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Contractual Indemnification by the Federal Government

Shane Murphy O'Connell

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I. INTRODUCTION

By necessity, the federal government contracts with private entities to perform inherently dangerous and highly hazardous activities such as hazardous waste disposal,[1] environmental spill cleanup,[2] weapon manufacturing, military mission support,[3] nuclear waste disposal,[4] and large-scale construction projects. In such contracts the likelihood of lawsuit is extremely high, and, thus, the parties have a significant incentive to include provisions allocating the risk of lawsuit or injury to one party or the other. Allocation of risk in private and public contracts is frequently accomplished through indemnification provisions or insurance provisions allocating risk of loss.[5] While private parties are able to incorporate either indemnification or insurance provisions into their contracts, public entities are not similarly unrestrained.

Indemnification provisions allocate the risk of lawsuit or compensation for damage to one party in a contract in exchange for compensation either in the form of other beneficial contract terms or financial compensation.[6] Indemnification provides an opportunity for a party without sufficient capital to cover a large lawsuit to shift the risk of loss to another party in exchange for

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[1] Clean Venture, Inc, B-284176, 2000 CPD ¶ 47 (Comp. Gen. March 6, 2000).

[2] Department of the Interior Contract with Industrial Economics, Inc., $7,000,000 Contract Awarded for the Emergency Response for the Deepwater Horizon Oil Spill, (July 12, 2010) (contract data on file with author).

[3] U.S. Gov't Accountability Office, GAO-11-192, Further Action Needed to Better Implement Requirements for Conducting Inventory of Service Contract Activities (Jan 14, 2011), *available at* http://www.gao.gov/assets/320/314659.pdf.

[4] Contract with Duke Energy Corporation, William States Lee II Nuclear Station – Unit 1, Contract # DE-CR01-09RW09003 (Nov. 4, 2008), *available at* http://www.ieer.org/reports/DOE_WasteContracts2010/09RW09003%20William%20States%20Lee%20III%201.pdf; Contract with PPL Bell Bend, LLC, Bell Bend Nuclear Power Plant, Contract # DE-CR01-09RW09016 (Dec. 18, 2008), *available at* http://www.ieer.org/reports/DOE_WasteContracts2010/09RW09016%20Bell%20Bend.pdf.

[5] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-192, FURTHER ACTION NEEDED TO BETTER IMPLEMENT REQUIREMENTS FOR CONDUCTING INVENTORY OF SERVICE CONTRACT ACTIVITIES (Jan 14, 2011); Lane v. Celanese Corp of Am., 94 F. Supp. 528, 529 (N.D.N.Y. 1950); Redevelopment Agreement between The Port Authority of New York and New Jersey and the Bayonne Local Redevelopment Authority, Contract for The Peninsula at Bayonne Harbor (July 2010) (on file with author); Dixon v. CertainTeed Corp., 944 F. Supp. 1501, 1506 (D. Kan. 1996).

[6] BLACK'S LAW DICTIONARY (9th ed. 2009).

a fee paid over the course of the entire contract term.[7] Simultaneously, the indemnifying party takes on the role of the insurer and retains the liability of the contract, presumably in exchange for a better contract price or more favorable terms.[8]

To allocate risk in private contracts, parties employ provisions requiring insurance covering the terms of the contract as well as indemnification provisions allocating risk through the contract terms. In private contracts, indemnification presents little problem, as freedom-of-contract doctrine includes a right to provide for indemnification.[9] In public contracts, however, the federal government is subject to unique contractual limitations, one of which restricts the means and scope of contractual indemnification in federal government contracts.[10] The limitation on the federal government is based on a line of Comptroller General opinions and United States Court of Federal Claims cases; all hold that the Anti-Deficiency Act prohibits indemnification contracts that purport to establish unlimited liability in the federal government.[11] Though the weight of authority holds that the federal government cannot contractually indemnify for an unlimited amount of liability, the government's pattern of conduct in entering indemnification agreements warrants a discussion of the law limiting a contractor's ability to succeed on a claim for enforcement of such an unlimited indemnification provision.[12]

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[7] Eric F. Herzberg, *Is Indemnification a Barrier to Public-Private Partnerships?*, LOGISTICS MGMT. INST. (2004), http://www.acq.osd.mil/log/mpp/articles/LG301L3%20Hold%20Harmless.pdf (stating that indemnification in governmental contracts is, at its core, a tool for risk management and risk allocation).

