

# BRIEFING PAPERS

## SECOND SERIES

THOMSON  
WEST

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

### RISK MITIGATION APPROACHES FOR GOVERNMENT CONTRACTORS

By Agnes P. Dover and Thomas L. McGovern III

Contracting with the Federal Government often involves unique risks and uncertainties. Today, contractors supporting contingency operations overseas are faced with claims by U.S. military personnel and their families for injuries caused by their activities in support of the mission.<sup>1</sup> This type of exposure is heightened as contractors have become more heavily involved in homeland security and biodefense-related tasks involving handling of hazardous materials that may subject private businesses to potentially large third-party claims for injury, death, or property damage.<sup>2</sup> Thus, the topic of risk mitigation approaches for Government contractors is timely and important. This BRIEFING PAPER discusses indemnification and other contractual risk allocation, statutory immunities and limitations on liability, and common-law defenses. It provides background information on these risk mitigation tools available to Government contractors and also addresses recent developments, including court and board of contract appeals decisions illustrating the issues faced by contractors when relying on these tools.

#### IN BRIEF

##### Indemnification For Contractors

- Public Law 85-804
- Price-Anderson Act
- Indemnification For R&D Projects
- Contractual Allocation of Risk—FAR 52.228-7

##### Statutory Immunities & Limitations On Liability

- SAFETY Act
- PREP Act
- Defense Base Act

##### Common-Law Defenses

- Government Contractor Defense
- Combatant Activities Exception
- Political Question Doctrine
- Westfall/Governmental Function Defense

#### Indemnification For Contractors

In commercial contracting, contractual indemnification is an important risk mitigation tool. Its use in Government contracts, however, is circumscribed by the Anti-Deficiency Act, which precludes federal agencies from entering into a contract or other obligation exceeding available appropriated funds or before an appropriation is made.<sup>3</sup> In other words, the Government is prohibited from entering into open-ended indemnification agreements, unless Congress expressly permits such agreements. The traditional exceptions, discussed below, cover activities to “facilitate

*Agnes P. Dover and Thomas L. McGovern III are partners in the Washington, D.C. office of Hogan & Hartson, LLP. The authors gratefully acknowledge the invaluable assistance of their colleagues, Todd Overman and Steve Williams, in preparation of this BRIEFING PAPER.*

the national defense” under Public Law 85-804,<sup>4</sup> nuclear-related work under the Price-Anderson Act,<sup>5</sup> and certain research and development work under 10 U.S.C.A. § 2354.

### ■ Public Law 85-804

P.L. 85-804 grants the President the authority to authorize federal agencies involved in the national defense “to enter into contracts or into amendments or modifications of contracts... and to make advance payments...without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever...such action would facilitate the national defense.”<sup>6</sup> P.L. 85-804 also provides the President the ability to authorize federal agencies to indemnify public contractors against unusually hazardous or nuclear risks. P.L. 85-804, therefore, is an exception to the general rule providing that the Government may not enter into open-ended indemnification agreements.

P.L. 85-804 has been implemented by a series of Executive Orders, beginning with Executive Order 10789, issued by President Eisenhower in 1958.<sup>7</sup> Executive Order 11610, issued by President Nixon in 1971, authorized the Department of Defense, the National Aeronautics and Space Administration, the General Services Administration, and a handful of other federal agencies to provide indemnification to contractors for “unusually hazardous or nuclear risks” without regard to the availability of appropriated funds.<sup>8</sup> In October 2001, President Bush in Executive Order 13232 extended P.L. 85-804 authority to the Department of Health and Human Services.<sup>9</sup> However, on February 28, 2003, in Executive Order 13286, he constrained the ability of the

HHS and other non-DOD agencies to enter into indemnification agreements by indicating that indemnification will not be available for “any matter that has been, or could be, designated...as a qualified anti-terrorism technology” pursuant to the SAFETY Act (discussed below).<sup>10</sup> This same Executive Order also extended P.L. 85-804 authority to the newly created Department of Homeland Security.<sup>11</sup>

Although indemnification under P.L. 85-804 is sparingly provided, it is a relatively comprehensive form of risk mitigation. The process under which indemnification is requested and negotiated is set forth in Part 50 of the Federal Acquisition Regulation. In general, the contractor must provide the Government with a description of the unusually hazardous or nuclear risks associated with the project and detailed information regarding available insurance coverage.<sup>12</sup> The Secretary of the cognizant agency must determine that the indemnity is necessary “to facilitate the national defense,” and that determination is discretionary and made on a case-by-case basis.<sup>13</sup>

If approved, the contract is amended to include the “Indemnification Under Public Law 85-804” clause at FAR 52.250-1, which provides indemnification for third-party claims (including litigation costs) for death, personal injury, or loss of, damage to, or loss of use of property that results from the unusually hazardous or nuclear risk defined in the contract. Importantly, the indemnity applies only to the extent that the claims exceed the contractor’s available insurance coverage,<sup>14</sup> and it does not cover claims that result from willful misconduct or lack of good faith on the part of the contractor’s principal officers.<sup>15</sup>



### BRIEFING PAPERS

*This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.*

BRIEFING PAPERS® (ISSN 0007-0025) is published monthly except January (two issues) and copyrighted © 2007 ■ Valerie L. Gross, Editor ■ Periodicals postage paid at St. Paul, MN ■ Published by Thomson/West / 610 Opperman Drive, P.O. Box 64526 / St. Paul, MN 55164-0526 ■ <http://www.west.thomson.com> ■ Customer Service: (800) 328-4880 ■ Postmaster: Send address changes to Briefing Papers / PO Box 64526 / St. Paul, MN 55164-0526

BRIEFING PAPERS® is a registered trademark used herein under license. All rights reserved. Reproduction, storage in a retrieval system, or transmission of this publication or any portion of it in any form or by any means, electronic, mechanical, photocopy, xerography, facsimile, recording or otherwise, without the written permission of Thomson/West is prohibited. For authorization to photocopy, please contact the Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, (978)750-8400; fax (978)646-8600 or West’s Copyright Services at 610 Opperman Drive, Eagan, MN 55123, fax (651)687-7551.

In a 2006 case involving an indemnification claim under P.L. 85-804, *The Boeing Co.*,<sup>16</sup> the Armed Services Board of Contract Appeals rejected the Government's argument that the board lacked jurisdiction to hear a P.L. 85-804 indemnification claim, and, in doing so, it focused on the distinction between a contract *breach* claim and a contract *adjustment* claim brought under P.L. 85-804. The facts giving rise to this case began in 1966, when the Air Force awarded several contracts to Boeing for the development and production of the nuclear Short Range Attack Missile (SRAM). Each contract contained a P.L. 85-804 indemnification clause covering claims regarding death, injury, and destruction or loss of property resulting from the performance of unusually hazardous risks in accomplishing the contracts. Among other listed risks, the clause identified the risks associated with use of toxic or other hazardous chemicals or energy sources. Boeing flowed down this provision to Lockheed Propulsion Company, a division of Lockheed Aircraft Corporation and predecessor of Lockheed Martin Corporation, in a subcontract for the development and production of the missile's propulsion system at a plant in Redlands, California. After the Redlands plant was closed and sold at the end of the production in 1975, two hazardous chemicals that had been used in the production of the missile engines were discovered in the groundwater in the Redlands area, and Lockheed was required to take remedial action by the local water board. Lockheed was only able to recover a portion of its investigation and remediation costs from its insurance carriers and subsequently sought reimbursement and protection from past and anticipated toxic tort suits pursuant to the P.L. 85-804 provision in its subcontract.

Lockheed, which proceeded against the Government under claims sponsored by Boeing, alleged that the Government breached each of the SRAM contracts by refusing to honor its obligations under the P.L. 85-804 indemnification provision. The Government responded that (a) the ASBCA lacked jurisdiction to hear the indemnification claim, (b) any contractual relief required executive branch authorization pursuant to P.L. 85-804, and (c) the Anti-Deficiency Act precluded relief because the contract contained an open-ended indemnification clause.

