

Reducing Tort Liability Arising Out of Federal Munitions/Explosives Contracts: A Matter of Mutual Responsibility for the U.S. and Its Contractors

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Eliminating or reducing tort liability to third parties injured or killed from activities performed under military contracts involving such hazardous products as explosives, munitions or weapon systems is a matter of mutual interest and responsibility for both the U.S. military and its contractors. Wrongful death and personal injury lawsuits filed by third parties against the U.S. and its contractors can be debilitating and resource-draining. This paper advocates for a “partnered solution” between the U.S. and its contractors where both proactively pursue “best risk management practices” to mitigate these often catastrophic and high-profile lawsuits.

This paper first examines the key theories of liability that plaintiff attorneys use against contractors who design and manufacture explosives and munition systems, including allegations of design defect, unsafe handling and failure to warn. The paper then addresses real-life scenarios where contractors and federal agencies have worked together during the procurement process to “build-in” particular common law “federal” defenses such as the government contractor defense, through the use of “special H” clauses. Such defenses will inure to the benefit of both the U.S. and its contractors should an incident and third party lawsuits occur downstream.

The paper will then address the procedures by which contractors can protect themselves from third-party liabilities by obtaining federal indemnification under such statutes as PL 85-

804, which provides substantial indemnification from the U.S. to contractors, including explosive and munitions manufacturers, involved in “unusually hazardous” activities under a government contract. The paper will also examine the specialized defense used to protect “contractors on the battlefield” whose munitions or weapons systems may be involved in “friendly fire” accidents in hostile environments resulting in tort liability suits. These defenses include the Political Question Doctrine, the Combatant Activity Exception and the States Secret Doctrine, the latter of which involves classified contracts.

Finally, because the storage, maintenance, and protection of explosives, as well as the explosives themselves, are considered “high-value” targets by terrorists, this paper will examine the most significant tort mitigation mechanism -- the U.S. SAFETY Act-- which protect contractors and the U.S. from enterprise-threatening tort lawsuits following a terrorist attack. The SAFETY Act can eliminate such liability arising out of a terror attack if the contractor, including those that design, manufacture and deploy such anti-terror products, as well as companies that provide security services for the storage of such items, obtain the approval of the Department of Homeland Security under the SAFETY Act, of their particular explosives, munitions or protective services.

I. Plaintiffs’ Tort Liability Theories

The core allegations in any product liability suit is that something about the contractor’s product or services is unsafe in its design, manufacture, warning labels or services (repair, maintenance, operation), which caused or contributed to the plaintiff’s injury or death.

Plaintiffs will seek compensatory damages, i.e. lost wages, pain and suffering, medical expenses, etc., and also punitive damages which are intended to punish the contractor. Plaintiffs will seek such damages under several alternative legal theories:

- Negligence -- plaintiffs will allege the contractor failed to exercise ordinary and reasonable care and did not avoid foreseeable risks to the plaintiffs.
- Strict Liability -- plaintiffs only need to establish that the contractor's product was defective and caused or contributed to the injury or death. Strict liability focuses on the condition of the product, not the nature of the contractor's actions.
- Failure to warn -- plaintiffs will argue that the contractor failed to warn of foreseeable risks that the contractor knew or should have known. However, federal contractors are held to an "actual knowledge" standard, not a "should have known" standard. Most states impose a "continuing duty to warn" on contractors about hazards which are discovered even after delivery.

II. The "Partnered Solution" To Minimize Tort Liability for the Contractor and the U.S.

A. Why Contractors Are The "Tempting Deep Pocket" for Tort Suits

Since 1950, Supreme Court case law has isolated government contractors as the key defendant in tort suits brought by plaintiffs who are killed or injured from activities or products provided under a military contract. In the *Feres v. United States* case (1950), the Supreme Court held that military personnel injured or killed pursuant to military service cannot sue the United States.

In 1977, the Supreme Court concluded that military contractors sued by injured or deceased military personnel or their families cannot seek contribution from the U.S. for damages resulting from such suits even where the contractor performed as the U.S. required it to do so under the contract. And in *Hercules v. United States* (1996), the Supreme Court found that military contractors could not sue the U.S. for breach of implied warranty even where the United States provided the contractor with the specifications for the product that caused the death or injury of third parties.

