

MEMORANDA OF UNDERSTANDING (MOU) AND MEMORANDA OF AGREEMENT (MOA)

I. Purpose

This directive establishes the Department of Homeland Security (DHS) policy for Memoranda of Understanding (MOU's) and Memoranda of Agreement (MOA's).

II. Scope

This directive applies to all DHS organizational elements.

III. Authorities

The Homeland Security Act of 2002, codified in Title 6, US Code.

IV. Definitions

- A. **Memorandum of Understanding (MOU)**: A document that describes very broad concepts of mutual understanding, goals and plans shared by the parties.
- B. **Memorandum of Agreement (MOA)**: A document describing in detail the specific responsibilities of, and actions to be taken by, each of the parties so that their goals may be accomplished. A MOA may also indicate the goals of the parties, to help explain their actions and responsibilities.
- C. **Parties**: The parties to a MOU/MOA covered by this instruction are the DHS and one or more governmental or private entities.
- D. **Designated DHS Official**: Senior DHS officials as designated by the Secretary, Deputy Secretary or Under Secretaries.

V. Responsibilities

- A. **All Under Secretaries and Designated DHS Officials:** when exercising any authority vested in them by law or delegated by the Secretary, shall be responsible for complying with this instruction when drafting or signing an MOU or MOA.
- B. **The General Counsel:** shall be responsible for providing legal review of all MOUs and MOAs drafted to ensure compliance with applicable laws, rules and regulations. This responsibility may be further delegated by the General Counsel.

VI. Policy & Procedures

- A. **Policy:**
1. Every DHS MOU and MOA must be consistent with the DHS mission and be authorized by federal law, regulations and funding constraints. Additionally, the existence of a MOU or MOA does not eliminate or diminish the need for additional contracts, documents, or agreements to execute the activities contemplated by the parties. Neither this directive nor any MOU/MOA can be used as the sole authority or means to acquire or procure goods or services, exchange funds or property, or transfer or assign personnel. Although the MOU/MOA can address those issues and indicate the goals and intent of the parties, all DHS personnel must comply fully with pertinent contracting and procurement regulations.
 2. **PROHIBITED INDEMNIFICATION AGREEMENTS OR CLAUSES.**
An agreement to indemnify is an agreement to assume financial, legal, or other liabilities on behalf of that other party. Neither the DHS nor any person in the DHS may agree to indemnify any other party absent specific federal statutory authorization. Federal law, 31 U.S.C. 341(a)(1)(A) and 1341(a)(1)(B), commonly referred to as the Anti-Deficiency Act, prohibits all officers and employees of the United States from making or authorizing expenditures or obligations exceeding appropriated funding and from obligating payment of money before it is appropriated. A typical indemnification clause violates both provisions of that Act because it potentially obligates the federal government (or DHS) to pay an unspecified, unlimited, and unappropriated amount of money should someone else's property be lost, damaged or destroyed, some person be injured or killed, or other parties to the MOU/MOA incur legal liabilities or expenses. Should any prospective party to a MOU/MOA request or demand that the DHS agree to an indemnification clause, contact the General Counsel's office for assistance.

B. **Procedures:**

1. Each employee drafting or signing an MOU/MOA should comply with the following procedures:

a. **NEGOTIATIONS.** When negotiating with another party, the DHS official involved should clearly indicate that he or she cannot commit the DHS until the position advanced has been approved by the Office of General Counsel for legal sufficiency and other policy offices, as appropriate.

b. **FORMAT.** Enclosure (1) is the format for a two-party MOU/MOA used when the MOU/MOA originates with the DHS. The wording of the agreement may be appropriately changed to reflect multiple parties. Enclosure (1) may also be tailored to accommodate the subject matter of the agreement and needs of the parties, or to conform to an applicable law, regulation or directive. If a party other than the DHS originates the MOU/MOA, the format may differ from enclosure (1). However, every MOU/MOA in which the DHS is a party should include the following basic information:

(1) **Parties.** The parties to be bound by the agreement must be identified.

(2) **Authority.** The legal authority for the agreement must be cited. Federal law, applicable DHS Rules, Regulations or other directives are referenced.

(3) **Purpose.** The purpose or reason for entering the agreement must be stated.

(4) **Responsibilities.** A description of the duties and responsibilities of the parties must be provided. The description should be as specific and detailed as necessary. Extreme details may be provided in an appendix rather than the body of the MOU/MOA.

(5) **Reporting and Documentation.** The MOU/MOA must specify whether follow-up reports or documentation of actions taken are required and state how often and to whom they are to be submitted.