[8] *See id.*

[9] Charles Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 534 (1923) ("Freedom is the general rule, and restraint the exception.").

[10] 59 Comp. Gen. 369 (1980); 35 Comp. Gen. 85 (1955); 16 Comp. Gen. 803 (1937); 7 Comp. Gen. 507 (1928); *Indemnification Agreements and the Anti-Deficiency Act*, 8 U.S. Op. Off. Legal Counsel 94 (1984); Rick's Mushroom Serv., Inc. v. U.S., 76 Fed. Cl. 250 (Fed. Cl. 2007).

[11] 59 Comp. Gen. 369 (1980); 35 Comp. Gen. 85 (1955); 16 Comp. Gen. 803 (1937); 7 Comp. Gen. 507 (1928); *Rick's Mushroom Service, Inc.*, 76 Fed. Cl. 250.

[12] *See Rick's Mushroom Service, Inc.,* 76 Fed. Cl. 250; Union Pac. R.R. Corp. v. U.S., 52 Fed. Cl. 730 (Fed. Cl. 2002); *see* Contract with Duke Energy Corporation; Contract with PPL Bell Bend, LLC, Bell Bend Nuclear Power Plant (demonstrating that the federal government still incorporates indemnification provisions in its contracts). While governmental entities have been discouraged from entering contractual indemnity contracts, the necessity of the tool has forced the United States Legislature to statutorily permit contractual indemnity in many situations. 10

To succeed on a claim for indemnification from the federal government, a contractor must show that: (1) the federal government's sovereign immunity has been waived for contractual indemnity claims and (2) that the Anti-Deficiency Act either does not apply to the particular claim or should not foreclose indemnification.[13] A contractor can show a waiver of sovereign immunity either by pointing to the express terms of the contract or by showing a legislative waiver of sovereign immunity.[14] The most sweeping legislative waiver of sovereign immunity with regard to enforcing contractual indemnification under federal law is the Tucker Act,[15] which provides the United States Court of Federal Claims with jurisdiction over all claims arising under federal contracts, and thus waives sovereign immunity for all such contract claims.[16] In order to bring a contractual indemnity claim under the Tucker Act, the contracting party need establish only that enforcement of the indemnity provision is contractually based rather than based on tort law or some other legal right.[17] Once a party establishes a waiver of sovereign immunity, it must then show that the contractual indemnity provision that it is attempting to enforce does not violate the Anti-Deficiency Act.

To establish that contractual indemnity does not violate the Anti-Deficiency Act, a contracting party must show that the indemnification provision establishes a cap on liability for which a sufficient appropriation has been made, or that legislation expressly authorizes the unlimited indemnification.[18] If the parties have entered into a contract for unlimited indemnity

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U.S.C. § 2354 (2006); 48 C.F.R. § 950.7101 (West April 19, 2012); 42 U.S.C. § 2210 (2006). Even when not statutorily permitted, governmental entities occasionally place contractual indemnity clauses in their contracts. Tex. & N.O.R. Co. v. Galveston Cnty., 161 S.W.2d 530 (Tex. Civ. App. 1942), *aff'd*, 169 S.W.2d 713 (Tex. 1943) (the county indemnified several railroads for the construction and operation of a drawbridge).

[13] *See infra* Part III.A and Part III.B.

[14] *See infra* Part III.A.

[15] *See* 28 U.S.C. § 1491 (2006) (waiving sovereign immunity for contract claims in excess of $10,000).

[16] 28 U.S.C. § 1491 (2006).

[17] Kenney Orthopedic, LLC v. U.S., 83 Fed. Cl. 35 (Fed. Cl. 2008).