The Government argued that the ASBCA lacked jurisdiction because all relief under P.L. 85-804 should be considered a nonreviewable "contract adjustment" that must be granted or denied internally by the agency's contract adjustment board. Under P.L. 85-804, any contract adjustment over \$50,000 requires approval by an official at or above the Assistant Secretary level or by an agency contract adjustment board, with any adjustment over \$25 million requiring prior notification of congressional oversight committees.<sup>17</sup> The Government contended that these provisions applied *postaward* and that there could be no indemnification payout without the requisite approval. In rejecting this argument, the ASBCA first distinguished between a "contract adjustment" decision, over which it conceded no jurisdiction, and a breach of contract claim, which the board properly could consider. With respect to the lack of approval argument, the ASBCA held that the requisite approval was granted *before* inclusion of the indemnification provisions in the contracts. Thus, Boeing was properly before the board to enforce those approved contract provisions. To hold otherwise, the board pointed out, would eviscerate the protections afforded by the clause by giving the Government a "two-bites-at-the-apple" approval process, one preaward, the other postclaim.

The ASBCA also rejected the Government's Anti-Deficiency Act preclusion argument, noting that the Anti-Deficiency Act could only serve as an affirmative defense, not a jurisdictional preclusion. The board went on to note the availability of the judgment fund for the payment of claims under the Contract Disputes Act<sup>18</sup> and the specific *exemption* to the Anti-Deficiency Act for indemnifications under P.L. 85-804.<sup>19</sup> Accordingly, the board rejected the lack of jurisdiction claim and denied the Government's motion to dismiss.

### ■ Price-Anderson Act

The Price-Anderson Act authorizes the Department of Energy to indemnify contractors for liabilities arising out of a nuclear incident,<sup>20</sup> which is defined as "any occurrence...within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss

or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive or other hazardous properties of source, special nuclear or byproduct material.”<sup>21</sup> Similar to P.L. 85-804, indemnities under the Price-Anderson Act are not subject to the Anti-Deficiency Act, which prohibits agencies from making contractual commitments in excess of appropriated funds.<sup>22</sup> As implemented in the DOE’s acquisition regulations,<sup>23</sup> Price-Anderson Act indemnity covers “public liability” in the event of a nuclear incident or precautionary evacuation in the United States that arises out of or in connection with activities under the contract.<sup>24</sup> The indemnity provided under the DOE contract clause is mandatory.<sup>25</sup>

“Public liability” is broadly defined and includes “any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation.”<sup>26</sup> Coverage extends to damage to property or persons, but does not reach workers’ compensation claims or claims arising out of an act of war.<sup>27</sup> The liability ceiling and indemnity amount for DOE contractors is currently approximately \$10 billion per incident.<sup>28</sup> Unlike P.L. 85-804, the Price-Anderson Act does not contain a “carve out” for bad faith or willful misconduct.<sup>29</sup> In the event of an “extraordinary nuclear occurrence,” the DOE may coordinate procedures for prompt payment of claims, require the indemnified contractor to waive certain defenses, and seek consolidation of all claims in the local federal district court.<sup>30</sup> The intent of this authority is to ensure that claims are paid promptly, without regard to fault, and that the indemnified contractor incurs no undue defense burden.

#### ■ Indemnification For R&D Projects

Under 10 U.S.C.A. § 2354, the DOD may indemnify research and development contractors for “[c]laims (including reasonable expenses of litigation or settlement) by third persons, including employees of the contractor, for death, bodily injury, or loss of or damage to property, from a risk that the contract defines as unusually hazardous.”<sup>31</sup> Identical authority was extended to the HHS pursuant to 42 U.S.C.A. § 241(a)(7), which grants the Secretary of the HHS authority to “enter into contracts, including contracts for research in accordance with and subject to the provisions of law applicable to contracts

entered into by the military departments under [10 U.S.C.A. §] 2354.” Both indemnification authorities, however, are subject to the availability of appropriated funds.<sup>32</sup>

#### ■ Contractual Allocation of Risk—FAR 52.228-7

Contractors may also obtain a contractual agreement from the Government to cover claims asserted by third parties for *defined risks*, i.e., those risks specifically called out in the contract. However, as discussed above, under the Anti-Deficiency Act, the Government’s maximum liability, absent statutory authority, must be capped (as opposed to open-ended or unlimited).<sup>33</sup> Typically, contract clauses state that indemnification obligations are *subject to availability of funds* and impose no obligation to appropriate additional funds to cover the contractor’s losses.

In cost-type contracts (other than construction or architect-engineer contracts), the Government typically self-insures for liability to third parties above and beyond that covered by contractually required insurance by inserting the FAR 52.228-7 “Insurance—Liability to Third Persons” clause.<sup>34</sup> Under FAR 52.228-7, a contractor is reimbursed not only for the cost of the insurance expressly required for (and allocable to) the contract, but also for any *uninsured* liabilities to third persons arising out of contract performance.<sup>35</sup> However, unlike P.L. 85-804 indemnification, this reimbursement is subject to the availability of appropriated funds at the time the liability arises.<sup>36</sup> Interestingly, there have been no recent decisions interpreting the application of FAR 52.228-7.

With respect to whether funds in fact are “available,” the agency has an obligation to look beyond those funds appropriated for the specific contract. In *Cherokee Nation of Oklahoma v. Leavitt*,<sup>37</sup> the U.S. Supreme Court held that where Congress had appropriated sufficient legally unrestricted funds to pay the contracts in question, the Government could not avoid its contractual obligation to pay contract support costs on grounds of “insufficient appropriations.” The Court also suggested that if there are *any* available funds to satisfy contractual obligations, even if it requires a fiscally difficult tradeoff, then there are no grounds for rejection of the claim based on “insufficient appropriations.”



## Statutory Immunities & Limitations On Liability

In contrast to indemnification laws, which provide for *reimbursement* to contractors for third-party liabilities, several laws address risk issues either by extending governmental *immunity* to contractors or by otherwise *limiting* liability to third parties.

### ■ SAFETY Act

One law providing limited immunity, as well as meaningful limitations on liability from third party lawsuits, is the Support Antiterrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act).<sup>38</sup> This law was enacted as part of the Homeland Security Act of 2002<sup>39</sup> with the purpose of encouraging the development of anti-terrorism products and services by providing liability protections for sellers (and purchasers) of qualified anti-terrorism technologies (QATTs). These technologies are broadly defined to include any product or service that is used for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause.<sup>40</sup>

In the summer of 2006, the DHS issued the final rule implementing the SAFETY Act<sup>41</sup> and released a revised SAFETY Act Application Kit.<sup>42</sup> The final rule clarified some open issues, but also has left some unanswered questions that hopefully will be addressed in future guidance from the DHS. FAR Case 2006-023, which will implement the DHS regulations in the FAR, is currently pending and will likely address issues raised by the final rule.