(6) Points of Contact. Points of Contact for all parties are provided, including names, office symbols, addresses and phone numbers. Fax numbers, e-mail and Internet addresses should also be provided if available.

(7) Modification. A provision stating how to modify or amend the agreement is included. Modifications can be formal (written) or informal (oral). They can be approved by the Points of Contact, by the signatories, or other appropriate individuals. While it is often appropriate for those at the working level to make modifications, either orally or in writing, modifications that change central provisions of the agreement should normally be made in writing and agreed to by the individuals who originally approved the MOU/MOA or their successors.

(8) Effective Date. The date the MOU/MOA becomes effective must be stated. This may be a specified date after the MOU/MOA is signed by all parties or it may be the date the last party signs the agreement.

(9) Termination. The MOU/MOA must contain several provisions regarding termination. The document will indicate that it will terminate on a certain date, upon the accomplishment of its purpose, or upon agreement of the parties. The MOU/MOA will also contain a provision indicating whether the duration of the agreement may be extended and, if so, the extension mechanism (e.g. by written agreement of the parties). Finally, the agreement will indicate whether a party may terminate the agreement early (usually by written notice to the other parties).

c. APPROVING OFFICIAL. The DHS is a party to the agreement, not the person signing for the DHS. Therefore, that person must have the authority to sign the MOU/MOA and commit the DHS. In determining who that official is, refer to the statute, regulation or directive authorizing DHS participation in the MOU/MOA. Other sources of authority are the DHS Delegations of Authority. Also, prior to signing any MOU or MOA, the person signing for DHS must ensure that Office of General Counsel has reviewed the document for legal sufficiency and approved it. If the head of another Department or Agency is signing the agreement for another party, the agreement must be coordinated with the Office of the Secretary of Homeland Security. Even if the authority to sign a MOU/MOA has been delegated to a lower level, if a higher-level official is signing for another party, it may be appropriate to elevate

the signing of the MOU/MOA within DHS as a matter of protocol.

d. CLEARANCE. Clearance of a proposed MOU/MOA can be either consecutive or concurrent. Early coordination and communication with interested offices, and the use of e-mail for reviewing and editing a draft MOU/MOA is encouraged. Prior to submitting a MOU/MOA to the approval authority for signature, the originating office shall ensure that the MOU/MOA does not conflict with any preexisting agreements. The originating office shall also ensure that all interested program offices and the General Counsel has reviewed the MOU/MOA

C. **Questions or Concerns Regarding the Process:** Any questions or concerns regarding this directive should be addressed to the General Counsel.

ENCLOSURE 1

MEMORANDUM OF UNDERSTANDING/AGREEMENT BETWEEN THE
DEPARTMENT OF HOMELAND SECURITY AND _____ REGARDING

1. PARTIES. The parties to this Agreement are the Department of Homeland Security (DHS) and _____.

2. AUTHORITY. This Agreement is authorized under the provisions of [list all applicable statutory and regulatory authority].

3. PURPOSE. The purpose of this Agreement is to set forth terms by which _____ and _____ will provide [services, personnel, equipment] in order to [summarize what the MOU/MOA is intended to accomplish.]

4. RESPONSIBILITIES:

DHS.

- a.
- b.
- c.

[Describe what the DHS will do. Include a paragraph indicating whether the DHS is required to submit status/progress reports, and, if so, how often.]

Other Party. [Describe the other party's responsibilities as discussed above.]

5. POINTS OF CONTACT. [Identify the POCs for the DHS and the other party, including office symbol, address and phone number (fax number and e-mail or internet addresses can also be included).]

6. OTHER PROVISIONS. Nothing in this Agreement is intended to conflict with current law or regulation or the directives of the DHS or [other party]. If a term of this agreement is inconsistent with such authority, then that term shall be invalid, but the remaining terms and conditions of this agreement shall remain in full force and effect.

7. EFFECTIVE DATE. The terms of this agreement will become effective on . . . [insert the effect date].

8. MODIFICATION. This agreement may be modified upon the mutual [written] consent of the parties.

9. TERMINATION. The terms of this agreement, as modified with the consent of both parties, will remain in effect until [date, completion of project, or upon agreement of parties.] The agreement may be extended by mutual written agreement of the parties. Either party upon [number] days written notice to the other party may terminate this agreement.

ENCLOSURE 1

APPROVED BY:

[Give the name and position of the official signing and dating for the DHS. If known, give the name and position of the official signing and dating for the other party.]

(date)

(date)