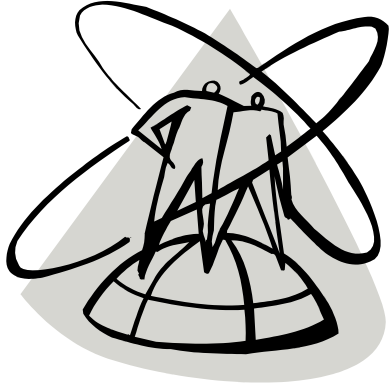


Extraordinary Contractual Actions



References

FAR Subpart 50.1, Extraordinary Contractual Actions
FAR Section 52.250-1, Indemnification Under Public Law 85-804
DEAR Part 950, Extraordinary Contractual Actions
DEAR Section 970.5001-4, Contract Clause

Overview

The purpose of this Chapter is to describe the process for the Department of Energy's (DOE) preparation, coordination and approval in determining whether to provide a DOE or National Nuclear Security Administration (NNSA) contractor indemnification for unusually hazardous or nuclear risks as a form of extraordinary contractual relief pursuant to Pub. L. No. 85-804.

Background

Under Pub. L. No. 85-804 (50 USC 1431 et seq.), “[t]he President may authorize any department or agency of the Government which exercises functions in connection with the national defense” to grant various forms of extraordinary contractual relief, where the relief would “facilitate the national defense.” Pub. L. No. 85-804 provides the President with broad authority to grant extraordinary contractual relief, such as an increase of contract price without consideration, or indemnification for unusually hazardous or nuclear risks. Executive Order 10789, “Contracting Authority of Government Agencies in Connection with National Defense Functions,” identifies the agencies to which this authority has been delegated and describes how it is to be implemented. DOE is one of the agencies with this delegated authority. The decision to grant

indemnification for unusually hazardous or nuclear risks may be made only by the Secretary of Energy.

This Chapter focuses on the process for preparing, reviewing and obtaining Secretarial approval for extraordinary contractual relief under Pub. L. No. 85-804 in the form of indemnification for unusually hazardous or nuclear risks. The form of an indemnification request and the criteria for granting the request are set forth in the Federal Acquisition Regulation (FAR) at 50.104-3(a) “Indemnification requests” and 50.104-3(b) “Action on indemnification requests,” respectively. These procedures also may be followed for other forms of extraordinary contractual relief amounting to more than \$70,000 which must be approved at the Secretarial level. Pursuant to FAR 50.102-1, the decision to grant extraordinary contractual relief amounting to \$70,000 or less to a DOE contractor has been delegated to the DOE Senior Procurement Executive and the NNSA Senior Procurement Executive, for their respective organizations.

Historically, most requests for indemnification by the Secretary of Energy under Pub. L. No. 85-804 have related to nonproliferation, weapons reduction, and other national security activities that have the potential for resulting in a nuclear incident outside the United States. DOE contractors have sought indemnification under Pub. L. No. 85-804 for these activities because the Price-Anderson Act (section 170d. of the Atomic Energy Act of 1954, as amended) limits indemnification for a “nuclear incident” outside the United States to \$500 million and is available only when the nuclear material causing the incident is owned by the United States and the nuclear incident results from a contractual activity on behalf of DOE. Further, indemnification under the Price-Anderson Act does not cover non-radiological risks, such as risks from exposure to chemical or biological agents.

In response to these requests, the Secretary of Energy had granted indemnification under Pub. L. No. 85-804 to contractors performing certain high-priority national security work abroad. In a 1994 memorandum from the Secretary to the Vice President, the Secretary outlined her policy for providing this indemnification in future contracts, and identified a non-exclusive list of programs and activities for which indemnification coverage would be appropriate (e.g., packaging and transportation of radioactive material outside the United States for non-proliferation purposes).

