



POLICY FLASH

POLICY FLASH 2005M57

DATE: October 5, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Implementation of the Price-Anderson Amendments Act of 2005

SUMMARY: On August 8, 2005, the Energy Policy Act, 2005, (EPACT), Pub.L. 109-58, became law. EPACT, among other things, contained sections 601 through 610, known as the Price-Anderson Amendments Act of 2005 (PAAA 2005). The Price-Anderson Act resides at section 170d. of the Atomic Energy Act of 1954, as amended. The Price-Anderson Act indemnifies DOE's contractors and subcontractors under contracts that involve a risk of public liability for a nuclear incident. This Flash transmits Acquisition Letter 2005-15, implementing PAAA 2005.

/J/h/4) I£lls,

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachment: OMB Memo dated October 3, 2005
Acquisition Letter 2005-15



Department of Energy
Acquisition Regulation

No. AL-2005-15
Date 10/05/05

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the DOE and NNSA Procurement Executives.

Subject: Implementation of the Price-Anderson Amendments Act of 2005

References: DEAR 970.250-70, Nuclear Hazards

Indemnification Agreement.

**The Price-Anderson Amendments Act of 2005, §§ 601-611 of
the Energy Policy Act, 2005, Pub.L, 109-58,**

When is this Acquisition Letter (AL) Effective?

This AL is effective upon issuance.

When does this AL Expire?

This AL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Robert M. Webb of the Office of Procurement and Assistance Policy at (202)287-1338 or Robert.Wcbb@hg.doc.gov.

Visit our website at www.pr.doc.gov for information on Acquisition Letters and other policy issues.

What is the Purpose of this Acquisition Letter?

The purpose of this AL is to distribute a model clause that reflects the changes to the clause at DEAR 970.250-70, Nuclear Hazards Indemnity Agreement, necessary to implement the Price-Anderson Amendments Act of 2005. As used in this AL, reference to DOE includes NNSA sites.

What is the Background?

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On August 8, 2005, the Energy Policy Act, 2005, (EPACT), Pub.L. 109-58, became law. EPACT, among other things, contained sections 601 through 610, known as the Price-Anderson Amendments Act of 2005. The Price-Anderson Act resides at section 170 of the Atomic Energy Act of 1954, as amended (AEA). The Price-Anderson Act at section 170d. indemnifies DOE's contractors and subcontractors under contracts that involve a risk of public liability for a nuclear incident, as defined in the AEA. The indemnification provides a structure that assures that monies are readily available to remedy damage to the public that may occur as the result of a nuclear incident. The indemnity applies as matter of right, not dependent upon contractual implementation.

The Price-Anderson Amendments Act of 2005 (PAAA 2005) altered the indemnity in three major ways. The statute:

1. Establishes prior law, establishes a specific \$10 billion liability limit for the indemnity. Previously, the indemnification had to be computed in accordance with a statutorily prescribed computational method;
2. Directs that the Secretary adjust the indemnification at least once every five years;
3. Increases the indemnification for damage outside the United States resulting from a nuclear incident occurring within the United States or involving Federal radiological materials from \$100 million to \$500 million; and

In addition, the PAAA 2005 removes from the Secretary the duty to determine whether civil penalties for violation of DOE nuclear safety directives or regulations by other not-for-profit contractors should be remitted. It further removes the exemptions from civil penalties for seven named management and operating contractors, their subcontractors, and suppliers, reflected in Note I to the clause at 970.250-70 (JUNE 1996). In place of the named exempt entities, the PAAA 2005 provides that civil penalties for any not-for-profit contractors, subcontractors, or suppliers, as defined in the PAAA 2005, "may not exceed the total amount of fees paid within any 1-year period (as determined by the Secretary) under the contract under which the violation occurs." Lastly, the changes to civil penalties in the PAAA 2005 do not apply to any violation of the AEA occurring under a contract entered into before August 8, 2005, the date of enactment of the PAAA 2005.

What is the Guidance?

The clause at DEAR 970.250-70 (JUNE 1996) reflects the statutory indemnity prior to enactment of the PAAA. This AL transmits a replacement model clause that makes the changes necessary to conform that clause to the recent statute. Specific changes in text from the prior version have been highlighted. See Attachment 1 to this AL.

Contracting officers shall incorporate the model clause or equivalent in all solicitations and all new contracts when performance involves the risk of public liability from a nuclear incident. In those

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solicitations and contracts, there is no need for an effective date provision. See Note I(a) to the model clause.

Contracting officers shall incorporate the model clause or equivalent into existing contracts that contain the clause at 970.250-70 (JUNE 1996) and include the appropriate effective date provision required by Note I. In contracts in effect upon the effective date of this AL, the prior clause expresses the indemnity before August 8, 2005 and liability for civil penalties. The model clause expresses the revised indemnity and liability civil penalties as a result of the PAAA 2005.

