough investigation to establish the facts, which may include obtaining affidavits from knowledgeable personnel (including both government and contractor personnel) if documentary evidence is lacking and conducting audits of financial and cost issues. FAR 50.103-5.

If the case involves issues that are of interest to multiple agencies, then the agencies should discuss whether joint action is appropriate. If funds are required from another agency, then the contracting agency may not approve adjustment requests before receiving advice that the funds will be available—although the agency granting the request is solely responsible for any action it takes regarding the request.

NASA's guidance provides that the contracting officer forwards the request to Associate General Counsel for Contracts and Procurement Law. 48 CFR § 1850.103-570 ("Submission of request to the Contract Adjustment Board"). The approval authority for contractor requests for extraordinary relief is NASA CAB. 48 CFR § 1850.101-2(a).

For requests to DoD, PGI 250.103-5(1) provides the officer or official responsible for the case forwards it to the contract adjustment board, which is the entity authorized to approve such requests.

ii. Deciding Requests

When either approving or denying a contractor's request, the agency must execute and date a Memorandum of Decision including the following elements:

> (a) The contractor's name and address, the contract identification, and the nature of the request;
>
> (b) A concise description of the supplies or services involved;
>
> (c) The decision reached and the actual cost or estimated potential cost involved, if any;
>
> (d) A statement of the circumstances justifying the decision;
>
> (e) 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
>
> (f) 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.

3. Judicial Review (or Lack Thereof)

Courts and Boards of Contract Appeal almost never have jurisdiction to review a Public Law 85–804 request. *See, e.g.*, *Am. Gen. Trading & Contracting, Wll*, ASBCA No. 56758, 12-1 BCA ¶ 34905 (quoting *Paragon Energy Corp. v. United States*, 645 F.2d 966, 975 (Ct. Cl. 1981) and citing *East West Research, Inc.*, ASBCA

Nos. 42166, 42231, 91-3 BCA ¶ 24,187 at 120,976) ("The government's motion to dismiss correctly observes that we lack jurisdiction to grant relief under FAR 50.103-2(c). . . . a request for relief under Public Law No. 85-804 is not a claim under the Contract Disputes Act of 1978, and we do not possess jurisdiction to grant relief under that statute and regulatory scheme.").

However, there are limited exceptions where they have jurisdiction to hear matters ***related to*** PL 85–804 relief. *See, e.g.*, *Murdock Mach. & Eng'g Co. of Utah v. United States*, 873 F.2d 1410, 1413 (Fed. Cir. 1989) (PL 85–804 does not "carr[y] with it a sweeping exemption of all agency action from judicial review" where the contracting officer repudiated the CAB decision to grant extraordinary relief). Further, it is appropriate for a reviewing court to interpret an indemnification clause permitted under Public Law 85-804, *see Kellogg Brown & Root Servs., Inc.*, ASBCA No. 59357, 15-1 BCA ¶ 36071, or to determine whether the agency may appropriately refuse to include such clause in a solicitation, *Day Zimmermann Hawthorne Corp.*, B-287121, 2001 CPD ¶ 60, Mar. 30, 2001 (agency's failure to include indemnification under PL 85–804 for unusually hazardous or nuclear risks did not render specifications defective or unduly restrictive of competition).

F. Types of Available Relief

Broadly, Public Law 85-804 provides six categories of possible relief: (1) contract amendments without consideration; (2) correcting mistakes; (3) formalizing informal commitments; (4) authorizing advance payments; (5) permitting government indemnification; and (6) a catch-all category titled "residual powers."

1. Contract Amendments Without Consideration

FAR 50.103-2(a) provides two grounds for providing a contract adjustment without consideration: (1) when essential to the national defense, and (2) when in the interests of fairness due to government action.

i. Essential to the National Defense

All relief granted under Public Law 85–804 must facilitate the national defense. However, where a contractor seeks a contract adjustment without consideration, the contractor must be ***essential*** to the national defense.

> When an ***actual or threatened loss*** under a defense contract, however caused, will ***impair the productive ability*** of a contractor whose continued performance on any defense contract or whose continued operation as a source of supply is found to be ***essential to the national defense***, the contract may be amended without consideration, but ***only to the extent necessary to avoid*** such ***impairment*** to the contractor's ***productive ability***.

FAR 50.103-2(a)(1) (emphasis added). To grant relief under this category:

> (1) the contractor must be essential to national defense,
> (2) the contractor must experience an actual or threatened loss, and
> (3) the loss must impair contractor's productive ability.