[18] *Rick's Mushroom Serv., Inc.,* 76 Fed. Cl. 250; 59 Comp. Gen. 369 (1980); 35 Comp. Gen. 85 (1955); 16 Comp. Gen. 803 (1937); 7 Comp. Gen. 507 (1928).

and a party cannot satisfy either of these requirements, the overwhelming weight of authority suggests that the provision is unenforceable.[19] If the party, has entered into a contract for unlimited indemnity, however, it may still argue that the Anti-Deficiency Act does not restrict indemnification contracts because the Anti-Deficiency Act targets definitive liability, rather than contingent liability.[20] Making such an argument, while supported by the defined language of the Anti-Deficiency Act, carries with it a difficult battle against established precedent.[21]

If a contracting party can demonstrate that the Anti-Deficiency Act does not bar recovery for the contractual indemnity provision that the government assumed, and that the federal government has waived its sovereign immunity, the claim will proceed as to the extent that a private entity in a similar circumstance would be liable.[22] By honoring its contractual obligations in this way, the government reinforces the legitimacy and stability of its contracts and enables future entities to be confident in entering similar indemnification provisions to allocate risk.[23]

This Comment will summarize the applicable law foreclosing the federal government's ability to contractually indemnify for unlimited liability, examine the obstacles presented to a contractor bringing a claim against the federal government for contractual indemnity, and suggest a possible alternative interpretation of the Anti-Deficiency Act, which would increase the federal government's flexibility in entering indemnity contracts without relieving Congress of the sole power to make appropriations.

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[19] *See Infra* Part III.B.
[20] *See Infra* Part IV.
[21] 59 Comp. Gen. 369 (1980); 35 Comp. Gen. 85 (1955); 16 Comp. Gen. 803 (1937); 7 Comp. Gen. 507 (1928); *Rick's Mushroom Serv., Inc.*, 76 Fed. Cl. at 250; Union Pac. R.R. Corp. v. U.S., 52 Fed. Cl. 730, 732 (2002).
[22] U.S. Fid. & Guar. Co. v. U. S., 728 F. Supp. 651, 653-54 (D. Utah 1989) ("the extent of the federal waiver is measured by assessment of how Utah law would treat 'a private individual in like circumstances.'") (citing Ewell v. U.S., 579 F. Supp. 1291 (D. Utah 1984)).
[23] Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 467 (1999).

Specifically, Part II will summarize contractual indemnification, the Tucker Act, and the Anti-Deficiency Act, and analyze how those doctrines apply to the federal government's ability to contractually indemnify. Part III will expand upon the Tucker Act and the Anti-Deficiency Act and specifically discuss how the Tucker Act establishes a waiver of sovereign immunity for claims arising out of contractual indemnity claims but how the Anti-Deficiency Act forecloses such indemnity claims through invalidating the terms of many indemnity contracts with the federal government. Part IV will discuss the plain language of the Anti-Deficiency Act, suggest that the current interpretation may contradict the Comptroller General's own definitions of the terms used in the Anti-Deficiency Act and will suggest an alternative approach to regulating the federal government's ability to enter indemnification contracts that create unlimited liability. Finally, Part V will explain that, while the Comptroller General never should have interpreted the Anti-Deficiency Act as foreclosing unlimited contractual indemnity by the federal government, a change in policy at this point is highly unlikely and may even be harmful due to the significant weight of authority establishing the current interpretation as the law.

II. LEGAL FRAMEWORK APPLICABLE TO THE FEDERAL GOVERNMENT'S INABILITY TO CONTRACTUALLY INDEMNIFY

A. Contractual Indemnity

Contractual indemnity is an agreement to hold harmless or assume another contracting party's liability for loss, damage, or harm resulting from the terms of a contract or as a result of the fulfillment of that contract.[24] It is an assurance which one party undertakes to shield another from anticipated, expected, or possible liability and a way to prevent the other party from

[24] *See* BLACKS LAW DICTIONARY (9th Ed. 2009). An indemnity provision is a contractual term that creates a duty to "make good any loss, damage, or liability incurred by another" or creates a right in a contracting party to claim reimbursement for loss, damage, or liability resulting from the terms of that contract. *Id.*

suffering the unexpected financial consequences of tort liability.[25] Under a standard indemnification contract, the "indemnitor" agrees to bear the risk of loss, reimburse the "indemnitee"[26] for all costs resulting from the contract, and assume the responsibility of defending any litigation resulting from furtherance of the contract.[27]

