

ALERT

Presidential Memorandum Grants VA Authority to Indemnify COVID-19 Contractors

April 15, 2020

Wiley continues to closely monitor the COVID-19 crisis and will update this list as the situation unfolds. This alert was last updated on April 15, 2020.

On April 10, 2020, the White House issued a Presidential Memorandum authorizing the Secretary of Veterans Affairs (VA) to exercise authority under Public Law 85-804 in connection with contracts awarded by the VA to combat the coronavirus (COVID-19). Public Law 85-804, as amended by 50 U.S.C. §§ 1431 *et seq.* and Executive Order 10789, provides federal agencies with the authority to grant “extraordinary contractual relief,” including the authority to indemnify contractors against claims resulting from performing work that involves “unusually hazardous” risks. This latest action is one of several protections against liability that may be available to contractors who support the government’s response to the COVID-19 crisis.

The April 10, 2020 Presidential Memorandum authorizes the VA Secretary to exercise authority under Public Law 85-804 with respect to contracts performed in support of efforts by the VA to combat the virus, provided the transactions are “directly responsive to the COVID-19 national emergency.” This authority is based on a recognition that the VA “is exercising functions in connection with the national defense in the course of contributing to the Nation’s response to the ongoing outbreak of COVID-19.” Although the Presidential Memorandum does not specifically authorize the VA to indemnify contractors, indemnification against third party claims is one form of “extraordinary contractual relief” available under Public Law 85-804. See Federal Acquisition Regulation (FAR) Part 50 (providing for indemnification of contractors against claims by third

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persons for death, personal injury, loss of, damage to, or loss of use of contractor or government-owned property if the damage arises out of or results from a risk the contract defines as “unusually hazardous” and is not otherwise covered by insurance).

This latest Presidential Memorandum is just one of several actions taken by the Administration that may protect government contractors against potential liability for certain claims related to the performance of COVID-19 relief efforts:

- Indemnification of DOE Contractors and Subcontractors. On March 26, 2020, the U.S. Department of Energy (DOE) issued a Memorandum authorizing contracting officers to use DOE’s existing authority under Public Law 85-804 to indemnify contractors and subcontractors performing work in response to COVID-19. The DOE Memorandum allows contracting officers to extend Public Law 85-804 indemnification to DOE contractors and their subcontractors engaged in tasks or activities undertaken in response to COVID-19. The authorization applies to work performed by DOE contractors for other agencies—including the U.S. Department of Health and Human Services (HHS), the Federal Emergency Management Agency (FEMA), as well as other federal, state, and local government entities—and applies retroactively to “tasks or activities” undertaken by DOE contractors or subcontractors in response to COVID-19 on or after March 13, 2020, and may be extended through June 30, 2020. The DOE Memorandum also includes a sample indemnification clause for incorporation into COVID-related contracts, which notes that the scope of covered COVID-19 contracts may include testing, providing equipment and resources, and developing treatment and vaccines to the extent they are not exempt from liability under the Public Readiness and Emergency Preparedness (PREP) Act (discussed below) or other law.
- PREP Act Immunity. On March 17, 2020, the HHS issued a Declaration invoking the PREP Act (42 U.S.C. 247d-6d) in response to COVID-19, which provides immunity from certain federal and state law claims to “covered persons” that provide certain covered medical “countermeasures” that are used or administered in response to COVID-19. Specifically, the Declaration gives immunity to “manufacturers,” “distributors,” and certain other covered persons (as defined in the PREP Act) who are engaged in the manufacture, test, development, distribution, administration, or use of “covered countermeasures” to combat COVID-19. Covered countermeasures include any “antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19.” The Declaration has retroactive application, which makes it effective as of February 4, 2020, and it applies to covered entities that provide such covered countermeasures pursuant to “present or future” government contracts or other agreements. The PREP Act provides immunity from suit for federal or state law claims for certain “losses” (e.g., death, physical injury, mental injury), but does not shield contractors from liability for claims for losses caused by the contractor’s wilful misconduct.
- Defense Production Act Protections. The Defense Production Act of 1950 (DPA) (50 U.S.C. §§4501 *et seq.*), which the President invoked in response to COVID-19 on March 18, 2020, also contains provisions that may provide government contractors with defenses against liability for certain claims. The DPA requires contractors who receive “rated orders” to prioritize the rated orders over commercial and non-rated government contracts and orders. Both the Defense Priority and Allocation System (DPAS) and the

Health Resources Priorities and Allocation System (HRPAS) rules governing rated orders, include provisions regarding “protection against claims,” which expressly state that contractors shall not be held liable for damages or penalties resulting directly or indirectly from compliance with the DPAS or HRPAS rules or other “official acts” relating to rated orders. In addition, Section 708(j) of the DPA provides a potential defense against civil and criminal antitrust liability for contractors acting in accordance with a “voluntary agreement” entered into by competitors pursuant to the DPA. (On March 27, 2020, the President delegated the authority to make such voluntary agreements to the HHS Secretary and the Secretary of Homeland Security under Executive Order 13911.)

Wiley attorneys are continuing to monitor developments related to the government’s response to the COVID-19 crisis, including those developments impacting the government contracts industry as well as other sectors of the economy. Please visit our COVID-19 Resource Center for further information and updates.

Jennifer Eve Retener, a Law Clerk in Wiley's Government Contracts Practice, contributed to this alert.

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