



Response Action Contractor Final Indemnification Guidelines

Superfund Revitalization Office

Intermittent Bulletin
Volume 2, Number 1

The final EPA Superfund Response Action Contractor Indemnification Guidelines were published in the Federal Register on January 25, 1993. The Final Guidelines supersede EPA's Interim Guidance on Indemnification which, since 1987, has prescribed the standard terms and conditions for indemnification agreements with Superfund response action contractors (RACs). Under CERCLA Section 119, EPA has discretionary authority to indemnify RACs for third-party damage claims based on negligent release during a response action.

The Final Guidelines affect all response action contracts, including ARCS, ERCS, TES, and TAT. The Guidelines also impact grants, contracts issued by States under cooperative agreements with EPA, closed contracts, and contracts awarded by the U.S. Army Corps of Engineers and other Federal agencies operating under interagency agreements with EPA to cleanup Superfund sites.

The Guidelines treat new and existing contracts differently. For example, no indemnification will be offered in new solicitations. If, however, it is determined that there is insufficient competition which results from the lack of indemnification, the solicitation may be amended to offer limited indemnification.

Many existing response action contracts currently have indemnification clauses that provide unlimited indemnification; however, the interim clauses provide that the indemnification provisions will be modified by mutual agreement within 180 days of promulgation of the Final Guidelines to be consistent with the Final Guidelines.

BACKGROUND

Section 119(a) of the Superfund Law (the Comprehensive Environmental Response,

Compensation, and Liability Act of 1980 or CERCLA), provides that response action contractors shall not be held liable under Federal law for damages resulting from the release of hazardous substances, pollutants, or contaminants, so long as the release is not caused by negligence, gross negligence, or intentional misconduct. Section 119 also provides that EPA may indemnify (i.e., not hold liable) response action contractors for damages (including litigation costs) caused by negligence, but EPA must establish limitations and deductibles applicable to that indemnification.

Federal protection, or indemnification as it is called, for releases due to negligence, may be offered to RACs only if commercial insurance is unavailable or offered at a price EPA determines not to be fair and reasonable. Thus, the requirements for receiving indemnification for negligence under Section 119(c) are that adequate insurance is not available at a fair and reasonable price, and the RAC has made diligent efforts to obtain insurance and agrees to continue to do so each time work begins at a new site.

Section 119 also required EPA to develop final indemnification guidelines. In 1987, EPA issued Interim Guidance on indemnification for RACs. Under the Interim Guidance, EPA provided indemnification which did not specify limits, deductibles, or terms of coverage. Contracts issued under the Interim Guidelines contain a clause that states "... these contracts will be modified by the mutual agreement of the parties hereto within 180 days of EPA's promulgation of the Final Guidelines ...". As a result, existing contracts containing the above clause must be modified.

MAJOR GUIDELINE PROVISIONS

No indemnification will be offered in new contracts. The Guidelines allow EPA to provide

limited indemnification to existing response action contractors and new procurements resolicited as a result of inadequate competition attributable to a lack of indemnification. The Final Guidelines specify a deductible that increases commensurate with an increase in the limitation. The maximum indemnification generally is \$50 million with a \$1 million deductible. The ARCS contractors, however, may be indemnified up to \$75 million with a \$2 million deductible and co-payments by the contractor above \$50 million. The ARCS contracts also have a \$15 million flow-down provision that is available for subcontractor indemnification. Contractors that use innovative technologies qualify for lower deductibles.

Generally, the contractor may choose any level of indemnification up to the bracket that incorporates the value of the contract; however, the higher the indemnification, the higher will be the deductible. Table 1 presents the relationship established in the Guidelines between contract value, indemnification limits, and deductibles.

Before a contractor is offered indemnification, however, the contractor must have made a diligent effort to purchase pollution liability insurance. The cost of the insurance generally would be considered a recoverable cost (either as a direct or indirect cost) under cost reimbursement contracts, so long as EPA approves the purchase of the insurance and makes the determination that the premium price is fair and reasonable. The Guidelines specify, however, that any purchased pollution liability insurance will reduce the amount of indemnification available to the contractor on a dollar for dollar basis.