The contractor may be "essential" either for current or future procurements.

A contractor does not need to be a sole source to be essential. As the Transportation CAB explained in *Inventive Mfg. & Mktg. Corp.*, 3 ECR ¶ 63 (Department of Transportation Contract Adjustment Board) (Sept. 29, 1975), "[E]ssentiality to the national defense is not a concept applicable only to sole source suppliers. The Board can also consider the availability of alternative supplies and courses of action, both in terms of time and money, in determining essentiality."

Further, essentiality is a time dependent analysis. The contractor may be essential today and not essential tomorrow.

For example, in *Nuclear Metals*, the Army CAB granted a depleted uranium munitions contractor extraordinary relief for environmental cleanup costs. *Nuclear Metals, Inc.*, 4 ECR ¶ 83 (Sept. 13, 1996), *modified in, Nuclear Metals, Inc.*, 4 ECR ¶ 86 (Department of Army Contract Adjustment Board) (Mar. 5, 1997). Nuclear Metals (NMI) operated a holding basin in Massachusetts where it neutralized the hazardous byproducts from its production depleted uranium munitions for Army,

Navy, Air Force, and Marine Corps. NMI later developed Beralcast, a beryllium-aluminum alloy that Lockheed Martin used in building the Comanche helicopters.

NMI faced considerable losses due to a decline in sales for depleted uranium munitions. Federal and state enactment of more stringent environmental laws exacerbated NMI's financial situation. It requested a $6.6 million contract adjustment without consideration for environmental remediation costs, alleging both essentiality to the national defense and government action as a basis for relief.

DCAA conducted an audit, which revealed that without extraordinary contractual relief, NMI would likely go bankrupt. ACAB found NMI essential to the national defense as a source of supply for Beralcast. Without Beralcast components, the Comanche program would suffer 18–24 months in schedule delay, along with a $300 million cost increase. ACAB found NMI essential to the national defense under its current contracts and as a future source of supply for Beralcast. ACAB granted NMI's request for relief.

But NMI had underestimated the cost of environmental remediation and sought an additional $17.5 million under Public Law 85–804 a few years later.

In NMI's second Public Law 85-804 request, the Comanche Program Manager advised ACAB that NMI was no longer an essential source of supply for critical parts. Concluded that NMI was no longer essential to the national defense, ACAB denied the request for relief. *Starmet*, No. ACAB No. 1248, 2000 WL 33158607 (Department of the Army Contract Adjustment Board) (Dec. 4, 2000) (note: the contractor changed its name between the two requests, explaining the different case captions).

Essentiality to the national defense depends on the totality of facts and circumstances. *Inventive Mfg. & Mktg. Corp.*, 3 ECR ¶ 63 (Department of Transportation Contract Adjustment Board) (Sept. 29, 1975). Per applicable DOD guidance, the agency should present the CAB with its findings as to (1) the contractor's performance record; (2) importance to the Government of performance on the contract at issue; (3) importance of contractor to national defense; (4) forecast of future contracts with contractor; (5) other available sources of supply; and (6) the cost and time of using other sources of supply. DFARS PGI 250.103–5(2).

Concepts of burden of proof, common in other contexts, are somewhat inapplicable in the case of Public Law 85-804 requests. Rather, as one CAB explained: "[T]he essentiality issue is not solely for the applicant to prove to the Board. Rather, it is for those persons bearing legal responsibility for the national defense to apprise the Board of their needs and, on the basis of their recommendations and position, for the Contract Adjustment Board to determine." *Sw. Marine, Inc.*, 4 ECR ¶ 77 (Department of Transportation Contract Adjustment Board) (Dec. 1, 1993). At bottom, Public Law 85-804 is intended to benefit the Government, not the contractors, and the burden reflects this reality.

a. Examples

In *Intes Constr. Co.*, 4 ECR ¶ 65 (Army Contract Adjustment Board) (Apr. 10, 1992), the Army awarded Intes a contract to build a military hospital in Turkey for $13.5 million. The new hospital would replace an existing non-U.S. hospital that the Air Force had deemed unsatisfactory due to significant life safety code violations. At award, the Turkish inflation rate was 70%, offset by a favorable exchange rate between the U.S. dollar and Turkish lira. The Army awarded the contract in U.S. dollars. After award, Turkish inflation outpaced the dollar/lira exchange rate. Intes's financial situation deteriorated to where its creditors threatened to force it into bankruptcy. Intes requested a $4.5 million contract adjustment without consideration based on essentiality to the national defense.