In addition to these Supreme Court cases which isolate the military contractor as the “tempting deep pocket”, the United States enjoys significant protection from tort suits under the “discretionary function exception” to the Federal Tort Claims Act. Under that exception, the United States will be dismissed from tort suits where it can show it exercised its judgment or discretion over the design or manufacturing features used by the military contractor to provide the product at issue in the plaintiffs’ suit. And even if the United States exercises such judgement or discretion negligently, the United States is still protected from liability in these tort suits.

However, because contractors can often “pass on” some or all the costs of tort suit settlements, litigation costs, etc. to the United States through higher contract costs and indemnity or reimbursement provisions under the Federal Acquisition Regulations, it behooves the U.S. to work proactively with its contractors to minimize such liability scenarios.

B. Proactively Building Key “Bookend” Defenses Into The Contract Which Benefit the U.S. and Contractor

As noted, when the U.S. is sued in tort by third parties arising out of a military contract, its key defense is to assert the “discretionary function exception” under the Federal Tort Claims Act. This potent defense will result in dismissal of the U.S. so long as it proves that it exercised judgment and discretion over the allegedly injurious activity or the design feature of the allegedly defective product at issue.

When the military contractor is sued in tort by third parties, its primary defense is the “government contractor defense”. This defense, first announced in 1988 by the Supreme Court in *Boyle v. United Technologies*, is based on the notion that the contractor should share in the U.S.’s immunity where the U.S. itself exercised discretion on judgement over the allegedly defective feature of the product or service. More specifically, the contractor is protected from third-party tort suits if it can prove under the government contractor defense that:

- the government issued or meaningfully reviewed and approved reasonably precise specifications for the product or service at issue
- the product or service conformed to the approved specifications
- the contractor warned the government of hazards actually known to the contractor but not known by the government

Thus, the U.S. and the contractor share a “common DNA” in the defense of tort cases -- the nature and extent of U.S. discretion exercised over the allegedly defective product or injurious services provided by the contractor. From this common touchstone emerge principles for a “partnered solution” between the U.S. and its contractors to reduce or eliminate third-party

tort liabilities. Specifically, at the outset of contract formation and implementation, the contractor and the U.S. should:

- identify “high risk” design and safety issues
- agree through “Special H Clauses” that such issues will be subjected to meaningful detailed review, consideration and judgment by the U.S. and ultimately approved by the U.S.
- agree through Special H Clauses that as to these high risk areas, the contractor has conformed to U.S. requirements prior to the U.S. receiving products or services into inventory or use environment
- ensure that all known hazards are identified in writing to the U.S. and that these hazards are addressed and resolved in writing by the U.S.

These proactive principles have been implemented with various federal agencies, including the TSA under a contract to reconfigure all U.S. airports following the September 11, 2001 terror attacks. Through careful implementation of the “partnered solution”, the U.S. and its contractors can create a viable joint shield to future tort liability arising out of its contracts.

C. Statutory and Regulatory Indemnification Provisions that Can Reduce Tort Liabilities

Military contractors such as explosives and munitions manufacturers should always consider certain federal indemnity statutes as a way to mitigate risks. The two most important ones are 10 U.S.C. §2354 and P.L. 85-804. Both statutes require the contractor to demonstrate to

the contracting officer and then ultimately the Secretary or his/her delegee at DOD that the contractor is performing “unusually hazardous” activities under its military contract.

Specifically, 10 U.S.C. §2354 authorizes DOD (or its military agency) to indemnify research and development contractors for third-party tort liabilities, including litigation and settlement expenses, for bodily injury or death from a risk the contract identifies as “unusually hazardous” and for which the contractor’s insurance is not responding. DOD can pay such liabilities from (1) funds obligated for the performance of the contract or from funds available for R+D, not otherwise obligated, or (2) funds appropriated for those payments.

Under P.L. 85-804, certain federal agencies, including DOD, can provide “extraordinary contractual relief” to their contractors, including indemnification for third-party liabilities, where the Secretary of the agency determines that it “facilitates the national defense.” To the extent the contractor’s insurance is not responding to third party liabilities, the federal agency that granted P.L. 85-804 indemnity to the contractor must indemnify the contractor for such litigation expenses, settlements, etc. if they arise out of a risk the contract defines as “unusually hazardous.” Such indemnity must still be provided even if the contractor acted grossly negligent. Importantly, the federal agency’s requirement to pay is not limited to the availability of appropriated funds, which means the U.S. must pay out of the Judgment Fund if appropriated funds are not available.

