

President Bush Adds New Requirements for Approval of Requests for Indemnification under P.L. 85-804

On February 28, 2003, President Bush significantly modified the Executive Order governing requests for Federal indemnification under Public Law 85-804 (EO 10789, November 14, 1958) by adding additional requirements for heads of agencies and departments considering requests from contractors seeking Federal indemnification for certain products and services.

Under the Executive Order, as revised, the head of a Federal agency or department, other than the Secretary of Defense, considering a contractor's request for Federal indemnification for products or services that *have been* or *could be* designated as "qualified antiterrorism technologies" under the SAFETY Act must now consult with the Secretary of Homeland Security and receive the approval of the Director of the Office of Management and Budget (OMB) before granting such a request. During this consultation, the Secretary of Homeland Security must advise the head of the agency or department whether use of the authorities provided to the Secretary of Homeland Security under the SAFETY Act would be more appropriate than Federal indemnification. If the head of the non-Defense agency or department determines that Federal indemnification is appropriate after such consultation, he must also receive approval from the Director of OMB before granting the contractor's request for Federal indemnification under P.L. 85-804.

The revised Executive Order further states that the Secretary of Defense must only consider whether use of the SAFETY Act is appropriate before granting Federal indemnity for indemnification for products or services that have been or could be designated as "qualified antiterrorism technologies" under the SAFETY Act. Coordination with the Secretary of Homeland Security and approval by the Director of OMB is not required.

Finally, the revised Executive Order provides the authority to grant Federal indemnification under P.L. 85-804 to the Secretary of Homeland Security in lieu of the head of the Federal Emergency Management Agency, which is now part of the Department of Homeland Security.

As you can see, the ability of contractors to receive Federal indemnity under PL 85-804 is now explicitly linked to the application of the SAFETY Act for certain products and services. For non-DOD agencies, this change requires contractors to face two new and significant obstacles -- namely, approval by both the Secretary of Homeland Security and the Director of OMB -- before Federal indemnification for homeland security products or services will be approved. Moreover, this change applies to products or services that have been, or more strikingly, *could be* designated as "qualified antiterrorism technologies" under the SAFETY Act.

■ Contact Info

If you would like more information, please contact any of the McKenna Long & Aldridge attorneys with whom you regularly work. You may also contact:

Ray Biagini
202.496.7687

John Clerici
202.496.7574

Contractors seeking Federal indemnification are advised to give careful consideration to the requirements of these amendments to the Executive Order. While it may be possible to avoid triggering these new requirements by portraying a product or service as outside the scope of the SAFETY Act, such a position could result in creating a record that may preclude future application of the SAFETY Act if Federal indemnity is ultimately not provided. Use of P.L. 85-804 to provide indemnification by the Federal agencies that have this authority is and will remain relatively difficult to obtain. Thus, contractors must carefully consider which of these protections is best suited for its products or services, taking into consideration both the nature of the risk and likelihood of receiving the protection sought.

■ About Us

McKenna Long & Aldridge LLP is a full-service law firm of nearly 400 lawyers and public policy advisors. The firm provides business solutions in the areas of corporate law, government contracts, intellectual property and technology, complex litigation, public policy and regulatory affairs, real estate, environmental, energy and finance.

■ Subscription Info

If you would like others to receive our future mailings, please email their contact information to us at information@mckennalong.com

If you would like to be removed from our Homeland Security Bulletin mailing list, please email information@mckennalong.com

*This **Homeland Security Bulletin** is for informational purposes only and does not constitute specific legal advice or opinions. Such advice and opinion are provided by the firm only upon engagement with respect to specific factual situations.

• Atlanta • Brussels • Denver • Los Angeles • Philadelphia • San Diego • San Francisco • Washington D.C.

©Copyright 2003, McKenna Long & Aldridge LLP