The Army CAB sought advice from the U.S. Air Force. The Air Force explained its urgent need for the new hospital, noting that the hospital was the only U.S. military hospital in the Middle East. If Intes were to default under the contract, any re-procurement would take six to 18 months, an unacceptable delay.

The Army CAB found Intes essential to the national defense on the contract to build the hospital, but not as a source for future procurements because numerous other contractors had similar capabilities. The Army CAB awarded Intes $2.5 million in relief. The CAB relied on a Defense Contract Audit Agency ("DCAA") audit conducted to support Intes's request for relief. DCAA estimated that Intes would suffer a $2.5 million loss on the contract without relief. The CAB stated that the $4.5 million Intes requested was greater than the amount necessary to avoid impairment of Intes's ability to finish the project. Further, the CAB recognized that even with relief, Intes faced the possibility of bankruptcy. In fashioning relief, ACAB's motivation was to deter Intes' creditors from forcing it into bankruptcy.

Thus, the CAB granted Intes an extension of time and eliminated retainage from the contract, but directed the Army not to pay Intes the $2.5 million until Intes completed the new hospital.

In *BioPort Corp.*, A.C.A.B. 1246, 4 E.C.R. ¶ 89, 1999 WL 33233099 (Department of Army Contract Adjustment Board) (July 27, 1999), the Army CAB granted relief to the sole source producer of an anthrax virus.

Keystone Gen., Inc., 4 ECR ¶ 49 (Army Contract Adjustment Board) (Nov. 22, 1988), involved firm-fixed unit price contracts to supply personnel and vehicle-mounted FM radio equipment, which had been a mainstay of the U.S. Army and Department of Defense communication networks since the 1960s. Due to inadequate finances and poor management, Keystone had difficulty performing the contracts, resulting in losses and a severe cash flow problem. Keystone claimed that its financial difficulties threatened its existence as a viable government contractor. Keystone requested a contract adjustment without consideration based on essentiality to the national defense and mutual mistake to nearly double the unit prices, as well as $8.5 million for production losses.

The Army CAB rejected Keystone's mutual mistake theory, reasoning that Keystone was solely to blame for its own losses. However, the Army CAB granted $6.7 million as a contract adjustment without consideration based on Keystone's essentiality to the national defense. The Army CAB found that Keystone was essential to the national defense for its performance on the existing contracts and as a continued source of supply. The CAB reasoned that Keystone was one of only two suppliers for the personnel radio, the sole domestic producer for the complete vehicle radio set, and the sole supplier for spare parts for the vehicle radio set. The Army's Deputy Chief of Staff for Operations and Plans confirmed that both radio sets were on the Department of the Army Critical Items List: "That list identifies the radios as a necessary item for equipping soldiers mobilized in the event of war or National emergency."

In *Atlas Fabricators, Inc.*, 2 ECR ¶ 192 (Air Force Contract Adjustment Board) (July 3, 1973), Atlas contracted with the Air Force to produce 26,000 BLU-32 fire bombs at a firm fixed unit price of $144.66, with a government option for an additional 30,000 bombs at original unit price. After the total cost of materials increased by about 40%, the Air Force exercised the option.

The contractor requested a contract adjustment without consideration based on essentiality to the national defense. It asked the AFCAB to convert the option to a cost-reimbursement contract. While AFCAB found that the contractor was not essential to the national defense due to other sources of supply, it granted a no-cost termination of the option as a contract adjustment without modification based on government action (the Air Force exercising the option). AFCAB found performance of the option at the original unit price would render the contractor insolvent. Suing its suppliers for breach of contract was not an adequate legal remedy because the contractor was unlikely obtain relief in time. AFCAB noted that neither party likely contemplated a total material increase of 40%. And while contractors bear the risk of material price increases on an option, overall Government interests require some limitation to the risk.

In *Allegheny Metal Stamping Co, Inc.*, 3 ECR ¶ 5 (Army Contract Adjustment Board) (Mar. 14, 1974), Allegheny entered two firm-fixed price contracts with the Army: the first, to produce 41 million M16 cartridge clips for $531k in 1972, and the second, to produce 23 million cartridge clips for $404k in 1973. After the cost of steel and copper rose by 23% and 90% respectively, Allegheny found itself on the verge of bankruptcy and requested $158k as a contract adjustment without consideration based on essentiality to the national defense. ACAB agreed that Allegheny was essential to the national defense. If Allegheny stopped work, it would prevent the timely delivery of M16 rounds to US armed forces in the field. ACAB granted $129k in extraordinary contractual relief, but prohibited the contracting officer from paying that amount to Allegany as a lump sum. ACAB directed the contracting officer to use his best judgment to pay Allegheny as much as required to ensure continued production and completion of the contracts. ACAB authorized the contracting officer to include a price escalation clause in Allegheny's contracts to address future increases in steel and copper prices.