Finally, for most cost-type federal contracts, the DOD and civilian agencies must reimburse a contractor for liabilities, including litigation and settlement expenses, to the extent not compensated by the contractor’s insurance and subject to the availability of appropriated funds at the time the contingency occurs. FAR 52.2287-7, Insurance-Liability to Third Persons.

This reimbursement occurs even if the contractor acted negligent but is not applicable if the contractor's directors, officers or managers acted with willful misconduct or lack of good faith.

D. Specialized Federal Defenses That Protect "Contractors on The Battlefield"

Military contractors whose explosives, weapon systems or munitions allegedly cause injury or death to third parties have a cadre of potent "federal" defenses to tort suits filed in the U.S. federal courts. They are:

1. The Political Question Doctrine -- Tort suits brought by military or civilian personnel against contractors but which in reality challenge key military judgments and discretionary decisions are "non-justiciable." If a contractor's defenses require judicial review of sensitive military judgments, the suit should be dismissed.
2. The Combatant Activity Exception -- Tort suits are eliminated if the contractor proves it was integrated into the military's command and control apparatus and injuries/death arose out of U.S. military combat activities. DOJ supports the extension of this doctrine to protect contractors sued in combatant-related activities.
3. State Secrets Doctrine -- Tort suits that implicate classified information about product's design or the military's rules of engagement usually results in dismissal of such suits.
4. Derivative Sovereign Immunity -- Especially applicable to contractors performing "public works" military projects, this doctrine can eliminate

contractor liability where the contractor was acting at the direction of the U.S. and there is no evidence that the contractor was acting “outside the scope” of the contract.

5. Defense Base Act -- Unless the contractor/employer intended to harm his employee, the sole remedy for injury or death to a contractor employee is administrative and his tort suit against his employer is prohibited.

E. The SAFETY Act -- Most Significant Tort Mitigation Technique For Contractors Supplying Anti-Terror Products or Services in the U.S. or abroad.

Following the horrific terrorist attacks of 2001, Congress passed the SAFETY Act in 2002. It is landmark legislation, eliminating or minimizing tort liability for sellers of facilities that deploy anti-terror technology (products or services) which have been approved by the U.S. Department of Homeland Security (DHS) should suits arise in the U.S. after an act of terrorism. The Secretary of DHS will determine on a case-by-case basis whether an attack meets the definition under the SAFETY Act. The “losses” from which an awardee is protected include damage, for third party death, injury, property and business interruption.

There are two levels of protection afforded under the SAFETY Act. The highest form is “Certification” which provides the following protections to the seller or deployer of anti-terror technology:

- a presumption of immediate dismissal from third party lawsuits arising out of an act of terror unless clear and convincing evidence exists that the seller/deployer

acted fraudulently or with willful misconduct in submitting data to DHS during the application process

- the seller cannot be held liable for punitive damages in such suits
- such suits can only be maintained in federal courts
- any liability for the seller/deployer is capped at agreed upon limits, usually the terror insurance coverage limits of the seller/deployer

The second form of protection is “Designation” and it provides all of the above protections except the presumption of immediate dismissal. An applicant will receive Designation coverage but not Certification coverage when its anti-terror technology has not been deployed very long or in many diverse environments.

The Certification and Designation protections also apply to sellers/deployers’ subcontractors, vendors, distributors and customers, commercial or governmental, who contribute to or utilize the SAFETY Act approved technologies. Importantly, DHS clarified in 2006 that these protections apply to entities implementing and deploying their own anti-terror security measures to protect their own facilities and assets. Also, these protections apply even if the act of terror occurs outside the United States so long as the “harm”, including financial harm, is to persons, property or entities of the U.S. and the lawsuit is filed in the U.S.

The definition of anti-terror technologies is broad and covers those technologies deployed in defense against or in response to or recovery from a terror attack. These include security procedures like vulnerability assessments; deployed physical security systems like command and

control systems; and deployed cybersecurity systems. Just recently, DHS has approved over 1,000 anti-terror technologies since 2002.

A seller/deployer of anti-terror technology must apply for SAFETY Act coverage at DHS. The application process takes on average about 120 days, with more complex applications taking longer. The applicant will provide technical, financial and insurance information relating to its anti-terror technology. All such information is handled with strict confidentiality by DHS. An applicant awarded SAFETY Act coverage receives these protections for all such deployments of its anti-terror technology for the next five years from the date of its award letter. An applicant can also apply for renewal of its award.