The general rules which govern the creation, interpretation, and application of contracts, and the standards by which contractual terms are analyzed and scrutinized, apply similarly to interpreting a contract for indemnification.[28] Further, determination of the validity of an indemnification contract generally follows the same standards applied to all private contracts.[29] Where the terms of the indemnity provision are unambiguous, those terms will govern.[30] Where, however, the terms of the provision or contract are ambiguous, the court will determine the limits of the contractual provision based on its interpretation of the intent of the contracting parties.[31] In accordance with general contract principle, private entities may freely enter contracts which purport to indemnify, so long as those contracts does not attempt to indemnify a party against harm caused due to that party's sole negligence.[32] So long as the indemnitee's fault is not solely responsible for causing the injury being indemnified, the terms of the indemnification contract

[25] *See id.*
[26] An "indemnitee" is the individual being indemnified against liability. The "indemnitor" is the individual taking on liability and holding the indemnitee harmless. *Id.*
[27] Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993).
[28] IFC Interconsult, AG v. Safeguard Intern. Partners, LLC., 438 F.3d 298 (3d Cir. 2006).
[29] *Id.*
[30] Chevron U.S.A., Inc. v. Murphy Exploration & Production Co., 151 S.W.3d 306 (Ark. 2004).
[31] *Id.*
[32] Indemnification contracts which purport to indemnify a party for its sole negligence are invalid as against public policy. Allowing such a contract provision would allow a party to act negligently or grossly negligent without an associated duty to compensate for harm done. *See* Brown v. Balt. and Ohio R. Co., 805 F.2d 1133 (4th Cir. 1986); Kemira, Inc. v. A-C Compressor Corp., 755 F. Supp. 1059, 1070 (S.D. Ga. 1991) (citing Nat'l. Candy Wholesalers, Inc. v. Chipurnoi, Inc., 350 S.E.2d 303 (Ga. Ct. App. 1986).).

can cover all actions resulting from furtherance of the contract or specific action required under the contract.[33]

Contractual indemnity is an important tool that allows private entities to allocate the risk of a contract to a particular party in exchange for compensation. Parties that may otherwise be unable to assume the risk of a large future lawsuit can instead pay a greater price upfront or over the course of the contract to avoid the possibility of paying a large unknown sum in the future. The flexibility and benefit of indemnification has led to its consistent use in a variety of contract areas including manufacturing contracts, property acquisition contracts, and construction contracts.[34] In these areas indemnification is especially useful due to the high likelihood of harm and resultant litigation. Indemnification acts as a form of insurance, allowing the contractors to pursue risky contracts without having to set aside large amounts of capital for the possibility of future lawsuits. In any indemnification contract, however, one party necessarily must assume that underlying risk.[35]

In contracts with the federal government, however, private entities are able to take on the risk of unlimited loss, while the federal government cannot.[36] The federal government can pay upfront for relief from the risk of lawsuit, so long as an adequate appropriation has been made, but may not take on the role of the insurer without express statutory authorization.[37] If the

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[33] Flynn v. Am. Auto Carriers, Inc., 85 F. Supp. 2d 158, 167 (E.D.N.Y. 2000) (stating that federal law adheres to the general contract principle that a party cannot be indemnified for their sole negligence).

[34] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-192, FURTHER ACTION NEEDED TO BETTER IMPLEMENT REQUIREMENTS FOR CONDUCTING INVENTORY OF SERVICE CONTRACT ACTIVITIES (Jan 14, 2011) (showing the existence of indemnity provisions in military contracts); Lane v. Celanese Corp of Am., 94 F. Supp. 528, 529 (N.D.N.Y. 1950) (showing the existence of indemnity provisions in manufacturing contracts); Redevelopment Agreement between The Port Authority of New York and New Jersey and the Bayonne Local Redevelopment Authority, Contract for The Peninsula at Bayonne Harbor (July 2010) (on file with author) (showing the existence of indemnity provisions in property acquisition contracts); Dixon v. CertainTeed Corp., 944 F. Supp. 1501, 1506 (D. Kan. 1996) (showing the existence of indemnity provisions in construction contracts).

[35] *See* BLACKS LAW DICTIONARY (9th Ed. 2009).

[36] *See infra* Part III.