(a) *Basic SAFETY Act Protections*—The Act provides two basic types of liability protections. First, for those QATTs that receive a “designation,” the protections include (1) exclusive jurisdiction in federal district courts for lawsuits related to acts of terrorism, (2) limitation on damages to the amount of the seller’s insurance coverage (an amount that is determined by the Government) and reduction in the recovery by the amount of any collateral compensation, (3) requirement of proof of physical harm for recovery of non-economic damages (e.g., pain and suffering), and (4) prohibition on punitive damages and

prejudgment interest.<sup>43</sup> These protections will apply to any deployment of a QATT that occurs on or after the effective date of the designation, even if the seller originally sold the technology or provided the services before the effective date of such designation. However, the ability to take advantage of the liability protections is limited to situations involving an “act of terrorism.”<sup>44</sup>

Second, once a product or service is “designated” a QATT, it may also be “certified” and placed on the Approved Product List for Homeland Security.<sup>45</sup> A rebuttable presumption of the “Government contractor defense” applies to certified products or services.<sup>46</sup> This is an *immunity* defense—co-extensive with the common-law “Government contractor defense”—that permits the seller to escape tort liability for harm caused by products manufactured in conformance with Government specifications or certain Government-approved specifications. The premise is that if a contractor works according to specifications provided by the Government, it should be protected by the Government’s immunity to the same extent the Government would be if it had performed the work itself. Once certified, the immunity applies in perpetuity to all deployments of the technology that occur on or after the effective date, as long as the technology was sold by the seller before the certification’s expiration or termination.<sup>47</sup>

In return for the liability protections, the seller must obtain a required level of insurance in an amount necessary to “satisfy otherwise compensable third-party claims arising out of, relating to, or resulting from an Act of Terrorism when Qualified Anti-Terrorism Technologies have been deployed in defense against, response to, or recovery from, such act.”<sup>48</sup> The specific amount of insurance is determined by the DHS and specified in the seller’s designation.<sup>49</sup>

(b) *What Qualifies for SAFETY Act Protection?*—A QATT is defined in the DHS regulations as “any Technology (including information technology) designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause.”<sup>50</sup> The DHS Secretary is empowered to “designate” and “certify” QATTs.<sup>51</sup> In determining whether to grant a designation, the DHS will evaluate (1) prior Govern-

ment use or demonstrated substantial utility and effectiveness, (2) availability of the technology for immediate deployment, (3) existence of extraordinarily large or unquantifiable potential third-party liability risk exposure to the seller or other provider of the technology, (4) substantial likelihood that the technology will not be deployed absent SAFETY Act protections, (5) magnitude of risk exposure to the public if the technology is not deployed, (6) extent to which scientific studies support the capability of the technology to substantially reduce risks of harm, (7) whether the technology is effective in facilitating defense against acts of terrorism, and (8) determinations made by federal, state, or local officials that the technology is appropriate for the purpose of preventing or identifying acts of terrorism.<sup>52</sup>

Designation is a prerequisite for granting certification.<sup>53</sup> In determining whether to grant certification, the DHS will review the design of the QATT and determine whether it (a) will perform as intended, (b) conforms to the seller's specifications, and (c) is safe for use as intended.<sup>54</sup> Certification is valid for the same period as the designation, and the seller may apply for renewal in connection with the renewal of a related designation.<sup>55</sup>

(c) *Highlights of the Final Rule*—The final rule implementing the SAFETY Act was issued on June 8, 2006, and became effective on July 10, 2006.<sup>56</sup> Among other things, the final rule clarified the liability protections available under the Act, summarized the DHS's efforts to protect applicants' confidential information, intellectual property, and trade secrets, and streamlined the SAFETY Act application process. The final rule confirmed many aspects of the interim rule<sup>57</sup> but also made some noteworthy enhancements.

First, the DHS revised provisions on the effect of a "significant modification" on the designation or certification of a QATT. The interim rule provided for automatic termination of SAFETY Act protection if a "significant modification" was made to a QATT (defined as a modification that could significantly reduce the technology's safety or effectiveness), unless the seller notified the DHS and received approval of the modification.<sup>58</sup> Responding to comments from the American Bar Association and others, the final

rule eliminated language from the regulations that suggested that a designation or certification could terminate automatically and retroactively to the time of the modification and without notice.<sup>59</sup> The DHS stressed that modifications that do not cause the QATT to be outside the scope of the QATT's designation or certification will not adversely affect SAFETY Act coverage, nor do such modifications require notification to the Department.<sup>60</sup> The final rule did not, however, eliminate the requirement that a seller provide notice to the DHS if the seller intends to make, or has made, a modification that would cause the QATT to be outside the scope of the original designation or certification.<sup>61</sup>

Second, the DHS confirmed its interpretation that an "act of terrorism" potentially encompasses acts that occur outside of the United States. Specifically, the Act is concerned more with where the *effects* of a terrorist act are experienced rather than where a particular act may have occurred. Thus, an act on foreign soil may be deemed an "act of terrorism" for purposes of the SAFETY Act provided that it causes harm in the United States. The DHS indicated that "harm" in this context included harm to financial interests.<sup>62</sup>

Third, the final rule addressed the relationship between the SAFETY Act's liability protections and P.L. 85-804 indemnification. As noted above, Executive Order 13286 revised Executive Order 10789 to state that no technology that has been, or could be, designated as a QATT would be considered for indemnification under P.L. 85-804 (except by the DOD) until "(i) the Secretary of Homeland Security has advised whether the use of the authority provided under [the SAFETY Act] would be appropriate, and (ii) the Director of the Office and Management and Budget has approved the exercise of authority under this order."<sup>63</sup> To help resolve this apparent obstacle to applying for P.L. 85-804 protection, the final rule stated that the DHS will entertain requests for a "Notice of Inapplicability of SAFETY Act Designation," which would allow entities to obtain a statement from the DHS regarding the inappropriateness of SAFETY Act designation for a technology in a particular context.<sup>64</sup> The final rule also acknowledged that some technologies involve unusually hazardous risks, independent of an act of terrorism, and that both the SAFETY Act

and P.L. 85–804 could be applicable to the same technology for different risks at the same time.<sup>65</sup>

Fourth, the final rule established a streamlined process for providing SAFETY Act coverage for qualified sellers of certain categories of technologies. The purpose of a “Block Designation” or “Block Certification” is to notify potential sellers of the subject QATT that the DHS has determined that the QATT satisfies the technical criteria for either certification or designation and that no additional technical analysis will be required in evaluating applications from potential sellers of that QATT.<sup>66</sup> “Block Designations” and “Block Certifications” may be issued in response to an application from a seller and/or at the Secretary’s discretion and will be published at <http://www.safetyact.gov> within 10 days of issuance.<sup>67</sup>

Fifth, the final rule incorporated several provisions that establish a flexible approach for coordination of SAFETY Act applications within the traditional procurement process. For instance, a Government agency can seek a preliminary determination of SAFETY Act applicability (through a “Pre-Qualification Designation Notice”) with respect to a technology to be procured. The notice will (a) enable the selected contractor to receive expedited review of a streamlined application for SAFETY Act coverage and (b) in most instances, establish the presumption that the technology under consideration constitutes a QATT.<sup>68</sup> In addition, if the technology has previously received a “Block Designation” or “Block Certification,” or the technology is based on established, well-defined specifications, the DHS may indicate in DHS procurements, or make recommendations with respect to procurements of other agencies, that the contractor providing such technology will receive designation or certification with respect to the technology, provided the contractor satisfies the other SAFETY Act requirements.<sup>69</sup> Finally, the DHS may unilaterally determine that the subject of a procurement is eligible for SAFETY Act protections and give notice of such determination in connection with the solicitation.<sup>70</sup>

#### ■ PREP Act

In the final hours of its 2005 session, Congress adopted a new liability protection measure for enti-

ties that produce and administer biological countermeasures as part of the Department of Defense Appropriations Act, 2006.<sup>71</sup> The Public Readiness and Emergency Preparedness Act (PREP Act) is a follow-on to the Project BioShield Act of 2004,<sup>72</sup> which was intended to encourage the development of products to counter bioterrorism threats. The PREP Act provides two new, potentially broad liability protections: (1) immunity from liability for losses arising out of the administration or use of a “declared” covered countermeasure, and (2) an alternative compensation system for those injured from the administration or use of covered countermeasures.