Conversely, in *Ems Dev. Corp.*, 4 ECR ¶ 82 (Oct. 6, 1995), the CAB determined that a supplier of ship degaussing equipment was not essential where other sources exist, and continued performance was not required to support delivery of ships because equipment could be installed post-delivery. And in *Trident Marine Corp*, 1993 WL 614729, at *1 (Jan. 7, 1993), the CAB explained that "[Naval Supply Center] contracting personnel indicate that Trident is not an essential source of supply. On the contrary, there are a number of sources for these services.

Consequently, [the Board found] that Trident is not essential to the national defense."

ii. In the Interests of Fairness Due to Government Action

FAR Part 50 provides another mechanism for contractors to recover even if not essential to the national defense where the contractor's loss results from Government action:

> When a contractor **suffers a loss** (not merely a decrease in anticipated profits) under a defense contract **because of Government action**, the **character of the action** will generally determine whether any adjustment in the contract will be made, and its extent. When the Government directs its action primarily at the contractor and acts in its capacity as the other contracting party, the contract may be adjusted **in the interest of fairness**. Thus, when Government action, while not creating any liability on the Government's part, increases performance cost and results in a loss to the contractor, fairness may make some adjustment appropriate."

FAR 50.103-2(a)(2) (emphasis added). Recovery under this theory generally requires three elements: "(1) the contractor suffers an actual loss under a defense contract; (2) the government action cited caused that loss; and (3) the government action resulted in unfairness to the contractor." *Starmet*, ACAB No. 1248, 2000 WL 33158607, at *4 (Dec. 4, 2000). This basis for recovery is distinct from a CDA claim and is generally not applicable if the CDA presents an avenue for recovery.

For example, in *Jaycor, Inc.*, 4 ECR ¶ 66 (Army Contract Adjustment Board) (July 22, 1992), Jaycor entered into a one-year lease agreement with the Army with four option years. The Army had urgently needed to lease a building, but because Jaycor did not own the building, it encouraged Jaycor to lease the building from its owner. The Army stated it would then lease the property from Jaycor for five years. However, the existing procurement regulations prevented the Army contracting officer from signing a five year lease with Jaycor. The Army accordingly only awarded a one year lease with four option years, and the Army exercised only two of

the four option years, notwithstanding that Jaycor was obligated for the full five-year lease with the building owner.

Jaycor requested relief under PL 85–804. The contracting officer's investigation found sufficient facts to justify relief under government action or residual powers clause, but only recommended $81,000 (half the amount Jaycor requested), arguing that Jaycor had failed to mitigate its damages. The Army CAB granted $81,000 as a contract adjustment without consideration.

Note that although when the Government acts in its sovereign capacity, rather than its contractual capacity, the contractor is ordinarily precluded from recovery under the Sovereign Acts doctrine, that is not necessarily so in the case of Public Law 85-804 recovery:

> When the Government's action is public and general and not directed primarily at the contractor, it is considered to be taken as a sovereign act for which relief is not ordinarily granted. . . . There may, however, be exceptional situations where a contractor might be granted relief based on a sovereign act, depending upon such factors as the nature of the act and the specific effect upon the contractor.

Cheek's Maint. Serv. Co., Inc., 2 ECR ¶ 80 (Mar. 19, 1969) (considering but denying relief resulting from an increase in federal minimum wage).

2. Correcting Mistakes

The FAR also contemplates revising contracts to address mistakes:

> (1) A contract may be amended or modified to correct or mitigate the effect of a mistake. The following are examples of mistakes that may make such action appropriate:
>
> > (i) A mistake or ambiguity consisting of the failure to express, or express clearly, in a written contract, the agreement as both parties understood it.
> >
> > (ii) A contractor's mistake so obvious that it was or should have been apparent to the contracting officer.
> >
> > (iii) A mutual mistake as to a material fact.

FAR 50.103-2(b). For example, in *Gichner Mobile Sys.*, 4 ECR ¶ 18 (Oct. 14, 1981), the CAB granted relief based on a pricing mistake where a 22.3% disparity between the contractor and the next lowest bidder should have been obvious to the contracting officer.