In addition, in recent years DOE is increasingly using its contractors in emergency response and anti-terrorism activities that may arise unexpectedly and require a case-by-case determination for coverage under Pub. L. No. 85-804. Accordingly, to ensure readiness in the face of unpredictable exigencies and to address contractor concerns regarding work in particular arenas, the Secretary has, in certain contracts, included provisions whereby the Secretarially-approved indemnification may be invoked by designated officials on a case-by-case basis (“case-by-case indemnification”) for particular requested or approved work.

Indemnification under these circumstances is permitted only upon the request or approval of the designated official, and only for the particular activity specified in the request or approval. Thus,

language in a contract allowing for a case-by-case indemnification under specified conditions does not constitute an automatic extension of the Secretarially-approved indemnification. Section IV of this Chapter describes the process for extending a case-by-case indemnification.

Relief under Pub. L. No. 85-804 is never a routine contract action and should not be treated as such. The authority to grant this extraordinary contractual relief must be exercised with great caution. The grant of relief must be based on a sound and compelling justification. Speculation that the relief might be helpful is not sufficient. In requesting, reviewing and approving relief, careful consideration must be given to the extent to which the statutory and regulatory criteria are satisfied, the need for the relief, the consequences of not granting the relief, and the benefit to the Department and the United States in facilitating the national defense. Examination of these issues is vital when the relief takes the form of an indemnification which, in effect, transfers large and potentially unlimited liability to the United States. Secretarial approval of new work or modified work or case-by-case work that is being indemnified does not constitute ordering the work or funding the work.

Guidance

I. What are the Elements of a New or Modified Indemnification Request to the Secretary?

- A. Contractor Request for Indemnification
- B. Contracting Officer's Recommendation
- C. Proposed H clause defining unusually hazardous or nuclear risks
- D. Copy of Existing Contract Indemnification (if applicable)
- E. Program Secretarial Official Action Memorandum to Secretary
- F. Secretarial Memorandum of Decision

Contact the Office of the Assistant General Counsel for Civilian Nuclear Programs for additional information, as needed.

II. What is the Process for Requesting a New Indemnification?

A. Applicability

1. The most common situations where a contractor may submit a request for indemnification under Pub. L. No. 85-804 are:
 - a. a contractor does not have an existing contract with DOE or NNSA and has been awarded a new contract;
 - b. a contractor has an existing contract with DOE or NNSA and has been awarded a new contract;

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- c. a contractor has an existing contract with DOE or NNSA that has been noncompetitively extended, in which case the extension is considered a new contract;
 - d. a contractor has an existing contract with DOE or NNSA that does not include indemnification under Pub. L. No. 85-804, but the contractor is, or will be, engaging in certain work for which the contractor believes relief is necessary; or
 - e. whenever there is a “new” DOE or NNSA contract in effect, such that any existing Pub. L. No. 85-804 indemnification coverage does not automatically carry forward to the new contract. This is the case whether or not the contractor or work under the new contract is the same as that for which indemnification was previously granted.
 2. A contractor may submit a request for Pub. L. No. 85-804 indemnification to the cognizant contracting officer (CO). The request for indemnification for unusually hazardous or nuclear risks must identify the contract involved, what relief is sought, what work to be covered by the relief, why the relief is necessary and appropriate, and otherwise provide the information required at FAR 50.104-3(a) (“Indemnification requests”). The contractor must provide sufficient information to enable the CO to determine that the criteria at FAR 50.104-3(b) (“Action on indemnification requests”) are satisfied. Secretarial approval of a new indemnification does not constitute tasking or funding of the work.
 3. The CO must be provided with the contractor’s request at least 60 days *prior to* the date that the contractor has requested the extraordinary contractual relief to be effective. If expedited relief is sought, the request must contain a detailed discussion of why the request could not have been submitted in a timely manner and what adverse consequences, if any, will result in not granting the relief on an expedited basis.
 4. Retroactive application of Pub. L. No. 85-804 is strongly disfavored, and would require extraordinary circumstances and compelling justification to be requested and considered for approval. The burden of providing a compelling basis as to why it is needed would be upon the requester. Any approval of retroactive application of Pub. L. No. 85-804 would be only by the Secretary, and would be limited to the circumstances explicitly identified in such Secretarial approval.