Specifically, the liability protection provides that a “covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration...has been issued with respect to such countermeasure.”<sup>73</sup> The only exception to the immunity is for a federal cause of action against a “covered person” for death or serious physical injury that is proximately caused by willful misconduct.<sup>74</sup>

(1) *Secretary’s Declaration*—As mentioned above, a key limitation on the liability protection is that it is available for the administration or use of a covered countermeasure only during the period and in accordance with a declaration issued by the Secretary of the HHS. Specifically, if the Secretary determines that a disease, health condition, or other threat to health constitutes—or may in the future constitute—a public health emergency, the Secretary may make a declaration recommending the administration or use of a covered countermeasure.<sup>75</sup>

The declaration must identify for each covered countermeasure the disease or health condition against which the countermeasure should be used, the effective immunity period, the entities for which immunity would apply, and the geographic area or areas for which the immunity applies with respect to the administration or use of the covered countermeasure.<sup>76</sup> The Secretary’s decision with respect to the scope or duration of a declaration is not subject to judicial review, but the Secretary must notify the appropriate con-

gressional committees within 30 days of making a declaration and publish the declaration in the *Federal Register*.<sup>77</sup>

When deciding what qualifies for a declaration, the only guidance provided by the PREP Act is that the Secretary must consider the “desirability of encouraging” the development or manufacture of a specific countermeasure.<sup>78</sup> No guidance is included on what type of disease, health condition, or threat may constitute a public health emergency. Furthermore, the PREP Act does not establish any procedures or offer the public any mechanism for requesting that the Secretary issue a declaration. Although rulemaking likely will answer some of these questions, the HHS has not yet issued any proposed rules to implement the Act.

(2) *Willful Misconduct Exception to Immunity*—In the event the Secretary issues a declaration for a specific covered countermeasure, the only exception to the covered person’s immunity applies when a plaintiff can provide clear and convincing evidence of “willful misconduct” on the part of the covered person that resulted in death or serious physical injury to the plaintiff.<sup>79</sup> The Act establishes an exacting definition for what constitutes willful misconduct: Only those acts or omissions that are undertaken “intentionally to achieve a wrongful purpose,” “knowingly without legal or factual justification,” and “in disregard of a known or obvious risk so great as to make it highly probable that the harm will outweigh the benefit.”<sup>80</sup> In addition, the Secretary, in consultation with the Attorney General, is directed to develop regulations that “further restrict” the definition, describing the scope of acts or omissions that “may qualify as willful misconduct” for purposes of the authorized civil suit.<sup>81</sup> Although the Act directed that the rulemaking process should be complete by June 30, 2006,<sup>82</sup> as of this writing the HHS has not published any regulations regarding what constitutes “willful misconduct” under the Act.

With respect to the exclusive federal cause of action for “willful misconduct,” the Act also imposes several procedural and choice-of-law requirements. For instance, the action must be filed in the U.S. District Court for the District of Columbia and will be governed by the law of the state in which the alleged willful misconduct occurred, unless such law is inconsistent with or preempted by federal law.<sup>83</sup>

In addition, the Act imposes heightened pleading requirements, including a requirement that each element of the claim be pled with particularity, including the specific acts or omissions constituting willful misconduct by each defendant and facts supporting proximate causation with respect to serious physical injury or death.<sup>84</sup> The plaintiff must also file an affidavit attesting to the truth of the facts alleged, as well as an affidavit from a medical expert on proximate causation and certified medical records evidencing serious physical injury or death.<sup>85</sup>

If a plaintiff proves willful misconduct, any recovery is reduced by the amount of any collateral source benefits (e.g., private insurance) received by the plaintiff.<sup>86</sup> With respect to any noneconomic damages, including pain and suffering and other nonpecuniary damages, the defendant’s liability must be proportional to the percentage of its responsibility for the harm to the plaintiff.<sup>87</sup>

(3) *Alternative Compensation System*—Before bringing a lawsuit for willful misconduct against a covered person, the plaintiff must exhaust the remedies provided under the Act’s alternative compensation scheme, the covered countermeasure process.<sup>88</sup> The Act requires that upon the issuance of a declaration, an emergency fund, entitled the “Covered Countermeasure Process Fund,” be established to provide compensation to individuals who suffer injuries as the result of the administration or use of a covered countermeasure.<sup>89</sup> Although the PREP Act provides for the creation of the fund, it did not appropriate any money for it.

The requirement for plaintiffs to exhaust their administrative remedies is waived if Congress fails to fund the compensation program or if the Secretary fails to make a final determination on a claim for compensation within 240 days after such request is filed.<sup>90</sup> Nonetheless, if a plaintiff receives and accepts an award under the compensation program, the plaintiff may not file suit against a covered person under the willful misconduct exception.<sup>91</sup>

(4) *Use of the PREP Act To Facilitate Biodefense Initiatives*—The jury is still out on the usefulness of the PREP Act to spur biological countermeasure



development. As of early 2007, the HHS had not yet issued the required regulations setting forth what constitutes willful misconduct and has not provided any further guidance on how it plans to make PREP Act declarations. However, on February 1, 2007, HHS issued the first declaration under the Act—for avian flu (H5N1) vaccine—and specifically identified a number of Government-funded H5N1 vaccine development contracts that would be covered by the Act's protections.<sup>92</sup>

### ■ Defense Base Act

In view of the unprecedented contractor support of U.S. military forces deployed in the Middle East, tort cases filed by contractor employees or their estates not surprisingly are now being litigated. One law with the potential to limit the liability of contractors for injuries sustained by their deployed personnel is the Defense Base Act,<sup>93</sup> which was enacted in 1941 to provide compensation to injured contractor employees or their dependents for disability or death due to an injury occurring on U.S. military bases outside the United States. If an injured worker is covered under the DBA, the worker is generally entitled to the benefits and procedures set forth in the Longshore & Harbor Workers' Compensation Act.<sup>94</sup> The LHWCA is supposed to provide the exclusive remedy against a qualifying employer for injury or death of the employee.<sup>95</sup> In addition, the DBA expressly excludes liability of employers under "the workmen's compensation law of any State."<sup>96</sup> In place of recovery under state workers' compensation and tort law, the liability of an employer is limited to medical and disability benefits, statutory death benefits, payment for reasonable funeral expenses, and compensation payments to surviving eligible dependents.<sup>97</sup> The benefits are determined and adjudicated through a comprehensive scheme administered by the Department of Labor.

Significant questions concerning whether federal contractors can be sued in state court for injuries or deaths presumably covered by the DBA's compensation scheme were the subject of litigation in 2006 in the U.S. Court of Appeals for the Fourth Circuit. In *Nordan v. Blackwater Security Consulting*,<sup>98</sup> the estates of deceased contractor employees sued in state court for wrongful death and fraud, claiming that the deaths resulted from Blackwater's failure to provide the equipment,

maps, and logistical information required by the contract. Blackwater sought to remove the claims to federal district court, arguing that they were preempted by the DBA, or, alternatively, that they involved a unique federal interest that could be addressed only in federal court.

After reviewing the exclusive scheme set out by the DBA for compensation claims, the federal district court in North Carolina noted that missing from the DBA was any provision for a federal cause of action that could be brought in federal district court. Relying upon the Fourth Circuit's view that "the *sine qua non* of complete preemption is a pre-existing federal cause of action *that can be brought in the district courts*," the district court ruled that it lacked "subject matter jurisdiction to consider plaintiff's claims, however much they involve coverage issues under the DBA."<sup>99</sup>

The district court also rejected the defendant's argument that the case should be removed to federal court because it presented a "unique federal interest" concerning the remedies available to individuals working in support of national defense or war-zone efforts. The district court found that the asserted federal interest, based upon coverage under the DBA, "assumes the very conclusion which this court lacks jurisdiction to reach, namely that the decedents in this case are covered as employees under the DBA."<sup>100</sup> Thus, where the district court found no basis for subject matter jurisdiction, it remanded the case pursuant to 28 U.S.C.A. § 1447(c).

