

## Presidential Power: Public Law 85-804 (50 U.S.C. §§ 1431-35)

Pursuant to Public Law 85-804, codified at 50 U.S.C. §§ 1431-35, the President of the United States may authorize certain federal agencies to grant broad contractual relief even if the relief is prohibited by other statutes or common law, as long as it “facilitate[s] the national defense.” Such an authorization of power allows a designated agency, for example, to increase a contract price without consideration, or provides the agency with indemnification for unusually hazardous or nuclear risks.<sup>1</sup> The statute was originally created shortly after the Korean War as a temporary wartime shortcut to guarantee uninterrupted performance of defense contracts.<sup>2</sup> Fourteen agencies have been authorized to exercise this power since the law was enacted in 1958.<sup>3</sup> As of 2014,<sup>4</sup> any of the designated agencies<sup>5</sup> may

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 (2018). Many of these agencies have delegated their ability to grant “Public Law 85-804” relief to contract adjustment boards (CABs). *See* 48 C.F.R. 50.102–2 (FAR 50.102-2).

The statute technically only applies in a “national emergency declared by Congress or the President, and for six months after the termination thereof.” *Id.* at § 1435.<sup>6</sup> However, the statute continues to remain in effect since its invocation in 1958 by Executive Order 10,789.<sup>7</sup> When the state of national emergency was officially terminated in 1978, Congress exempted Public Law 85-804.<sup>8</sup> In 2014, when former President Obama authorized USAID under Public Law 85-804, he only stated that the “USAID is exercising functions in connection with the national defense in the course of complying with its humanitarian mandate, and there is a relevant state of national emergency that authorizes the use of Public Law 85-804.”<sup>9</sup>

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<sup>1</sup> *See* 50 U.S.C. § 1431 (2018). *E.g.*, 79 Fed. Reg. 68,757 (Nov. 18, 2018) (authorizing USAID to “hold[] harmless and indemnify[] contractors with respect to claims, losses, or damage arising out of or resulting from exposure, in the course of performance of the contracts, to Ebola”).

<sup>2</sup> *See* H.R. Rep. No. 2232, 85th Cong., 2d Sess. 2 (1958). *See generally* Patrick E. Tolan Jr., *Environmental Liability Under Public Law 85-804: Keeping the Ordinary Out of Extraordinary Contractual Relief*, 32 Pub. Cont. L.J. 215, 221-22 (2003) (discussing the historical background of Public Law 85-804) (citing First War Powers Act, 1941, § 201 (granting authority to facilitate “prosecution of the war”)).

<sup>3</sup> These agencies are the Department of Defense, Department of the Treasury, Department of the Interior, Department of Agriculture, Department of Commerce, Department of Health and Human Services, Department of Transportation, Atomic Energy Commission, General Services Administration, National Aeronautics and Space Administration (NASA), Tennessee Valley Authority, Government Printing Office [Government Publishing Office], Department of Homeland Security; and United States Agency for International Development (USAID). All the agencies except for USAID were added by presidential amendments to Executive Order 10,789; USAID was added by presidential memorandum. 68 Fed. Reg. 19705 (April 17, 2003).

<sup>4</sup> *See* 79 Fed. Reg. 68,757 (Nov. 18, 2018) (The “United States Agency for International Development (USAID) is authorized to exercise authority under Public Law 85-804, ... with respect to contracts performed in Africa in

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support of USAID's response to the Ebola outbreak in Africa where the contractor, its employees, or subcontractors will have significant exposure to Ebola”).

<sup>5</sup> 79 Fed. Reg. 68,757 (Nov. 18, 2018) (expanding USAID’s authority by presidential memorandum).

<sup>6</sup> 50 U.S.C. § 1435.

<sup>7</sup> 23 Fed. Reg. 8,897 (1958), *reprinted as amended in* 50 U.S.C. § 1431 (2018).

<sup>8</sup> *See* Pub. L. No. 94-412, § 502(a)(6) (codified at 50 U.S.C. § 1651(a)(6)).

<sup>9</sup> 79 Fed. Reg. 68,757 (Nov. 18, 2014) (authorizing the exercise of authority under Public Law 85-804).