B. Contracting Officer Responsibilities

1. The CO receiving the request must review and determine, after consultation with program officials and local field counsel, whether to recommend that the requested relief satisfies the criteria at FAR 50.104-3(a) and 50.104-3(b).
2. If the CO concludes that the request should be granted, the CO shall prepare a package to support granting the request. The package must include: 1) the CO's Recommendation; 2) the contractor's request; 3) a copy of the existing indemnification, if any; 4) the FAR 52.250-1 clause; 5) the proposed H clause defining unusually hazardous or nuclear risks; 6) a draft Secretarial Memorandum of Decision; and 7) any other relevant supporting documentation. The CO should contact the field counsel, the NNSA General Counsel, and the DOE Office of the Assistant General Counsel for Civilian Nuclear Programs, as appropriate, for assistance in preparing the package. At NNSA, the CO shall contact NNSA General Counsel for assistance in preparing the package.
3. The CO Recommendation must address and demonstrate that the criteria at FAR 50.104-3(b) are satisfied, including a definition and evaluation of the unusually hazardous or nuclear risks involved, a description of the relief to be granted, and a statement that the indemnification would facilitate the national defense and is both necessary and appropriate to achieve the objectives of the Department.
4. The CO must include FAR 52.250-1 "Indemnification Under Public Law 85-804" or FAR 52.250-1, Alternate I "Indemnification Under Public Law 85-804 – Cost Reimbursement Contracts." In management and operating contracts, the CO may substitute the words "Obligation of Funds" for "Limitation of Costs or Limitation of Funds" in accordance with Department of Energy Acquisition Regulation (DEAR) 970.5004-1. The CO shall identify in a separate draft H clause, the unusually hazardous or nuclear risks involved (including, if applicable, activities requiring a case-by-case indemnification determination) and excluding from its coverage liabilities already indemnified under the Price-Anderson Act or other provision of law. If the CO is recommending that the Secretary authorize extending the indemnification to a contractor's domestic or foreign subcontractor(s) and/or supplier(s), or authorize the CO to do so, the recommendation shall be identified and authorized in the Secretary's Memorandum of Decision.

C. Head of Contracting Activity Responsibilities

1. The cognizant Head of Contracting Activity (HCA) of the contracting action shall receive the package from the CO through the appropriate chain of command and shall review the CO's Recommendation and supporting documentation. The HCA, upon concurrence, shall prepare a transmittal memorandum to the Program Secretarial Official (PSO) at DOE/NNSA Headquarters whose organization is responsible for the project (the "Requesting PSO"). The term "PSO" includes the Deputy Administrators for the NNSA. The transmittal must provide background on the contractor's request for indemnification, the basis for any recommendation of the HCA, and forward the CO's Recommendation package and supporting documentation to the Requesting PSO, with a copy to the NNSA General Counsel (for NNSA contracts or where NNSA is responsible for the project), and the DOE Assistant General Counsel for Civilian Nuclear Programs.
2. The HCA should forward the package to the HQ PSO at least 40 days prior to the date that the contractor has requested the extraordinary contractual relief to be effective.

D. Program Secretarial Officer Responsibilities

1. The Requesting PSO shall take responsibility for the request at Headquarters (except where the work is pursuant to a "Strategic Partnership Program" [formerly known as the "Work for Others" program] arrangement, see subsection 3, below), with support from the PSO whose organization is responsible for the contract under which the work will be performed (the "Primary PSO"). If the Requesting PSO concurs with the recommendation from the HCA, the Requesting PSO shall prepare an Action Memorandum package for the Secretary recommending that the request be approved.
2. The Action Memorandum should identify and provide background on the contract, including its scope and effective date, reference any indemnification under Pub. L. No. 85-804 that the contractor may have under an existing contract, and explain the contractor's current request for indemnification. The Action Memorandum should also discuss the proposed work for which indemnification is recommended, the basis for the PSO's recommendation, any relevant sensitivities, and whether the indemnification is in the best interests of the U.S. and would support the national defense.
3. In cases where a contractor would perform work for another federal agency under a "Strategic Partnership Program" arrangement that may be covered by the indemnification, the Primary PSO must take responsibility for the request at