The Fourth Circuit dismissed Blackwater's appeal and remanded the case to state court, without reaching the merits of the dispute.<sup>101</sup> Specifically, the Fourth Circuit found that where, as here, a district court determined that it lacked subject matter jurisdiction, 28 U.S.C.A. § 1447(d) prohibits a circuit court from reviewing the remand order. The Supreme Court denied Blackwater's petition for a writ of certiorari in February 2007.<sup>102</sup>

## Common-Law Defenses

### ■ Government Contractor Defense

A contractor sometimes can mitigate risk by being mindful of common-law defenses that may

be available if certain factual predicates can be established, provided that it conducts its affairs so as to maximize the potential applicability of the defenses. One area with such potential is the so-called “Government contractor defense,” which permits the contractor to escape tort liability for harm caused by products manufactured in conformance with Government specifications or certain Government-approved specifications. The defense is derived from the doctrine of sovereign immunity and the premise that if a contractor works according to specifications provided by the Government, it is entitled to the Government’s privilege of immunity and should be protected by that immunity to the same extent the Government would be if it had performed the work itself. In the leading case of *Boyle v. United Technologies Corp.*,<sup>103</sup> the Supreme Court applied this doctrine because holding contractors liable for damages resulting from Government contracts would subvert the sovereign immunity protections of the Federal Government by causing the contractor to pass its costs back to the Government.

Elements of the defense include (a) a determination that the subject matter of the contract involves uniquely federal interests and (b) a significant conflict between an identifiable federal policy and the operation of state law. Once these requirements are met, the following three-part test is applied: (1) the Government must have provided the contractor with “reasonably precise specifications”; (2) the contractor’s work must have conformed to those specifications; and (3) the contractor must have warned the Federal Government about dangers known to the supplier but not known by the United States.<sup>104</sup>

The Government contractor defense is not applicable to purely commercial items. In *Boyle*, the Supreme Court created a “stock” product exception.<sup>105</sup> Thus, the defense does not protect the manufacturer of a product ordered by the Government from the manufacturer’s stock. Moreover, it is not enough for the contractor to prove that it acted in accordance with the Government’s direction. It must also establish that allowing the plaintiff to challenge the contractor’s actions under state law would be inconsistent with a specific and significant exercise of Federal Government discretion.<sup>106</sup>

Since *Boyle*, there have been a number of cases interpreting the breadth and scope of the Government contractor defense. For example, the tort liability of a maintenance service provider was foreclosed based on a showing that (a) the United States approved reasonably precise maintenance procedures, (b) the contractor’s performance of maintenance conformed to those procedures, and (c) the contractor warned the United States about the dangers in reliance on the procedures that were known to it but not to the United States.<sup>107</sup>

A 2006 decision, *Hill v. Raytheon Aircraft Co.*,<sup>108</sup> is a recent illustration of the application of the Government contractor defense. The case arose from the crash of a U.S. Army electronic mission airplane during a training flight in Germany. The plaintiff (the deceased pilot’s wife) brought suit alleging that Raytheon Aircraft Company (RAC) was negligent in the design, manufacture, testing, repair, and warnings associated with the aircraft, specifically alleging defects in the anti-ice/de-icing system and icing detection and warning systems.

In determining whether the Government contractor defense applied, the court analyzed the Government’s involvement in the aircraft design and approval process, dating back to similar predecessors from the 1960s. Relying on the three-part test announced in *Boyle*, the court found that the aircraft was “manufactured by [RAC] pursuant to a government contract outlining precise specifications for the design and development of the [aircraft], and RAC was required to follow these specifications.”<sup>109</sup> With regard to the second element, contractor conformance to specifications, the court also found that the Government was extensively and regularly involved in the design process, reviewing and approving the design on a regular basis as it was formalized for production. Lastly, as to the third element, the court noted that “the Army through its more extensive testing actually had superior knowledge regarding the [aircraft’s] icing performance.”<sup>110</sup> Given the facts of the case, the court determined that RAC qualified for the Government contractor defense as to the icing system—even though it was essentially the same FAA-certified system used in the commercial version of the aircraft—and granted RAC’s motion for summary judgment.

Another 2006 decision, *Ammend v. BioPort, Inc.*,<sup>111</sup> involved the application of the Government contractor defense to an anthrax vaccine manufacturer. In this consolidated case involving allegations of harm resulting from anthrax vaccinations, BioPort, the vaccine manufacturer, moved for summary judgment based on two affirmative defenses, a state-specific statute, and the Government contractor defense. The court concluded that all three *Boyle* elements were met. First, with respect to the Government specifications requirement, the court noted that BioPort had “shown that [the DOD] not only approved ‘reasonably precise’ specifications, but that agents of the DOD actually invented and patented [the vaccine].”<sup>112</sup> Second, the court found that BioPort conformed to the DOD’s standards, and that the DOD would not accept a shipment of vaccine until it had passed a series of Food and Drug Administration and supplemental tests. In assessing the third requirement, the court stated that the “DOD was fully aware of all risks related to the use of [the vaccine], because DOD, as the primary user of [the vaccine], is at least as knowledgeable, if not more so, than BioPort regarding such risks.”<sup>113</sup> Thus, BioPort was shielded from liability related to the manufacture of the anthrax vaccine.

### ■ Combatant Activities Exception

The combatant activities exception to the Federal Tort Claims Act applies to “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”<sup>114</sup> Although this defense is primarily applicable to lawsuits against the Federal Government it is, like the Government contractor defense, another potential bar to a third-party lawsuit against contractors. A 1992 Ninth Circuit decision, *Koohi v. United States*,<sup>115</sup> is the leading case involving the extension of the combatant activities exception to a contractor. The claims in *Koohi* arose after a U.S. warship equipped with the Aegis air defense system mistook a civilian Iranian airplane for an Iranian F-14 and shot it down, killing all 290 persons aboard. When heirs of the deceased sued Varian Associates, the Aegis system manufacturer, for design defects, the court held that the claim was barred by the FTCA’s combatant activities exception rather than the Government contractor defense. The court reasoned that imposition of liability would produce the same effect sought to be avoided by the FTCA exception, that is, second-guessing of military decisionmaking,

and also emphasized the fact that the victims were reasonably perceived to be the *enemy*, to whom no duty was owed. Although some courts have followed *Koohi* in applying this doctrine to contractors, several courts recently have ruled that the doctrine has limited or no application to contractors and contractor personnel.

In 2006, the combatant activities exception was rejected in a case involving an Iraq services contractor sued by a wife on behalf of her soldier-husband for injuries sustained in the performance of convoy operations in Iraq. In *Carmichael v. Kellogg, Brown & Root Services Inc.*,<sup>116</sup> a soldier riding as a passenger in a tractor-trailer driven by a civilian contractor employee was severely injured when the tractor-trailer left the road and overturned in a ravine. In determining that the defendant was not eligible for the combatant activities exception, the court distinguished its decision from *Koohi* by noting that *Koohi* involved the United States’ use of weapons during combat, while no military decisionmaking was involved in the instant case (i.e., a civilian operating in a civilian service-providing capacity).<sup>117</sup>

The court also noted that in *Koohi* there was no duty of care owed a perceived enemy, while in the instant matter there was a duty of care owed by a private corporation to a U.S. citizen. The court adopted the idea that the “vital distinction” was the military’s role in the incident at issue and granted the plaintiff’s motion to dismiss the combatant activities defense.<sup>118</sup>

### ■ Political Question Doctrine

Another potential defense that Government contractors should consider is the “political question” doctrine, expressed as a six-part test in *Baker v. Carr*,<sup>119</sup> a legislative redistricting case. In *Baker*, the Supreme Court held that if *any one* of the following six criteria is met, the matter must be dismissed as nonjusticiable: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, (2) a lack of judicially discoverable and manageable standards for resolving the case, (3) the impossibility of deciding the case without an initial policy determination of a kind clearly for nonjudicial discretion, (4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect

due coordinate branches of Government, (5) an unusual need for unquestioning adherence to a political decision already made, or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>120</sup> As applied to Government contractors, especially in the context of a contingency support operation, the doctrine quickly narrows, with the courts often looking mainly at the extent of “command and control” the military exercises over a contractor’s operations.

The political question doctrine has been advanced as a defense in several recent tort suits stemming from the conflict in Iraq. In a decision rejecting a plaintiff’s motion to remand to state court, *Lane v. Halliburton*,<sup>121</sup> a federal district court in Texas ruled that there was a colorable political question defense for purposes of satisfying the federal officer removal rule.<sup>122</sup> In *Lane*, a civilian truck driver working for Halliburton in Iraq under an Army Material Command contract was injured when his fuel convoy came under fire in an area known to be prone to attacks. Finding, for purposes of the jurisdiction question only, that Halliburton had made an adequate showing that the military exercised significant control over the destination and path of the convoy, the court determined that it was possible Halliburton could meet one of the *Baker* elements.