[37] 59 Comp. Gen. 369 (1980); 35 Comp. Gen. 85 (1955); 16 Comp. Gen. 803 (1937); 7 Comp. Gen. 507 (1928); *Indemnification Agreements and the Anti-Deficiency Act*, 8 U.S. Op. Off. Legal Counsel 94 (1984).

federal government does purport to assume the role of an indemnitor, a private party entering such a contract has significant barriers to enforcement of the indemnification terms.[38]

B. Sovereign Immunity and the Tucker Act

In federal jurisprudence, the doctrine of sovereign immunity stands as the primary barrier to a private entity's ability to sue the federal government.[39] The doctrine states that an entity may not sue the government or governmental agencies unless permission to sue is granted in a legislative act.[40] The original foundation of sovereign immunity was based on the divine right of kings.[41] The theory stated that, as a divine entity, the monarch could commit no wrong, and thus subjects of the kingdom had no right to sue him.[42] One of the earlier cases recognizing sovereign immunity in the United States was *Kawananakoa v. Polybank.*[43] *Kawananakoa* moved the doctrine away from its feudal background and established a democratic justification for its use in the United States.[44] *Kawananakoa* held that "[a] sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[45] As the right evolved, it came to embody the principle that a legal right could exist against the United States only if the legislature authorizes such a right.[46] Accordingly, the government is now shielded from substantive liability for any legal claim that it has not consented to, but cannot

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[38] *See infra* Part IV.
[39] Robert Porter, *Contract Claims Against the Federal Government: Sovereign Immunity and Contractual Remedies*, (Harv. Law Sch. Fed. Budget Pol'y Seminar, Briefing Paper, 2006).
[40] U.S. v. McLemore, 45 U.S. 286, 288 (1846).
[41] Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 434 (2005).
[42] *Id.*
[43] Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).
[44] *Id.*
[45] *Id.*
[46] Seidman, *supra* note 36, at 393.

claim immunity from suit in areas of law where it has consented to suit.[47] When a party fails to establish a waiver of sovereign immunity, the substantive law underlying the claim is irrelevant, and the suit must be dismissed for lack of subject matter jurisdiction.[48]

The reach of sovereign immunity is expansive; however, it is not limitless.[49] Where the government has consented to suit, it is liable for all claims falling under that consent, as if it were acting as a private entity.[50] To establish a lawsuit against the federal government, the party bringing suit must be able to point to a statute waiving sovereign immunity for the specific type of claim being brought.[51] To establish such a waiver, the text of the statute must contain an unequivocally clear statement waiving sovereign immunity.[52] The waiver need not use the words "waiver of sovereign immunity" to explicitly constitute an express right to sue, but a party cannot base such a waiver solely on implication.[53] As such, the court will strictly construe any claimed waiver based on the terms of the statute and will not interpret such a waiver loosely.[54]

The most pertinent legislative enactment, giving rise to a waiver of sovereign immunity with respect to the federal government's ability to contractually indemnify, is the Tucker Act.[55] For some time Congress has understood the necessity of establishing liability for the federal government arising out of contract disputes and has waived the government's immunity from

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[47] U.S. v. Shaw, 309 U.S. 495 (1940); Lehman v. Nakshian, 453 U.S. 156 (1981).
[48] U.S. v. McLemore, 45 U.S. 286, 288 (1846); U.S. v. Sherwood, 312 U.S. 584, 586 (1941) ("[T]he terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit.")
[49] *McLemore*, 45 U.S. at 288.
[50] *Id.*
[51] Taylor v. U.S., 303 F.3d 1357, 1361 (Fed. Cir. 2002); U.S. v. King, 395 U.S. 1 (Ct. Cl. 1969) (stating that the Court of Federal Claims jurisdiction to provide relief must be based on some area in which the Federal Government has waived its sovereign immunity).
[52] Mollison v. U.S., 568 F.3d 1073 (9th Cir. 2009).
[53] Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assoc., Inc., 86 F.3d 656 (7th Cir. 1996) ("Although sovereign immunity may not be waived by implication, waiver need not use words "sovereign immunity" to be deemed explicit; statutory or contractual creation of right to sue constitutes effective waiver.").
[54] U.S. v. Kubrick, 444 U.S. 111 (1979); Lane v. Pena, 518 U.S. 187 (1996) ("[W]aiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.").
[55] *See infra* Part III.A. (discussing the Tucker Act and it's legislatively mandated abrogation of sovereign immunity).

