

Date: April 23, 2020

From: Executive Director, Office of Acquisition and Logistics and Senior Procurement Executive

Subj: Emergency Acquisition Flexibilities Update 20-02 – Exercising Authorities in Public Law 85-804 (50 U.S.C. §§ 1431 - 1436)

To: Veterans Health Administration - Veterans Health Services, Assistant Under Secretary for Health, Support Services

VA Heads of Contracting Activity

Purpose – This memorandum provides standardized guidance for exercising the authorities in Public Law (P.L.) 85-804, related to the making of advance payments when acquiring commercial items in connection with the national defense, in the context of contributing to the Nation’s response to the ongoing outbreak of COVID-19.

Update – This guidance updates Emergency Acquisition Flexibilities – Emergency Assistance Activities in support of Global Pandemic for Coronavirus Disease 2019 (COVID-19), issued, March 15, 2020. This is Update 20-02.

VA standardized guidance aligns with the Federal Acquisition Regulation (FAR) Part 50, which prescribes policies and procedures for entering into, amending, or modifying contracts in order to facilitate the national defense under the extraordinary emergency authority granted by Public Law 85-804 (50 U.S.C. §§ 1431 - 1436) and Executive Order 10789, dated November 14, 1958, as amended. Specific FAR guidance covering advance payments can be found in FAR subpart 32.4, which is specific to Non-Commercial Items and is used as a baseline for developing VA standardized guidance when exercising the authorities in P.L. 85-804 for commercial items.

Advance payments are authorized under P.L. 85-804, which allows the President to authorize departments or agencies that exercise functions in connection with the national defense “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 [the President] deems that such action would facilitate the national defense.” 50 U.S.C. § 1431; see also Attachment 1. On April 10, 2020, the President deemed that VA is exercising functions in connection with the national defense in the course of contributing to the Nation’s response to the ongoing outbreak of COVID-19. The President further deemed that the authorization provided in the attached memorandum and actions taken pursuant to that authorization would facilitate the national defense.

Advance payments are advances of money by the Government to a prime contractor before, in anticipation of, and for the purpose of complete performance under one or more contracts. They are expected to be liquidated from payments due to the contractor incident to performance of the contracts. Since they are not measured by performance,

they differ from partial, progress, or other payments based on the performance or partial performance of a contract. Advance payments may be made to prime contractors for the purpose of making advances to subcontractors.

The authority conferred by P.L. 85-804, only applies for acquisitions where FAR Part 18 thresholds apply. The Veterans Health Administration (VHA), Veterans Health Services, Assistant Under Secretary for Health (AUSH), Support Services shall review required documentation when requesting approval to use advance payment. The request for approval will be forwarded to the Chief Acquisition Officer (CAO).

The authority conferred by P. L. 85-804 may not be used in a manner that encourages carelessness and laxity and may not be relied upon when other adequate legal authority exists within the agency. All actions under P.L. 85-804 shall be accomplished as expeditiously as practicable, consistent with the care, restraint, and exercise of sound judgement appropriate to the use of such extraordinary authority. The authority conferred by P.L. 85- 804 may not be used in a manner inconsistent with the restrictions at 50 U.S.C. § 1432, the requirements of 50 U.S.C. § 1433, or the effective period at 50 U.S.C. § 1435. The authority conferred by P.L. 85-804 must also be used to the same extent and subject to the same conditions and limitations as the head of an executive department or agency listed in section 21 of Executive Order 10789 of November 14, 1958 (Authorizing Agencies of the Government to Exercise Certain Contracting Authority in Connection with National-Defense Functions and Prescribing Regulations Governing the Exercise of Such Authority), as amended, with respect to contracts performed in support of efforts by the Department of Veterans Affairs to combat the virus.

This authority is only available for the procurement of:

- Personal Protective Equipment (PPE)
- Ventilators, ventilator consumables and ventilator repair parts
- Dialysis equipment, consumables and repair parts
- Critical care equipment and consumables, to include pharmaceuticals (e.g., EKG machines, paralytics)
- Others may be added, approval from the AUSH, Support Services is required.

A determination is required by 50 U.S.C. § 1431 and FAR Part 32.401(c); the CAO will approve the determination.

Use FAR Part 12 and modify appropriate clauses depending on the total award amount, except if such a modification would be inconsistent with 50 U.S.C. §§ 1431 – 1436 or applicable conditions and limitations of Executive Order 10789, as amended. If at or below the Simplified Acquisition Threshold (SAT), follow Simplified Acquisition Procedures (SAP) in FAR Part 13.500. The contracting officer shall prepare a Determination and Finding (D&F) and/or a Justification and Approval (J&A), if applicable. In preparing D&Fs, follow the guidance in FAR Part 1.7, which also allows for a class D&F at FAR Part 1.703. In addition, consider the guidance in FAR Part 32.410 and FAR Part 50.103-7. If preparing a J&A follow the guidance in FAR Part 6. Some of the documentation requirements in the D&F and the J&A are similar. There is no need to repeat the information, the objective is to make sure all required documentation is included regardless of the title of the final documentation. Guidance for a “Streamlined Combined Determination and Finding/Justification and Approval” (see Attachment 2). Guidance for processing the

advance payment is provided by the Office of Management (see Attachments 3 and 4).

The authority granted to VA to exercise P.L. 85-804 shall expire on September 30, 2020. Additionally, exercise of this authority requires contracting officer justification that the transaction is directly in response to the COVID-19 national emergency, that the burden of obtaining a lien under 41 U.S.C. §§ 4503 and 4505(b) to secure the advance payment risks the success of the transaction, and that the 15% of the contract price cap for commercial items under 41 U.S.C. § 4505(c) will not adequately satisfy the requirements of the transaction. Under section 9 of Executive Order 10789, as amended, “[a]dvance payments shall be made hereunder only upon obtaining adequate security.” Contracting Officers should use FAR subparts 28.203-2 (Acceptability of assets), 28.204 (Alternatives in lieu of corporate or individual sureties), 32.202-4(c) (Other assets as security), and 32.202-4(d) (Other forms of security) in determining whether the contractor has provided adequate security for the advance payment in lieu of obtaining a lien.

Before award, contracting officers shall submit required documentation for a D&F, J&A, or a combination of both to the VHA, Veterans Health Services, AUSH for Support Services for concurrence. Upon concurrence by the VHA, AUSH, Support Services, the document(s) shall be forwarded to the Office of Acquisition and Logistics, via email to Ms. Michele Moore, michele.moore4@va.gov, for final processing, review and approval.

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