Therefore, for those contracts awarded on or after August 8, 2005, but before the effective date of this AL, replace the clause at 952.250-70 or prior version with this model clause or equivalent and the effective date provision in accordance with NOTE I(b).

For contracts awarded prior to August 8, 2005, add this model clause or equivalent, leaving the clause at 950.250-70 (JUNE 1996) or prior version in the contract, in accordance with NOTE I(c).

ATTACHMENT 1-MODEL CLAUSE, IMPLEMENTING THE PRICE-ANDERSON AMENDMENTS ACT OF 2005.

DEAR 952.250-70 Nuclear hazards indemnity agreement. (OCT. 2005)

Insert the following clause in accordance with section 950.7006.

NUCLEAR HAZARDS INDEMNITY AGREEMENT

(a) *Authority.* This clause is incorporated into this contract pursuant to the authority contained in subsection 170d. of the Atomic Energy Act of 1954, as amended (hereinafter called the Act.)

(b) *Definitions.* The definitions set out in the Act shall apply to this clause.

(c) *Financial protection.* Except as hereafter permitted or required in writing by DOE, the contractor will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability, as described in paragraph (d)(2) below. DOE may, however, at any time require in writing that the contractor provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover such public liability, provided that the costs of such financial protection are reimbursed to the contractor by DOE.

(d)(1) *Indemnification.* To the extent that the contractor and other persons indemnified are not compensated by any financial protection permitted or required by DOE, DOE will indemnify the contractor and other persons indemnified against (i) claims for public liability as described in subparagraph (d)(2) of this clause; and (ii) such legal costs of the contractor and other persons indemnified as are approved by DOE, provided that DOE's liability, including such legal costs, shall not exceed the amount set forth in section 170d. of the Act, as that amount may be increased in accordance with section 170t., in the aggregate for each nuclear incident or precautionary evacuation occurring within the United States or \$500 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.

(2) The public liability referred to in subparagraph (d)(1) of this clause is public liability as defined in the Act which (i) arises out of or in connection with the activities under this contract, including transportation; and (ii) arises out of or results from a nuclear incident or precautionary evacuation, as those terms are defined in the Act.

(e)(1) *Waiver of Defenses.* In the event of a nuclear incident, as defined in the Act, arising out of nuclear waste activities, as defined in the Act, the contractor, on behalf of itself and other persons indemnified, agrees to waive any issue or defense as to charitable or governmental immunity.

(2) In the event of an extraordinary nuclear occurrence which:

(i) Arises out of, results from, or occurs in the course of the construction, possession, or operation of a production or utilization facility; or

(ii) Arises out of, results from, or occurs in the course of transportation of source material, by-product material, or special nuclear material to or from a production or utilization facility; or

(iii) Arises out of or results from the possession, operation, or use by the contractor or a subcontractor of a device utilizing special nuclear material or by-product material, during the course of the contract activity; or

(iv) Arises out of, results from, or occurs in the course of nuclear waste activities, the contractor, on behalf of itself and other persons indemnified, agrees to waive:

(A) Any issue or defense as to the conduct of the claimant (including the conduct of persons through whom the claimant derives its cause of action) or fault of persons indemnified, including, but not limited to:

1. Negligence;

2. Contributory negligence;

3. Assumption of risk; or

4. Unforeseeable intervening causes, whether involving the conduct of a third person or an act of God;

(B) Any issue or defense as to charitable or governmental immunity; and

(C) Any issue or defense based on any statute of limitations, if suit is instituted within 3 years from the date on which the claimant first knew, or reasonably could have known, of his injury or change and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. The waiver shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified.

(v) The term *extraordinary nuclear occurrence* means an event which DOE has determined to be an extraordinary nuclear occurrence as defined in the Act. A determination of whether or not there has been an extraordinary nuclear occurrence will be made in accordance with the procedures in 10 CFR part 840.

(vi) For the purposes of that determination, "offsite" as that term is used in 10 CFR part 840 means away from "the contract location" which phrase means any DOE facility, installation, or site at which contractual activity under this contract is being carried on, and any contractor-owned or controlled facility, installation, or site at which the contractor is engaged in the performance of contractual activity under this contract.

(3) The waivers set forth above:

(i) Shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action;

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(ii) Shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified;

(iii) Shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages;

(iv) Shall not apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant;

(v) Shall not apply to injury to a claimant who is employed at the site of and in connection with the activity where the extraordinary nuclear occurrence takes place, if benefits therefor are either payable or required to be provided under any workmen's compensation or occupational disease law;

(vi) Shall not apply to any claim resulting from a nuclear incident occurring outside the United States;

(vii) Shall be effective only with respect to those obligations set forth in this clause and in insurance policies, contracts or other proof of financial protection; and

(viii) Shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (A) the limit of liability provisions under subsection 170e. of the Act, and (B) the terms of this agreement and the terms of insurance policies, contracts, or other proof of financial protection.