Headquarters. In addition, the Primary PSO must ensure that the Action Memorandum includes confirmation that the interagency agreement includes a provision requiring full cost recovery that would cover any costs incurred under Pub. L. No. 85-804. That is, if the contractor incurs costs, including costs indemnified under Pub. L. No. 85-804, while performing the work for the other federal agency, then the other federal agency is responsible for such costs.

4. The Action Memorandum package should reference and attach as appropriate the following supporting documentation: 1) the contractor's request; 2) any indemnification for similar work under an existing contract; 3) the CO's Recommendation; 4) the CO's proposed H clause defining the unusually hazardous or nuclear risks; and 5) a draft Memorandum of Decision for the Secretary's approval which includes, as attachments, the applicable I clause (either FAR 52.250-1, or FAR 52.250-1, Alternate I) and the H clause to be approved by the Secretary. The Memorandum of Decision shall include substantially the same information that is required in the CO's Recommendation, as prescribed by FAR 50.104-3(b).

E. Reviewing Offices Responsibilities

1. For DOE contracts, the Requesting PSO must submit the Action Memorandum package to the DOE General Counsel for concurrences from: 1) the DOE Assistant General Counsel for Civilian Nuclear Programs; 2) the DOE Assistant General Counsel for Procurement and Financial Assistance; and 3) the DOE General Counsel.
2. For NNSA contracts, the Requesting PSO must submit the Action Memorandum package to the NNSA General Counsel for concurrences from: 1) the DOE Assistant General Counsel for Civilian Nuclear Programs; 2) the DOE Assistant General Counsel for Procurement and Financial Assistance; and 3) the NNSA General Counsel.
3. For all contracts, where the Requesting PSO is not the same as the Primary PSO (e.g., NNSA national security work to be performed by a DOE Office of Science contractor), the concurrence of the Primary PSO must be obtained on the Action Memorandum package.

F. Secretarial Approval

Only the Secretary of Energy may grant the request for extraordinary contractual relief under Pub. L. No. 85-804 where the relief is for indemnification of any value against unusually hazardous or nuclear risks.

III. What is the Process for Requesting a Modification to an Indemnification?

A. Applicability

1. A contractor may submit a request for modification to an existing indemnification when the tasking of a new project that involves activities that are not encompassed within the existing definition of unusually hazardous or nuclear risks is imminent. The Secretarial approval of 85-804 relief for a modification to an existing indemnification does not constitute tasking or funding the work.
2. A modification to an existing indemnification to add a new project to the definition of unusually hazardous or nuclear risks is appropriate for projects that are of a continuous nature. A request to modify an existing indemnification is not the same as a contractor request for a case-by-case indemnification, described below in section IV, which is appropriate for particular activities of a discrete, non-continuous nature.

B. Elements and Process for Modification of an Existing Indemnification

1. The elements of a request for modification are the same as those in a request for a new indemnification to the Secretary, described above in section I.
2. The only major distinctions between the elements of a request for modification of an existing indemnification and a request for a new indemnification are:
 - 1) the modification request would be appropriately tailored to provide the basis for approval of only the new project activities to be added to the H clause definition of unusually hazardous or nuclear risks, as opposed to a new indemnification request for approval of inclusion of both the I clause containing the appropriate FAR 52.250-1 indemnification under Pub. L. No. 85-804 and the related H clause defining the unusually hazardous or nuclear risks in the contract; and
 - 2) since the request is for a modification of an existing indemnification, the Secretarial Memorandum of Decision need only include as an attachment the new, as modified H clause definition of unusually hazardous or nuclear risks, rather than also include the I clause containing the appropriate FAR 52.250-1 indemnification provision.
3. The process for requesting, reviewing and approving a modification request is the same as for a new indemnification, described above in section II. That is, the responsibilities of the CO, the HCA, the PSOs, the Reviewing Offices, and the Secretary are the same.