In *Whitaker v. Kellogg Brown & Root, Inc.*,<sup>123</sup> the political question doctrine was successfully invoked in a case involving a U.S. soldier escorting a convoy in Iraq who drowned after being knocked into the Tigris River by a KBR-operated truck. KBR argued that this was a political question case because it turned on strategic and tactical decisions made in a combat zone. The federal district court noted that the military exercised significant control over operation of the convoy, including its speed and the spacing of the vehicles, and declared the accident at issue was far from a “garden variety road wreck.”<sup>124</sup> The court stated: “The question here is not just what a reasonable driver would do—it is what a reasonable driver in a combat zone, subject to military regulations and orders, would do. That question necessarily implicates the wisdom of the military’s strategic and tactical decisions, a classic political question over which this Court has no jurisdiction.”<sup>125</sup>

In contrast, the political question argument was unsuccessfully asserted in *Potts v. Dyncorp International, LLC*,<sup>126</sup> which involved vehicles operated by Dyncorp under a contract with the Coalition Provisional Authority. The Dyncorp convoy was traveling from Jordan to Baghdad, Iraq at a high rate of speed when one of the cars swerved to miss an object in the road, flipped over multiple times, and burst into flames, severely injuring the plaintiff, a passenger. Dyncorp asserted that the matter should be dismissed under the political question doctrine because it would cause the court to pass judgment on the security procedures in its CPA contract and, therefore, pass judgment on U.S. foreign policy. After examining the *Baker* factors and determining that none applied, the court held that “because Dyncorp’s own internal policies controlled its conduct and because the United States military was not in a position of command or control over Dyncorp, the assessment of Dyncorp’s alleged negligence or wantonness d[id] not present a non-justiciable political question.”<sup>127</sup>

#### ■ Westfall/Governmental Function Defense

Another common-law defense flows from a Supreme Court decision, *Westfall v. Erwin*,<sup>128</sup> and its progeny extending Government immunity to private contractors performing a so-called “governmental function.” *Westfall* involved the alleged negligent handling of toxic ash by Government supervisors that subsequently injured another Government employee when he was accidentally exposed to the ash. The Court, in determining whether the Government supervisors were immune from state tort liability under a federal employee immunity theory applied a two-part test to determining immunity: (1) was the act within the scope of the federal officials’ employment, and (2) was the act discretionary in nature. Congress subsequently enacted legislation to annul the Supreme Court’s insertion of a “discretionary act” requirement in the immunity standard as applied to Government employees, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the “Westfall Act”).<sup>129</sup> However, the original *Westfall* test is still used in determining whether a *private party* acting in a governmental capacity will qualify for an extension of immunity.



The Second Circuit recently applied the two-part *Westfall* test in a case involving a contractor administering a Government program. In *Murray v. Northrop Grumman Information Technology, Inc.*,<sup>130</sup> Northrop was the contracted program administrator for the Irish Peace Process Cultural and Training Program, a program established by Congress in 1998 that allowed nonimmigrant Irish to work and live in the United States. As part of its duties, Northrop was to monitor and report on the employment and other activities of any persons admitted to the United States under the program. Northrop was notified in 2002 by the ostensible employer of two Irish program participants that the two participants were not employed by him and, in the employer's estimation, presented a threat to the United States. Northrop, acting in its capacity as the program administrator, immediately forwarded this allegation to the Immigration and Naturalization Service and the Department of State. The two Irish participants were subsequently taken into custody and removed from the program and the United States, whereupon they instituted a suit against Northrop based primarily on Northrop's decision to pass along the terrorist threat allegation.

In finding that Northrop was entitled to the extension of immunity, the court reasoned that the same policy considerations that justify immunity for Government employees should apply to contractors performing a governmental function. Applying *Westfall's* two-part test, the court found that Northrop indeed was performing a Government function by tracking program participants. It also found that Northrop's decision to forward the terrorist allegations was a "discretionary" act that was well within Northrop's contractual reporting duties.<sup>131</sup> Thus, the court held that Northrop was immune from state tort liability claims for passing on the terrorism allegation.

In addition to the governmental function immunity provided to private contractors by the *Westfall* case, the Westfall Act has been applied

to substitute the United States as the defendant in cases where contractor employees have been sued by third parties. The Westfall Act operates as follows: (a) the Attorney General submits a certification that the defendant employee was acting within the scope of the employee's office at the time of the incident giving rise to the cause of action, and (b) upon certification, the employee is dismissed from the action and the United States is substituted as defendant. The case then falls under the FTCA.<sup>132</sup> However, even when the Government submits a certification, a plaintiff can ask the district court to review the certification and determine whether the employee was actually acting outside the scope of the employee's employment at the time of the tortious conduct, pursuant to the Supreme Court's decision in *Gutierrez de Martinez v. Lamagno*.<sup>133</sup>

The judicial review provided by *Gutierrez* to evaluate a certification also allows a court to review a claim that a non-Government employee should be certified as a Government employee for purposes of a Westfall Act substitution.<sup>134</sup> An example of a successfully asserted substitution claim can be found in an unreported decision involving tort liability for negligent pap smear screenings.<sup>135</sup> In this decision, the district court looked extensively to the Government's level of control over a contracted laboratory technician performing pap smear screening analysis for the Armed Forces Institute of Pathology. Based on Government employees' extensive supervision and control of the technician, including significant oversight of work performed, co-location with the Government personnel, extensive input into personnel reviews, and even the power to cause the technician's firing, the court determined that the technician was, for purposes of the suit, a federal employee. This determination led the court to certify that the technician was a federal employee acting in the scope of her work, and the court, citing the Westfall Act, substituted the United States for the technician as the defendant in the suit.

---

## GUIDELINES

---

These *Guidelines* are intended to assist you in understanding the risk mitigation tools available to Government contractors. They are not, however, a substitute for professional representation in any specific situation.

1. Evaluate all programs posing significant risk to third parties (including employees) as candidates for inclusion of indemnification terms or other risk-sharing or risk-shifting provisions. If possible, raise indemnification and other risk-

sharing proposals during negotiations *before* contract award. Be prepared to justify such provisions based not only on the risk to the contractor, but also based on potential benefits to the Government, e.g., reduction or elimination of pricing “contingencies” and broader competition.

2. When seeking indemnification under P.L. 85-804, be prepared to provide detailed information about the unusual and hazardous nature of the risks to be covered by the indemnity, as well as detailed information about available insurance coverage (and the costs) to allow the Government to make a reasonable assessment of the “pros” and “cons” of shifting risk.

3. Even when indemnification is not available, carefully assess the sufficiency of available insurance for the contract risks. For cost-reimbursement contracts, purchase required insurance and consider purchasing insurance beyond “required” insurance, the cost of which is generally allowable, if reasonable.

4. Carefully monitor available program funding and reassess risk based on funding status. Claims for third-party liability may be covered under FAR 52.228-7 in cost-reimbursement contracts, but only if sufficient appropriated funds are available at the time the liability arises.

5. Consider whether your products or services potentially qualify for SAFETY Act coverage, which may limit your liability for injury or death resulting from use of a qualified or certified anti-terrorism products in the event of a terrorist attack. Recognize that indemnification also may be available for the same product or service in connection with *nonterrorism* related risks.

6. If your product relates to bioterrorism defense, the PREP Act, which provides immunity from liability for biological countermeasures designated by the Secretary of the HHS, may be relevant. However, thus far only avian flu has received the requisite designation of public health emergency.