(f) *Notification and litigation of claims.* The contractor shall give immediate written notice to DOE of any known action or claim filed or made against the contractor or other person indemnified for public liability as defined in paragraph (d)(2). Except as otherwise directed by DOE, the contractor shall furnish promptly to DOE, copies of all pertinent papers received by the contractor or filed with respect to such actions or claims. DOE shall have the right to, and may collaborate with, the contractor and any other person indemnified in the settlement or defense of any action or claim and shall have the right to (1) require the prior approval of DOE for the payment of any claim that DOE may be required to indemnify hereunder; and (2) appear through the Attorney General on behalf of the contractor or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE, the contractor or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

(g) *Continuity of DOE obligations.* The obligations of DOE under this clause shall not be affected by any failure on the part of the contractor to fulfill its obligation under this contract and shall be unaffected by the death, disability, or termination of existence of the contractor, or by the completion, termination or expiration of this contract.

(h) *Effect of other clauses.* The provisions of this clause shall not be limited in any way by, and shall be interpreted without reference to, any other clause of this contract, including the clause entitled Contract Disputes, provided, however, that this clause shall be subject to the clauses entitled Covenant Against Contingent Fees, and Accounts, records, and inspection, and any provisions that are later added to this

contract as required by applicable Federal law, including statutes, executive orders and regulations, to be included in Nuclear Hazards Indemnity Agreements.

(i) *Civil penalties.* The contractor and its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to civil penalties, pursuant to section 234A of the Act, for violations of applicable DOE nuclear-safety related rules, regulations, or orders. If the contractor is a not-for-profit contractor, as defined by section 234Ad.(2), the total amount of civil penalties paid shall not exceed the total amount of fees paid within any 1-year period (as determined by the Secretary) under this contract.

(j) *Criminal penalties.* Any individual director, officer, or employee of the contractor or of its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to criminal penalties, pursuant to section 223(c) of the Act, for knowing and willful violation of the Atomic Energy Act of 1954, as amended, and applicable DOE nuclear safety-related rules, regulations or orders which violation results in, or, if undetected, would have resulted in a nuclear incident.

(k) *Inclusion in subcontracts.* The contractor shall insert this clause in any subcontract which may involve the risk of public liability, as that term is defined in the Act and further described in paragraph (d)(2) above. However, this clause shall not be included in subcontracts in which the subcontractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170c. or k. of the Act for the activities under the subcontract.

Effective date

() See Note I below for instructions related to this section on Effective Date.

Relationship to general indemnity

() See Note I below for instructions related to this section on Relationship to General Indemnity.

(End of clause)

Note I

(a) For contracts with an award date after the effective date of Acquisition Letter 2005-15, October 4, 2005, do not include an effective date provision. Delete the title.

(b) For contracts with an award date on or after August 8, 2005, but before the effective date of Acquisition Letter 2005-15, and containing the Nuclear Hazards Indemnity Agreement clause, dated June 1996 or prior version, replace the clause at DEAR 952.250-70 with this model clause and use the EFFECTIVE DATE title and language, as follows:

"(I) Effective Date. This contract was awarded on or after August 8, 2005 and at contract award contained the clause at DEAR 952.250-70 (JUNE 1996) or prior version. That clause has been deleted and replaced with this clause. The Price-Anderson Amendments Act of 2005, described by this clause, control the indemnity for any nuclear incident that occurred on or after August 8, 2005. The Contractor's

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liability for civil penalties for violations of the Atomic Energy Act of 1954 under this contract is described by paragraph (i) of this clause.

(c) For those contracts awarded prior to August 8, 2005 and containing the Nuclear Hazards Indemnity Agreement clause, dated June 1996 or prior version, add this clause in addition to the clause at 952.250-70 or prior version and use the EFFECTIVE DATE title and language, as follows:

"(1) Effective Date. This contract was in effect prior to August 8, 2005 and contains the clause at DEAR 952.250-70 (JUNE 1996) or prior version. The indemnity of paragraph (d)(1) is limited to the indemnity provided by the Price-Anderson Amendments Act of 1988 for any nuclear incident to which the indemnity applies that occurred before August 8, 2005. The indemnity of paragraph (d)(1) of this clause applies to any nuclear incident that occurred on or after August 8, 2005. The Contractor's liability for violations of the Atomic Energy Act of 1954 under this contract is that in effect prior to August 8, 2005.

(End of note)

Note II

The following alternate will be added to the above Nuclear Hazards Indemnity Agreement clause for all contracts that contain a general authority indemnity pursuant to 950.7101. Caution: Be aware that for contracts that will have this provision added which do not contain an effective date provision, this paragraph shall be marked (1). In the event an Effective Date provision has been included, it shall be marked (m).

"() To the extent that the contractor is compensated by any financial protection, or is indemnified pursuant to this clause, or is effectively relieved of public liability by an order or orders limiting same, pursuant to 170e of the Act, the provisions of the clause providing general authority indemnity shall not apply."

(End of note)