This basis for relief has become somewhat duplicative of relief now available under the CDA, as recission or reformation for mutual mistake is permissible under the Disputes clause. Before a contractor may submit a request for Public Law 85-804 relief based on mistake, it must first submit a claim to the contracting officer, "unless other legal authority in the agency is determined to be lacking or inadequate." FAR 33.205(c). If a contractor's claim is not approved in its entirety, the contractor may then request relief under PL 85–804.

3. Formalizing Informal Commitments

FAR Part 50 further permits agencies to use the Public Law 85-804 authority to formalize informal commitments:

> Under certain circumstances, informal commitments may be formalized to permit payment to persons who have taken action without a formal contract; for example, when a person, responding to an agency official's written or oral instructions and relying in good faith upon the official's apparent authority to issue them, has furnished or arranged to furnish supplies or services to the agency, or to a defense contractor or subcontractor, without formal contractual coverage. Formalizing commitments under such circumstances normally will facilitate the national defense by assuring such persons that they will be treated fairly and paid expeditiously.

FAR 50.103-2(c). To invoke this basis for relief, the agency must determine that:

> (1) The contractor submits a written request for payment within 6 months after furnishing, or arranging to furnish, supplies or services in reliance upon the commitment; and
>
> (2) The approving authority finds that, at the time the commitment was made, it was impracticable to use normal contracting procedures.

FAR 50.102-3.

4. Advance Payments

Advance payments through PL 85–804 do not fall under FAR Part 50, but are separately addressed under FAR 32.4, which explains:

The agency may authorize advance payments in negotiated and sealed bid contracts if the action is appropriate under

(a) 41 U.S.C. chapter 45;

(b) 10 U.S.C. 2307; or

(c) Pub.L. 85–804 (50 U.S.C. 1431–1435) and Executive Order 10789, November 14, 1958 (3 CFR 1958 Supp. pp. 72–74) (see Subpart 50.1 for other applications of this statute).

FAR 32.401.

(a) Actions that designated agencies may take to facilitate the national defense without regard to other provisions of law relating to contracts, as explained in 50.101–1(a), also include making advance payments. These advance payments may be made at or after award of sealed bid contracts as well as negotiated contracts.

(b) Bidders may request advance payments before or after award, even if the invitation for bids does not contain an advance payment provision. However, the contracting

> officer shall reject any bid requiring that advance payments be provided as a basis for acceptance.
>
> (c) When advance payments are requested, the agency may—
>
> > (1) Enter into the contract and provide for advance payments conforming to this part 32;
> >
> > (2) Enter into the contract without providing for advance payments if the contractor does not actually need advance payments; or
> >
> > (3) Deny award of the contract if the request for advance payments has been disapproved under 32.409–2 and funds adequate for performance are not otherwise available to the offeror.

FAR 32.405.

> Agencies may authorize advance payments to facilitate the national defense for actions taken under Public Law 85–804 (see Subpart 50.1, Extraordinary Contractual Actions). These advance payments may be made at or after award of sealed bid contracts, as well as negotiated contracts. (See 32.405.)

FAR 18.122.

5. Indemnification Requests

Public Law 85-804 also permits the Government to indemnify parties in certain unusual circumstances, notwithstanding the typical prohibition against indemnifications due to the Anti-Deficiency Act. Indemnification under Public Law 85-804 is outside the scope of this presentation.

6. "Residual Powers"

The FAR also provides for a catch-all category of relief under the aegis of "residual powers":

> The term "residual powers" includes all the authority under the statute except that which is covered by Subpart 50.3, Amendments without Consideration, and advance payments. Residual powers are appropriately exercised in those instances that do not fit neatly and squarely into FAR 50.3, but where the national defense will be facilitated thereby.

Starmet, No. ACAB No. 1248, 2000 WL 33158607, at *5 (Dec. 4, 2000).

For example, the Government has used the residual powers category to grant relief to subcontractors far removed from the prime contractor and with no privity of contract with the Government. *See, e.g.*, *Avtex Fibers Front Royal, Inc.*, AFCAB No. 262, 4 ECR Rep. ¶ 47, Dec. 18, 1988. Avtex was a sixth-tier subcontractor under several contracts with the Air Force and NASA. It was the only qualified supplier of an aerospace-grade filament necessary for DoD rocket boosters, NASA's space shuttle, and several missile systems. Due to competitive pressure, significant material price escalation, and mounting environmental and safety concerns, Avtex was forced to shut its plant down. NASA and DoD officials immediately began negotiations with Avtex to resume operations.