such claims.[56] This early waiver of sovereign immunity that Congress implicitly established has been largely displaced by the Tucker Act.[57] The Tucker Act strips the government of sovereign immunity for claims arising out of government contract disputes, so long as the plaintiff meets certain criteria and follows certain rules.[58]

The Tucker Act further provides the United States Court of Federal Claims with jurisdiction to hear any non-tort claim against the United States, which is founded on any express or implied contract with the United States:[59]

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[60]

The Act does not explicitly state that it waives sovereign immunity for claims arising out of contract disputes, but it has been deemed to do so based on the clear language providing the United States Court of Federal Claims with jurisdiction over such claims.[61] Accordingly, the Tucker Act permits claims against the federal government for: (1) contractual disputes, (2) disputes where the plaintiff seeks reimbursement for money paid to the government, and (3) disputes where the plaintiff asserts a right to payment from the government[62]so long as the basis of the claim does not sound in tort.[63]

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[56] Porter, *supra* note 34 (stating that the creation of the Court of Claims in 1855 established a waiver of immunity for claims based in contract law and was essential to the government's ability to procure necessary goods and services through private contractors).
[57] *See infra* Part III.A. (discussing the Tucker Act and it's legislative abrogation of sovereign immunity).
[58] *Id.*
[59] Diversified Carting, Inc. v. N.Y.C., 423 F. Supp. 2d 85 (S.D.N.Y. 2005).
[60] The Tucker Act, 28 U.S.C. § 1491 (2006).
[61] *Id.*
[62] *Id.*
[63] 28 U.S.C. § 1346(b)

If a plaintiff can bring a claim under the Tucker Act, sovereign immunity is "simply a nonissue" and will not restrict the claim from moving forward.[64] The Tucker Act is quite broad and does not simply cover procurement contracts for goods, lands, and services, but extends to claims based on any "agreement undertaken by the federal government that has a private analogue, that is, categorically of the sort that can be executed among private entities and individuals."[65] As such, it should encompass claims for enforcement of indemnification provisions in federal contracts and any party bringing a claim for indemnity likely will not encounter a significant challenge to the waiver of sovereign immunity.

While the Tucker Act waives sovereign immunity for most contract claims, it does not fully dispense with the government's sovereign immunity associated with contract claims, instead, it retains significant limitations on a party's ability to sue.[66] Included in these limitations are a variety of rules, such as pre-suit notice, which a party must follow in order to pursue a contract-based suit against the federal government.[67] If any of the standards that the Tucker Act establishes is not strictly followed, jurisdiction fails, and the claim will be dismissed as if the federal government had never consented to suit.[68] Any party seeking to bring a claim for contractual indemnity against the federal government should fully review the restrictions set forth in the Tucker Act before proceeding with such a claim. If a party adheres to all of the standards and rules that the Tucker Act establishes, that party may still pursue a contractual

[64] Wesreco, Inc. v. U.S. Dep't of Interior, 618 F. Supp. 562 (D.C. Utah 1985) (stating that when a plaintiff asserts a claim for damage against the United States which falls within the purview of the Tucker Act, determining consent to suit is a nonissue).
[65] Stovall v. U.S., 71 Fed. Cl. 696 (Fed. Cl. 2006).
[66] 28 U.S.C. § 1491.
[67] *Id.*
[68] *Id.* Under the Tucker Act, waivers of sovereign immunity are limited to cases in which the damages sought are greater than $10,000, the plaintiff brings the action in the Court of Federal Claims, and the plaintiff may only seek monetary damages. *Id.*

claim against the federal government only if the contract it is seeking to enforce is valid and binding on the federal government.[69]

C. The Federal Anti-Deficiency Act

The major statutory bar to a contractual indemnification claim against the federal government is the Anti-Deficiency Act, which "bars a federal employee or agency from entering into a contract for future payment of money in advance of or in excess of an existing appropriation."[70] The Anti-Deficiency Act is not limited to any one branch of the federal government, but applies to all officers, agencies, and employees with the authority to enter contracts on behalf of the United States.[71] While private parties are free to allocate risk of loss through contract provision, the federal government does not have such a right, partially based on the restrictions set forth in the Anti-Deficiency Act.[72]