7. Understand that the level of involvement by Government personnel in designing products or in defining the nature of services to be provided may be determinative with respect to availability of the Government contractor defense. Encour-

age collaboration to the extent it otherwise is justified based on the nature of the contract effort. Recognize that this defense may apply even for some “commercial” aspects of a design if the Government participated substantially in the overall design process. Finally, take pains to warn the Government of all known risks associated with the product or the specified approach to supplying services.

8. When operating at any location outside of the United States, be aware that your employees engaged in public works (such as construction contracts) or national defense activities may be subject to the Defense Base Act, a workers’ compensation-like statute, and purchase required DBA insurance. Understand that DBA applicability has been construed *broadly* to cover even “off-duty” activities, but be prepared to litigate applicability of the DBA to employee tort and wrongful death lawsuits in both federal and state courts.

9. When operating in a combat zone, make sure that your company and personnel are fully apprised of all military operating instructions and take steps necessary to document and ensure compliance with such instructions or directions, which can be potentially relevant to applicability of the “combatant activities exception.” Be aware that the availability of this defense also may turn on whether the plaintiffs were in fact “enemies” or reasonably perceived to be at the time of their injury.

10. Evaluate the extent to which the plaintiff’s injury arguably resulted in part from the exercise of military command and control. If the claims are inextricably linked to a military operation and necessarily would require the court to inquire into and evaluate military decisionmaking or policies, the claims may be nonjusticiable and barred by the political question doctrine. Understand, however, that applicability of this doctrine may depend on which party—the contractor or the military—has overall responsibility for the activity, including responsibility for related security.

11. When performing work that arguably represents or supports a “governmental function,” such as monitoring foreign nationals’ status and activities within the United States,

be aware that the *Westfall* doctrine may shield your company from liability from third-party claims for “discretionary acts” performed to advance such governmental functions.

**12.** If your company’s employees are operating under direction and close supervision of Government personnel for some functions, recognize that they may qualify for certification as “Government employees” under the Westfall Act with respect to those activities, in which case the U.S. Government will be substituted as the defendant.

**13.** Keep abreast of court tort cases involving Government contractors to monitor evolving common-law defenses. The evolving roles of contractors, which are doing things that Government employees traditionally have done, means that contractors more and more will be asserting defenses traditionally asserted by Government defendants. At the same time, contractors also must recognize that some courts are reluctant to put private contractors on the same footing as Government/military actors, even when they are engaged in the same or similar activities.

## ★ REFERENCES ★

- 1/ See generally Goins, Fowler & Annus, “Regulating Contractors in War Zones: A Preemptive Strike on Problems in Government Contracts,” Briefing Papers No. 07-3 (Feb. 2007); McCullough & Edmonds, “Contractors on the Battlefield Revisited: The War in Iraq & Its Aftermath,” Briefing Papers No. 04-6 (May 2004); McCullough & Pafford, “Contractors on the Battlefield: Emerging Issues for Contractor Support in Combat & Contingency Operations,” Briefing Papers No. 02-7 (June 2002).
- 2/ See generally Zenner, Handwerker & Cattoe, “Fundamentals of Contracting With the Department of Homeland Security,” Briefing Papers No. 03-4 (Mar. 2003); Madsen, Dowd & Farley, “Combating Terrorism: Contracting Approaches & Lessons Learned,” Briefing Papers No. 02-6 (May 2002).
- 3/ See 31 U.S.C.A. § 1341.
- 4/ 50 U.S.C.A. §§ 1431–1435.
- 5/ 42 U.S.C.A. § 2210.
- 6/ 50 U.S.C.A. § 1431. See generally Mullen, “Extraordinary Contractual Relief Under Public Law 85-804,” Briefing Papers No. 02-13 (Dec. 2002).
- 7/ Exec. Order No. 10789, 23 Fed. Reg. 8897 (1958).
- 8/ Exec. Order No. 11610, 36 Fed. Reg. 13,755 (1971).
- 9/ Exec. Order No. 13232, 66 Fed. Reg. 53,941 (Oct. 24, 2001).
- 10/ Exec. Order No. 13286, 68 Fed. Reg. 10,619 (Mar. 5, 2003).
- 11/ *Id.*
- 12/ FAR 50.403-1.
- 13/ FAR 50.201(d), 50.403-2.
- 14/ FAR 52.250-1, para. (c).
- 15/ FAR 52.250-1, para. (d).
- 16/ Boeing Co., ASBCA No. 54853, 06-1 BCA ¶ 33,270. See generally Nash, “Indemnification Clauses: Litigation Breeders,” 20 Nash & Cibinic Rep. ¶ 42 (Sept. 2006).
- 17/ 50 U.S.C.A. § 1431.
- 18/ See 31 U.S.C.A. § 1304; 41 U.S.C.A. § 612. See generally Vacketta & Kantor, “Obtaining Payments From the Government’s ‘Judgment Fund,’” Briefing Papers No. 97-3 (Feb. 1997).
- 19/ See also *Viacom Inc. v. United States*, 70 Fed. Cl. 649, 657 (2006), 48 GC ¶ 219 (“the government may not hide behind the Anti-Deficiency Act when there is a binding obligation to pay and the Government has general appropriations sufficient to cover the contractual obligation”); *Ferris v. United States*, 27 Ct. Cl. 542 (1892) (insufficiency of funds does not relieve the Government of its contractual obligations).
- 20/ 42 U.S.C.A. § 2210(d).
- 21/ 42 U.S.C.A. § 2014(q).
- 22/ 42 U.S.C.A. § 2210(j).
- 23/ See 48 C.F.R. subpt. 950.70.
- 24/ 48 C.F.R. 952.250-70, para. (d).
- 25/ 48 C.F.R. 950.7006.
- 26/ 42 U.S.C.A. § 2014(w).
- 27/ 42 U.S.C.A. § 2014(w).
- 28/ 42 U.S.C.A. § 2210(d)(2); see DOE, *The Price-Anderson Act—Cross the Bridge to the Next Century—A Report to Congress* (Aug. 1998).
- 29/ Cf. FAR 52.250-1, para. (d).
- 30/ 42 U.S.C.A. § 2210(m), (n); see FAR 52.250-1, para. (e)(2).
- 31/ 10 U.S.C.A. § 2354(a).
- 32/ See 10 U.S.C.A. § 2354(d).
- 33/ See 31 U.S.C.A. § 1341.
- 34/ See FAR 28.311-1.
- 35/ FAR 52.228-7, para. (c).
- 36/ FAR 52.228-7, para. (d).
- 37/ *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005), 47 GC ¶ 110.
- 38/ 6 U.S.C.A. §§ 441–444.
- 39/ Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 861–865, 116 Stat. 296 (Nov. 25, 2002)
- 40/ 6 U.S.C.A. § 444(1).
- 41/ 71 Fed. Reg. 33,147 (June 8, 2006) (revising 6 C.F.R. pt. 25). See generally Nadler & Berger, “Feature Comment: DHS Issues Final Rule Governing SAFETY Act Implementation,” 48 GC ¶ 205 (June 14, 2006).
- 42/ Available at <http://www.safetyact.gov>; see 48 GC ¶ 305(b).
- 43/ 6 U.S.C.A. §§ 442, 443; 6 C.F.R. § 25.7.
- 44/ 6 C.F.R. § 25.7(c).
- 45/ 6 U.S.C.A. § 442(d); 6 C.F.R. §§ 25.8, 25.9.
- 46/ 6 U.S.C.A. § 442(d)(1); 6 C.F.R. § 25.8(b).
- 47/ 6 C.F.R. § 25.8(b).
- 48/ 6 C.F.R. § 25.5(a); see 6 U.S.C.A. § 443(a)(1).
- 49/ 6 C.F.R. § 25.5(a), (b).
- 50/ 6 C.F.R. § 25.2; see 6 U.S.C.A. § 444(1).
- 51/ 6 U.S.C.A. §§ 441(b); 442(d)(3); 6 C.F.R. §§ 25.4(a), 25.8(a).
- 52/ 6 C.F.R. § 25.4(b); see 6 U.S.C.A. § 441.
- 53/ 6 C.F.R. § 25.9(e).
- 54/ 6 C.F.R. § 25.8(a).

