



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH, DEVELOPMENT AND ACQUISITION
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WASHINGTON DC 20350-1000

SEP 27 2005

MEMORANDUM FOR DISTRIBUTION

Subj: AUTHORITY TO INDEMNIFY CERTAIN CONTRACTORS AND
SUBCONTRACTORS AGAINST NUCLEAR RISKS AND UNUSUALLY
HAZARDOUS RISKS ATTRIBUTABLE TO THE UTILIZATION OF
HIGH ENERGY PROPELLANTS

Encl: (1) Memorandum of Decision dated September 22 2005

The Navy's Memorandum of Decision under Public Law 85-804 for
Fiscal Year 2006, at enclosure (1), is forwarded for appropriate
action.

A handwritten signature in cursive script, appearing to read "Thomas W. Essig".

Thomas W. Essig
Director Program Analysis and
Business Transformation
Deputy Assistant Secretary of the Navy
Acquisition Management

Distribution:

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MEMORANDUM OF DECISION UNDER PUBLIC LAW 85-804

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Encl: (1) Schedule of Contractors

Subject to the following limitations, cognizant Contracting Officers are authorized during Fiscal Year 2006 to include in prime contracts described in the next paragraph contract provisions for the indemnification of the contractors listed in enclosure (1) and their subcontractors of any tier. The indemnity provided is against losses, not compensated by insurance or otherwise, for claims by third persons for death and personal injury and for loss of, damage to, or loss of use of the Government's, the contractor's or subcontractor's property, arising out of and resulting from nuclear risks, or from unusually hazardous risks attributable to the utilization of high energy propellants, or from both. This action is authorized pursuant to Public Law 85-804, Executive Order 10789 as amended by Executive Order 11610, Federal Acquisition Regulation (FAR) Part 50 and Department of Defense FAR Supplement Part 250.

This decision is limited to prime contracts by or for the Navy for:

- a. procurement of nuclear-powered vessels or components thereof; or
- b. procurement of POLARIS, POSEIDON, TRIDENT or Tomahawk Cruise Missiles, or components thereof, or other components or subcomponents of the POLARIS, POSEIDON, TRIDENT or Tomahawk Cruise Missile weapon systems; or
- c. repair, modification, support or services relating to nuclear-powered vessels, POLARIS, POSEIDON, TRIDENT or Tomahawk Cruise Missiles or other components of the POLARIS, POSEIDON, TRIDENT or Tomahawk Cruise Missile weapon systems or components thereof.

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As used in this decision:

a. "nuclear risks" are those risks attributable to the radioactive toxic, explosive, or other hazardous properties of "special nuclear material," "by-product material" or "source material," as such materials are defined in the Atomic Energy Act of 1954, as amended.

b. "unusually hazardous risks" are the risks of explosion, detonation, burning or propulsion attributable to the utilization of high energy propellants in (i) POLARIS, POSEIDON, TRIDENT, or Tomahawk Cruise Missiles, or of any component thereof, or (ii) propellant-powered POLARIS, POSEIDON, TRIDENT or Tomahawk Cruise test missiles or of any component thereof, or (iii) any other component or subcomponent of the POLARIS, POSEIDON, TRIDENT or Tomahawk Cruise Missile weapon systems which uses high energy propellants.

This decision is based upon the condition that each listed contractor maintains financial protection of the types set forth in enclosure (1). Further, if the amount of coverage for any contractor is reduced by more than 10%, this class decision shall no longer apply to that contractor and any indemnification of that corporation under Public Law 85-804 shall be made only upon separate request to and decision by the Secretary of the Navy. Regardless of the amount involved, Contracting officers shall notify the Office of the Deputy Assistant Secretary of the Navy for Acquisition Management of all changes in coverage made by any listed contractor.

This decision does not authorize (i) amendments without consideration within the meaning of FAR Part 50, Subpart 50.3; (ii) indemnification under any contract or subcontract against any incidents occurring before indemnification provisions, as authorized herein, are included in such contract or subcontract; or (iii) indemnification under research or development contracts against claims, losses or damage when indemnity is available under 10 United States Code Section 2354.

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Indemnification of subcontractors may be provided under authority of this decision only when:

a. the government will receive the benefits of any cost savings to the subcontractors, the prime contractor and all higher tier subcontractors resulting from such subcontractor indemnification, and

b. either:

(1) the subcontract is a new subcontract entered into hereafter, or

(2) the subcontract contains an express provision for the inclusion of such subcontractor indemnification without further consideration, which provision was included in the subcontract as originally written prior to the date of this Memorandum of Decision pursuant to express provision therefore in the prime contract and in each higher tier subcontract.

c. The limitations on indemnification of subcontractors may be accomplished by withholding approval required in the prime contracts for such subcontractor indemnification.

d. All contract indemnification clauses shall comply with applicable provisions of FAR Part 50, Subpart 50.4.

e. The requirements of FAR 50.307 shall be complied with.

When indemnification provisions are included in a prime contract pursuant to the authority of this decision, the cognizant purchasing office shall immediately submit to the Contract Adjustment Board a report referencing this Memorandum of Decision and containing the following information: (i) name and address of the contractor, (ii) cognizant purchasing office, (iii) contract number and date, and (iv) a brief description of the supplies or services procured under the contract.

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The actual or potential cost of the actions hereby authorized is impossible to estimate since it is contingent upon the occurrence and extent of loss resulting from nuclear incidents or unusually hazardous incidents attributable to the utilization of high-energy propellants. Such incidents may never occur; but in the event of a major event, many millions of dollars could be involved.

I find that this action will facilitate the national defense. In the event of a major incident arising from nuclear risks or unusually hazardous risks attributable to the utilization of high-energy propellants, the possible claims against and loss to the contractors and subcontractors could be so large that the full potential risks would exceed available insurance leaving the contractors' and subcontractors' financial and productive ability in jeopardy. The principle of indemnification against risks of this kind is recognized in Executive Orders 10789, 11610 and Congressional Committee reports recommending passage of Public Law 85-804.

This decision supersedes the memorandum of September 30, 2004.



9-22-05