"The Anti-Deficiency Act was born as a result of congressional frustration at the constant parade of deficiency requests for appropriations it was receiving in the nineteenth century and early twentieth century, generated, it believed, by the lack of foresight and careful husbanding of funds by executive branch agencies."[73] The animating view was that the executive branch simply ignored the Appropriations Clause of the United States Constitution and consistently

[69] Barron v. McKinnon, 196 F. 933, 938 (1st Cir. 1912).
[70] Hercules Inc. v. U.S., 516 U.S. 417, 427 (1996).
[71] Because the Anti-Deficiency Act applies to all branches of the federal government and all agencies, an interpretation that it restricts contractual indemnity forecloses the ability of all federal agencies to contractually indemnify. *See* 28 U.S.C. § 1491. Agencies that are typically involved in high-risk contracts, however, often have express legislative authorization to enter such indemnification contracts. 10 U.S.C. § 2354 (research and development of military departments); National Defense Contracts Act, Pub. L. No. 85-804, 72 Stat. 972 (1958); 42 U.S.C. § 241 (Department of Health and Human Services Contracts for Research and Investigation); Price-Anderson Amendments Act, 42 U.S.C. § 2210.
[72] Charles Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 534 (1923) ("Freedom is the general rule, and restraint the exception."); *see infra* Part III.B.
[73] 59 Comp. Gen. 369, 372 (1980) WL 17997 (Comp.Gen.) (citing 4 ANNALS OF CONG., 350-375 (1809)).

entered contracts without sufficient forethought or appropriate planning.[74] The Appropriations Clause states that "[n]o money shall be drawn from the Treasury but in Consequence of Appropriations made by Law"; by entering contracts for which no appropriation had been made, the executive branch was circumventing this Clause[75] since

Congress consistently make additional appropriations to pay for deficiencies in contracts already entered.[76] To halt this practice, the Anti-Deficiency Act established Congress's supremacy in determining and facilitating the budget and enforcing the Appropriations Clause of the United States Constitution.[77] It established a means by which the legislature could restrict government agencies from seeking additional appropriations to pay for deficiencies resulting from improper oversight in contracts.[78]

The Anti-Deficiency Act states:

> An officer or employee of the United States Government . . . may not
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> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve either the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.[79]

It prohibits (1) making any expenditure or obligation *in excess* of an available appropriation as well as (2) making any expenditure or obligation *in advance* of an available appropriation.[80] It forecloses a government agent's ability to rely on future appropriations to cover current obligations. Additionally, because the Anti-Deficiency Act specifically refers to "available

[74] Manos, *The Antideficiency Act Without an M Account: Reasserting Constitutional Control*, 23 PUB. CONTR. L.J. 337, 339 (Spring 1994) (stating that the Anti-Deficiency Act was a means of stopping the executive branch of the federal government from refusing to comply with the Appropriations Clause of the United States Constitution).
[75] U.S. CONST., art. I, § 9 cl. 7.
[76] Manos, *supra* note 61 at 339 (citing J. SHERMAN, RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE AND CABINENT: AN AUTOBIOGRAPHY 155 (1895).
[77] Manos, *supra* note 61 at 339 (stating that the Anti-Deficiency Act was enacted to foreclose executive agencies from complying with congressional appropriation restrictions).
[78] 59 Comp. Gen. 369, 372, (1980); *see* 4 ANNALS OF CONG., 350-375 (1809).
[79] 31 U.S.C. § 1341 (a)(1) (2006).
[80] *Id.*

appropriations," it contemplates not only appropriations that are insufficient at the time the contract is entered, but also depletion of appropriations.[81] If depletion of an appropriation occurs to a point where sufficient funds no longer exist for payment of a contract, no further payment of money may be authorized or can be made in association with such a contract or obligation.[82]

The settled policy is to keep the expenditures of each agency within the appropriations made by Congress each year for conducting its affairs.[83] This ensures that the "Powers of the Purse" remain with Congress, and limits a government agency's ability to spend money without the consent of Congress.[84] Any contract for which Congress has not consented — and thus there is not a sufficient appropriation to cover its completion — is deemed ultra vires, as a violation of the Anti-Deficiency Act.[85] When a governmental agent attempts to spend an amount in excess of what Congress has set aside in an appropriation for a particular contract, the Anti-Deficiency Act is triggered to disallow such an agreement.[86] A daunting example of such a violation occurred when the Department of the Army over-obligated and overspent nearly $160 million on government contracts and had to stop payment to approximately 900 contractors.[87]