IV. What is the Process for Invoking an Approved Case-By-Case Indemnification?

In certain circumstances, the Secretary has approved prospective indemnification which may be extended to particular activities *if* specifically requested or approved by a designated official. A typical clause reads as follows:

Other activities relating to non-proliferation, emergency response, anti-terrorism activities, or critical national security activities that involve the use, detection, identification, assessment, control, containment, dismantlement, characterization, packaging, transportation, movement, storage or disposal of nuclear, radiological, chemical, biological, or explosive materials, facilities or devices, provided such activities are specifically requested or approved, in writing, by the President of the United States, the Secretary of Energy, the Deputy Secretary of Energy, or an Under Secretary, and further provided that the request or approval specifically identifies the particular requested or approved activity and makes the indemnity provided by this clause applicable to that particular activity because it involves extraordinary risks.

This type of indemnification must be invoked by such designated official on a case-by-case basis, in compliance with the conditions and limitations set forth in the indemnification clause, and in accordance with the procedures in this Chapter. This type of indemnification is not intended for projects that are of a continuous nature.

A. Elements of a Case-By-Case Indemnification Request

1. Contractor's request
2. Copy of existing contract indemnification
3. CO's recommendation package
4. PSO's Action Memorandum constituting the decision document

B. Applicability

A DOE or NNSA contractor may request that the Secretary's case-by-case indemnification authorization be invoked to cover work by submitting a letter to the DOE or NNSA CO for the contract under which the work will be performed, identifying the case-by-case indemnification provision under the contract, the particular activities to be performed at the direction of a DOE or NNSA official, and the basis for claiming that those activities fall within the scope of the case-by-case indemnification. Secretarial approval of a case-by-case indemnification request does not constitute ordering the work or funding the work. The contractor's letter should include the existing contract indemnification clause, any

written request from the relevant DOE or NNSA program office for the particular project to which the case-by-case indemnification would apply, and any statement of work describing such project.

C. Contracting Officer Responsibilities

1. The CO receiving the contractor's request to invoke a case-by-case indemnification must determine, after consultation with DOE or NNSA program officials and local field counsel, whether to recommend that such indemnification be invoked.
2. If the CO concludes that the case-by-case indemnification should be granted, the CO will prepare a package including a recommendation by the CO that identifies the case-by-case indemnification provision, describes the work to be performed, and explains why the particular work falls within the scope of the case-by-case indemnification. The CO's package should be directed for review to the HCA.
3. If the HCA concurs, the CO's package should be forwarded to the Requesting PSO at DOE/NNSA Headquarters and include a short transmittal memorandum to the PSO recommending approval of the case-by-case indemnification.

D. Program Secretarial Officer Responsibilities:

1. The Requesting PSO at Headquarters is responsible for the coordination and approval process at Headquarters (except where the work is pursuant to a "Strategic Partnership Program" arrangement, see subsection 2, below). If concurring, the PSO must prepare an Action Memorandum package to one of the officials designated in the contract's existing case-by-case indemnification clause recommending that such indemnification be granted for the particular work.
2. In cases where a contractor would perform work for another federal agency under a "Strategic Partnership Program" arrangement that may be covered by the indemnification, the Primary PSO must take responsibility for the request at Headquarters. In addition, the Primary PSO must ensure that the Action Memorandum includes confirmation that the interagency agreement includes a provision requiring full cost recovery that would cover any costs incurred under Pub. L. No. 85-804. That is, if the contractor incurs costs, including costs indemnified under Pub. L. No. 85-804, while performing the work for the other federal agency, then the other federal agency is responsible for such costs.

