

PUBLICATION

DOE Extends 85-804 Indemnification to Contractors Supporting COVID-19 Response

April 3, 2020

On March 26, the Secretary of Energy authorized Department of Energy (DOE) contracting officers to extend indemnification under Public Law 85-804 to contractors and subcontractors performing assignments directed or authorized by DOE or the National Nuclear Security Administration (NNSA) in response to COVID-19.

The government is only authorized to indemnify contractors pursuant to Public Law 85-804 when "the approving official [in this case, the Secretary of Energy] determines that the contractor shall be indemnified against unusually hazardous or nuclear risks." FAR 50.104-4. When contracts include the clause implementing Public Law 85-804 indemnification located at FAR 52.250-1, the contractor is indemnified against:

1. Claims (including reasonable expenses of litigation or settlement) by third persons (including employees of the contractor) for death, personal injury, or loss of, damage to, or loss of use of property
2. Loss of, damage to, or loss of use of contractor property, excluding loss of profit
3. Loss of, damage to, or loss of use of government property, excluding loss of profit. FAR 52.250-1(b).

In order to qualify for indemnification, the claim, loss, or damage must (1) arise out of or result from a risk defined in their contract as unusually hazardous or nuclear, and (2) not be compensated for "by insurance or otherwise." 52.250-1(c). Another limitation on a contractor's ability to qualify for indemnification in Public Law 85-804 is that contractors will not be reimbursed for (1) claims against the contractor by the government, or (2) losses to the contractor's property when such actions are the result of "willful misconduct or lack of good faith on the part of any of the contractor's principal officials." 52.250-1(d). It should be noted that the contractor's "principal officials" is a small subset of very senior company representatives who supervise or direct:

4. All or substantially all of the contractor's business
5. All or substantially all of the contractor's operations at any one plant or separate location in which this contract is being performed
6. A separate and complete major industrial operation in connection with the performance of this contract.

The Secretary's extension of Public Law 85-804 indemnification to COVID-19 response activities is noteworthy because DOE has generally applied such indemnification to contractors' hazardous nuclear activities or extremely hazardous environmental activities. In making the determination that COVID-19 response is unusually hazardous, the [Secretary said the following](#):

The unprecedented magnitude and challenges associated with responding to COVID-19 present significant potential – even if remote – liability risks to the Department's contractors and their subcontractors that have been or may be requested to assist in response activities and related supporting roles. The nature and magnitude of the COVID-19 pandemic indicate that unusually hazardous risks are involved and that all actors, including the Department's contractors and their subcontractors, may be exposed to potentially large claims and legal liabilities for which no insurance is readily available. Furthermore, the nature and magnitude of the

COVID-19 pandemic exposes all aspects of American society to potentially serious disruptions, including activities at DOE and elsewhere vital to national defense.

DOE contractors engaged in COVID-19 response activities should consult their contracting officers to request contract modifications to include Public Law 85-804 protection from claims arising out of COVID-19 response activities.

Contractors with questions about DOE's extension of Public Law 85-804 indemnification to COVID-19 response activities should contact the author, another member of the [Baker Donelson Government Contracts Team](#), or their existing Baker Donelson attorney. Also, for more information visit the [Coronavirus \(COVID-19\): What You Need to Know information page](#) on our website.