Avtex prepared a financial analysis, which found that it needed $43 million to continue production in the short term. The Air Force assessed the impact to its existing programs if Avtex were to close its doors for good, concluding that it would take 18–24 months to find another qualified supplier of the filament. The break in production would impact several defense programs, and if Avtex did not reopen, the Air Force estimated a total economic loss of $100–500 million.

ACAB found that providing relief to Avtex would facilitate the national defense. But as Avtex had no contract with the government, ACAB relied on its residual powers to grant $25 million to Avtex.

G. Limitations

1. Cannot Omit Certain Clauses

The FAR specifically explains that Public Law 85-804 cannot be used to omit certain clauses:

> (b) The authority in 50.101–1(a) shall not be used to omit from contracts, when otherwise required, the clauses at 52.203–5, Covenant Against Contingent Fees; 52.215–2, Audit and Records—Negotiation; 52.222–4, Contract Work Hours and Safety Standards—Overtime Compensation; 52.222–6, Construction Wage Rate Requirements; 52.222–10, Compliance With Copeland Act Requirements; 52.222–20, Contracts for Materials, Supplies, Articles, and Equipment; 52.222–26, Equal Opportunity; and 52.232–23, Assignment of Claims.

FAR 50.103-7(b).

2. Must Exhaust Administrative Remedies

FAR 50.102–3 states that Public Law 85–804 relief is not available "[u]nless other legal authority within the agency concerned is deemed to be lacking or inadequate." *See also* FAR 50.101-2(a)(2) ("The authority conferred by Pub. L. 85–804 may not. . . [b]e relied upon when other adequate legal authority exists within the agency."). The CABs have explained that running afoul of this issue requires that (1) other remedies exist and (2) such other remedies are adequate. *See Sw. Marine, Inc.*, 4 ECR ¶ 77 (Dec. 1, 1993).

The typical situation where another remedy exists is where the contractor has a claim under the CDA. However, relief under the CDA may be insufficient and may be too time consuming to remedy the problem, permitting recovery under Public Law 85-804 notwithstanding a potential CDA claim.

For example, in *Redifon Flight Simulator Ltd*, 3 ECR ¶ 126 (Mar. 8, 1979) the contractor held a fixed price incentive contract to design and build a prototype B-52 Aerial Refueling Part Task Trainer. Redifon anticipated that the Air Force would

award the contract in US dollars, but the Air Force insisted on British pounds. Redifon suffered losses when the exchange rate plummeted after award because it had to purchase almost a third of its supplies from the US. Additionally, Redifon experienced significant challenges in meeting certain military standards and obtaining necessary data. The AFCAB granted Redifon relief for exchange rate fluctuations under its residual powers out of fairness to Redifon but denied relief on the parts control component of the request because Redifon failed to exhaust its legal remedies.

Conversely, in *Avondale Indus., Inc.*, 4 ECR ¶ 75 (Mar. 12, 1993), Avondale had several contracts with the Navy for detail design and construction of certain ships. Concerns raised during a financial audit risked triggering events that could lead to the contractor declaring bankruptcy. Avondale requested a $25 million contract adjustment without consideration based on essentiality to the national defense. NCAB agreed that Avondale was essential to the national defense. Additionally, NCAB determined Avondale's requests were not barred by its failure to exhaust administrative remedies. Notwithstanding that Avondale had submitted numerous REAs that were pending, the NCAB determined those REAs would not provide Avondale adequate remedy because they would take too long to resolve.

3. National Emergency Requirement

Public Law 85–804 states:

> This chapter shall be effective only during a national emergency declared by Congress or the President and for six months after the termination thereof or until such earlier time as Congress, by concurrent resolution, may designate.

50 U.S.C. § 1435. However, this is essentially meaningless as applied. First, although the National Emergencies Act provides that all national emergencies terminate two years from September 14, 1976, 50 U.S.C. § 1601, that statute does not apply to Public Law 85-804, 50 U.S.C. § 1651(a)(4), meaning that President Truman's 1950 declaration of a national emergency for the Korean War remains in effect today as far as Public Law 85–804 is concerned. Second, U.S. Presidents have extended the declaration of a national emergency on North Korea's nuclear program every year since President G.W. Bush's Executive Order 13466. *See, e.g.,* President

Biden's notice to Congress extending the national emergency on June 13, 2022, *A Message to the Congress on the Continuation of the National Emergency with Respect to North Korea*, 2022 WL 2115956, at *1.

Lack of a national emergency has never been cited as the basis to deny relief under Public Law 85-804.