IMPLEMENTATION STRATEGY FOR MODIFYING EXISTING CONTRACTS

The Agency needs to modify all contracts, grants, and cooperative agreements by July 25, 1993 (180 days from the January 25, 1993 publication date) to incorporate the limits, deductibles and terms outlined in the final guidelines. Our approach for implementing the Indemnification Guidelines is to provide contractors with the opportunity to select their limits and deductibles from the Final Guidelines and inform EPA of their choice.

The Contracting Officer (CO) will send to each affected contractor a letter that will advise them of the publication of the Final Guidelines, and will request that they make a diligent effort to purchase pollution liability insurance from the private

insurance industry if they have not done so recently. The cost of the insurance policy will be recoverable under the contract, either as a direct or indirect cost, so long as EPA determines that the price of the premium is fair and reasonable. The letter will also explain that EPA will provide limited indemnification (with a deductible) against negligent actions that cause the release of hazardous substances, pollutants, or contaminants. The amount for which EPA is willing to indemnify them is specified in the Guidelines, and is a function of the size of their response action contract. For every dollar of insurance purchased, however, there will be a corresponding dollar reduction in indemnification.

The letter will request that contractors respond to EPA within 30 days, and provide a copy of any quotation for pollution liability insurance that they have identified, including information on the cost, terms, and conditions of the policy. If the contractor is unable to identify an acceptable insurance policy, the contractor must submit documentation on all diligent efforts made to purchase insurance.

EPA Headquarters will review the submitted pollution liability insurance quotations, and will approve purchase of those policies that are offered at a fair and reasonable price. Once the terms of the policies are established, and there is a commensurate reduction in indemnification limits, a new indemnification clause will be transmitted to the contractor. At the time that the contract indemnification clauses are modified, the contractor must submit to EPA proof of purchase of the pollution liability insurance.

For those contractors who made a diligent effort to purchase insurance, but nonetheless were unable to identify an acceptable policy, the CO, with concurrence from Headquarters, will transmit to them a modified indemnification clause that includes limitations and deductibles consistent with the Final Guidelines.

EPA Headquarters will provide draft clauses to the COs to reflect the final indemnification limits and deductibles, as well as any pollution liability insurance applicable to the contract. This will ensure that the new indemnification clauses are consistent across different types of contracts.

INDEMNIFICATION HOTLINE

To ensure that the lines of communication remain open, and the Regions have a clear point of

contact at Headquarters so that issues, questions, and concerns regarding indemnification can be addressed efficiently, we have set up an "Indemnification Hotline." The number is (202-260-6862). Please leave a message and we will get back to you within 24 hours.

If the pace of work at a site is threatened, please call the Hotline immediately, so that we may provide you with information and guidance as quickly as possible. We will distribute information as soon as issues are resolved and products are generated.

INDEMNIFICATION HOTLINE

(202) 260-6862

TABLE 1

RESPONSE ACTION CONTRACTOR INDEMNIFICATION

JOB VALUE	LIMIT	DEDUCTIBLE	
		NEGOTIATED FIXED PRICE OR COST REIMBURSEMENT CONTRACTS	INNOVATIVE TECHNOLOGY, SITE PROGRAM, GRANTS, REMEDIAL ACTION & INNOVATIVE TECHNOLOGY SUBCONTRACTS UNDER COST REIMBURSEMENT CONTRACTS > 5 YEARS
All Contracts	\$2 million	\$20,000	\$10,000
All Contracts	\$5 million	\$50,000	\$25,000
All Contracts	\$10 million	\$100,000	\$50,000
Single site of \$10 to \$25 million; multi-site less than \$25 million	\$25 million	\$250,000	\$200,000
\$25 million or more	\$50 million	\$1 million	Not available
ARCS contracts	\$75 million (copayment required above \$50 million)	\$2 million	Not available
	\$15 million indemnification available for subcontracting pool; \$5 million max per sub	\$50,000	