- 55/ 6 C.F.R. § 25.9(f)(2).
- 56/ 71 Fed. Reg. 33,147 (June 8, 2006).
- 57/ See 68 Fed. Reg. 59,684 (Oct. 16, 2003). See generally Mullen, "Feature Comment: DHS Interim Safety Act Regulations," 45 GC ¶ 445 (Nov. 5, 2003).
- 58/ See 6 C.F.R. § 25.5(i) (prior to July 10, 2006).
- 59/ 71 Fed. Reg. at 33,152–53; see 6 C.F.R. § 25.6(l).
- 60/ 71 Fed. Reg. at 33,153; see 6 C.F.R. § 25.6(l)(1).
- 61/ 6 C.F.R. § 25.6(l)(2).
- 62/ 71 Fed. Reg. at 33,154; see 6 U.S.C.A. § 444(2); 6 C.F.R. § 25.2.
- 63/ Exec. Order No. 13286, 68 Fed. Reg. 10,619 (Mar. 5, 2003).
- 64/ 71 Fed. Reg. at 33,155.
- 65/ *Id.*
- 66/ *Id.* at 33,156–57; see 6 C.F.R. §§ 25.6(h), 25.9(j).
- 67/ 6 C.F.R. §§ 25.6(h), 25.9(j).
- 68/ 71 Fed. Reg. at 33,156; see 6 C.F.R. § 25.6(g).
- 69/ 71 Fed. Reg. at 33,156; see 6 C.F.R. § 25.6(g).
- 70/ 71 Fed. Reg. at 33,156; see 6 C.F.R. § 25.6(g).
- 71/ Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, Div. C, § 2, 119 Stat. 2680, 2818 (Dec. 30, 2005) (adding 42 U.S.C.A. § 247d-6d, 247d-6e).
- 72/ Project BioShield Act of 2004, Pub. L. No. 108-276, 118 Stat. 835 (July 21, 2004).
- 73/ 42 U.S.C.A. § 247d-6d(a)(1).
- 74/ 42 U.S.C.A. § 247d-6d(d)(1).
- 75/ 42 U.S.C.A. § 247d-6d(b)(1).
- 76/ 42 U.S.C.A. § 247d-6d(b)(2).
- 77/ 42 U.S.C.A. § 247d-6d(b)(1), (7), (9).
- 78/ 42 U.S.C.A. § 247d-6d(b)(6).
- 79/ 42 U.S.C.A. § 247d-6d(c)(3), (d)(1).
- 80/ 42 U.S.C.A. § 247d-6d(c)(1).
- 81/ 42 U.S.C.A. § 247d-6d(c)(2)(A).
- 82/ 42 U.S.C.A. § 247d-6d(c)(2)(D).
- 83/ 42 U.S.C.A. § 247d-6d(e)(1), (2).
- 84/ 42 U.S.C.A. § 247d-6d(e)(3).
- 85/ 42 U.S.C.A. § 247d-6d(e)(4).
- 86/ 42 U.S.C.A. § 247d-6d(e)(7).
- 87/ 42 U.S.C.A. § 247d-6d (e)(8).
- 88/ 42 U.S.C.A. § 247d-6e(d)(1).
- 89/ 42 U.S.C.A. § 247d-6e(a).
- 90/ 42 U.S.C.A. § 247d-6e(d)(1).
- 91/ 42 U.S.C.A. § 247d-6e(d)(5).
- 92/ 72 Fed. Reg. 4710 (Feb. 1, 2007).
- 93/ 42 U.S.C.A. §§ 1651–1654.
- 94/ 42 U.S.C.A. § 1651(a); see 33 U.S.C.A. §§ 901–950; see also FAR 28.305.
- 95/ 33 U.S.C.A. § 905(a).
- 96/ 42 U.S.C.A. § 1651(c).
- 97/ See 33 U.S.C.A. §§ 904(a), 907, 908, 909.
- 98/ *Nordan v. Blackwater Security Consulting*, 382 F. Supp. 2d 801 (E.D.N.C. 2005).
- 99/ *Id.* at 809–10.
- 100/ *Id.* at 813.
- 101/ *In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576 (4th Cir. 2006).
- 102/ *Blackwater Sec. Consulting, LLC v. Nordan*, 127 S. Ct. 1381 (2007).
- 103/ *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988).
- 104/ *Id.* at 512.
- 105/ *Id.* at 509.
- 106/ *Id.* at 511.
- 107/ *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1334–35 (11th Cir. 2003), 45 GC ¶ 211 ("Holding a contractor liable under state law for conscientiously maintaining military aircraft according to specified procedures would threaten Government officials' discretion in precisely the same manner as holding contractors liable for departing from design specifications. We thus hold that the Government contractor defense recognized in *Boyle* is applicable to the service contract[s].").
- 108/ *Hill v. Raytheon Aircraft Co.*, 470 F. Supp. 2d 1214 (D. Kan. 2006).
- 109/ *Id.* at 1217.
- 110/ *Id.* at 1225.
- 111/ *Ammend v. BioPort, Inc.*, 2006 WL 1050509 (W.D. Mich. Apr. 19, 2006).
- 112/ *Id.* at \*4.
- 113/ *Id.*
- 114/ 28 U.S.C.A. § 2680(j).
- 115/ *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992).
- 116/ *Carmichael v. Kellogg, Brown & Root Servs. Inc.*, 450 F. Supp. 2d 1373 (N.D. Ga. 2006).
- 117/ *Id.* at 1380.
- 118/ *Id.*; see also *Lessin v. Kellogg, Brown & Root*, No. H-05-01853, 2006 WL 3940556 (S.D. Tex. June 12, 2006) (distinguishing *Koohi* by noting the different duty of care owed a U.S. citizen as opposed to those against whom force is directed); *McMahon v. Presidential Airways, Inc.*, No. 6:05-CV-1002ORL28JGG, 2006 WL 3085606 (M.D. Fla. Sept. 27, 2006) (holding that combatant activities exception at most only shields private defense contractors for products liability claims involving complex, sophisticated equipment used during times of war; it does not bar suits alleging active negligence by contractors in the provision of services).
- 119/ *Baker v. Carr*, 369 U.S. 186 (1962).
- 120/ *Id.* at 217.
- 121/ *Lane v. Halliburton*, No. H-06-1971, 2006 WL 2583438 (S.D. Tex. Sept. 7, 2006).
- 122/ 28 U.S.C.A. § 1442(a).
- 123/ *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006).
- 124/ *Id.* at 1282.
- 125/ *Id.*
- 126/ *Potts v. Dyncorp Int'l, LLC*, 465 F. Supp. 2d 1245 (M.D. Ala. 2006).
- 127/ *Id.* at 1254.
- 128/ *Westfall v. Erwin*, 484 U.S. 292 (1988).
- 129/ Federal Employees Liability Reform & Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (amending 28 U.S.C.A. § 2679(b), (d)). See generally Cibinic, "Suits Against Government Employees: Congress Restores the Cloak of Immunity," 3 *Nash & Cibinic Rep.* ¶ 23 (Mar. 1989).
- 130/ *Murray v. Northrop Grumman Information Tech., Inc.*, 444 F.3d 169 (2d Cir. 2006).
- 131/ *Id.* at 175–76.
- 132/ 28 U.S.C.A. § 2679(d).
- 133/ *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995).
- 134/ See also *Haddon v. United States*, 68 F.3d 1420, 1423 (D.C. Cir. 1995) ("the federal court may determine independently whether the employee acted within the scope of employment and, therefore, whether to substitute the Federal Government as the proper defendant" (citing *Gutierrez*, 515 U.S. at 433–34, and *Kimbro v. Velten*, 30 F.3d 1501, 1505 (D.C. Cir. 1994))).
- 135/ *Sweeney v. American Registry of Pathology & Armed Forces Inst. of Pathology*, No. 00-2390 (D.D.C. July 31, 2002).