3. The PSO's Action Memorandum should address the background for the request, the work to be performed, the basis for granting the extension, and the PSO's recommendation for approval. The Action Memorandum package should include as attachments: 1) the contractor's request; 2) the recommendation package from the CO; 3) the HCA's recommendation; and 4) the existing case-by-case indemnification provision. The PSO's Action Memorandum shall provide signature lines for either approval or disapproval by the designated official, such that this Action Memorandum will constitute the decision document approving the case-by-case indemnification.

E. Reviewing Offices Responsibilities

1. For DOE contracts, the Requesting PSO must submit the Action Memorandum package to the DOE General Counsel for concurrences from: 1) the DOE Assistant General Counsel for Civilian Nuclear Programs; 2) the DOE Assistant General Counsel for Procurement and Financial Assistance; and 3) the DOE General Counsel.
2. For NNSA contracts, the Requesting PSO must submit the Action Memorandum package to the NNSA General Counsel for concurrence. Additionally, the Requesting PSO must consult with, and consider comments from: 1) the DOE Assistant General Counsel for Civilian Nuclear Programs; and 2) the DOE Assistant General Counsel for Procurement and Financial Assistance.
3. For all contracts, where the Requesting PSO (e.g., NNSA) is not the same as the Primary PSO (e.g., Office of Science), the concurrence of the Primary PSO must be obtained on the Action Memorandum package.

F. Which Designated Official Approves the Case-By-Case Indemnification?

1. Where the indemnification provision expressly identifies one particular official as authorized to approve the case-by-case indemnification, only that designated official may approve.
2. Where paragraph 1. above is not applicable, the designated official to approve the case-by-case indemnification must be the Under Secretary whose organization is responsible for the project (the "Requesting Under Secretary").
3. The Requesting Under Secretary must obtain the concurrence of the Under Secretary whose organization is responsible for the contract under which the

work will be performed (the “Primary Under Secretary”) if the Requesting Under Secretary and the Primary Under Secretary are different individuals.

V. What are the Post-Approval Procedures?

A. Extension of Approved Indemnification to Subcontractors and Suppliers

1. Only the Secretary has the authority to extend an indemnification to a contractor’s domestic subcontractors and suppliers, and/or to foreign subcontractors and suppliers. The Secretary has the discretion to authorize the CO to grant such extensions; however, the CO’s authority to extend an indemnification granted by the Secretary under Pub. L. 85-804 to domestic or foreign subcontractors and suppliers is effective if and only to the extent granted in the Secretary’s Memorandum of Decision. Such extension may only take effect where the Secretary’s Memorandum of Decision granting the indemnification explicitly provides the CO with the authority to extend the indemnification to domestic subcontractors and suppliers, and/or to foreign subcontractors and suppliers.
2. The CO’s determination to extend any indemnification to either domestic or foreign subcontractors and suppliers must be in writing and is appropriate only to the extent needed to achieve the objectives of the Department. As a matter of practice, the CO has exercised authority to extend the indemnification to domestic subcontractors and suppliers as necessary to meet the objectives of the Department. However, a CO’s grant of an extension of the indemnification to foreign subcontractors and suppliers is not a matter of practice, and would require significant and compelling justification.

B. Distribution of Approved Indemnification

After the decision is made, the Requesting PSO shall assure: 1) for NNSA contracts, that copies of the supporting documentation, the recommendation of the PSO, the concurrences of appropriate officials, and the Secretarial Memorandum of Decision are provided to the NNSA Senior Procurement Executive and General Counsel (both NNSA and DOE); and 2) for DOE contracts, that copies of the supporting documentation, the recommendation of the PSO, the concurrences of appropriate officials, and the Secretarial Memorandum of Decision are provided to the DOE Senior Procurement Executive and General Counsel. This is in addition to the normal distribution to the CO.