If a government agent employs a party properly, however, that party may be able to recover for services provided even if the appropriation is exhausted.[88] If Congress agrees to such payment, but, since congressional consent is required, such payment is in no way guaranteed.[89]

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[81] *See generally id.*
[82] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-RB, pt. C, s. 2 WL 6179172, OBLIGATION/EXPENDITURE IN EXCESS OR ADVANCE OF APPROPRIATIONS (2006).
[83] Parshall v. U.S., 147 F. 433 (8th Cir. 1906); Sutton v. U.S. 256 U.S. 575 (1921).
[84] U.S. CONST. art. 1, § 9, cl. 7.
[85] *Appeals of National Gypsum Co.*, ASBCA No. 53259, 03-1 B.C.A. ¶ 32,054 (2002).
[86] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-RB, pt. C, s. 2 WL 6179172, OBLIGATION/EXPENDITURE IN EXCESS OR ADVANCE OF APPROPRIATIONS (2006).
[87] 55 Comp. Gen. 768 (1976).
[88] King v. U.S. 1 Ct. Cl. 38 (Ct. Cl. 1863); Shipman v. U.S., 18 Ct. Cl. 138 (Ct. Cl. 1883) (stating that if a government agent is given authority to contract for specific work without limitation as to how that work is done, or the cost of that work, the contracts which that agent makes are binding on the government, regardless of whether money has been appropriated for the particular purpose).
[89] *King* 1 Ct. Cl. at 38; *Shipman* 18 Ct. Cl at 138.

Once an appropriation is depleted, a contractor may be required to stop the work it was contracted to perform, but that insufficiency in the appropriation "does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties."[90] Regardless of the general statement in *Ferris v United States* that a contractor should be paid under the terms of its contract regardless of the depletion of an associated appropriation, a contractor's ability to be paid for the completion of a contract that violates the Anti-Deficiency Act depends largely on the contractor's knowledge of the government's spending limitations under the appropriation.[91] As such, in any contractual indemnification provision, the party attempting to enforce the indemnification provision must continually be cognizant of the financial limitations placed on the federal government.

If the contractor has knowledge of the spending limitation that the federal government exceeds, the contractor cannot receive payment for any work completed.[92] If, however, the party can show that it did not have notice, nor should have had notice of the government's spending limitations, then it will not be able to continue working but will be paid for work completed.[93] One way to prove such a lack of notice is to show a division of the appropriation fund between multiple different contractors, and in turn show that the contractor could not have known the limited amount authorized for its portion of the contract.[94] In such a case, the contractor may be paid for the work it has completed, but the contract will be cancelled moving forward.[95] Because the funds are insufficient to pay for work already completed, the governmental agency that entered the contract must transfer funds from other appropriations, if authorized to do so, seek a

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[90] Ferris v. U.S., 27 Ct. Cl. 542, 546 (Ct. Cl. 1892).
[91] Sutton v. U.S., 256 U.S. 575 (1921).
[92] *Id.*
[93] Ferris 27 Ct. Cl. at 542.
[94] *Id.*
[95] *Id.*

deficiency and supplemental appropriations from Congress, or discontinue the service of the contract altogether and pay the debt already accrued.[96]

At any rate, the Anti-Deficiency Act, as interpreted by the weight of authority, bars contractual indemnification for an unlimited amount.[97] Even in cases of limited indemnification, however, the party attempting to enforce indemnification should be wary of depleting the appropriation set aside for its valid contract.

III. APPLICATION OF SOVEREIGN IMMUNITY AND THE ANTI-DEFICIENCY ACT TO CONTRACTUAL INDEMNITY

In order for a contractor to bring a claim against the federal government to enforce an indemnification provision entered by the federal government, that contractor must establish both (1) that the federal government has waived its sovereign immunity and legislatively consented to suit associated with the contractual indemnity, and (2) that the federal government had a legislatively mandated right to enter the indemnification contract in the first place. As discussed earlier in Part II.B., in contractual indemnity claims, as in all claims against the federal government, the contracting party must first found its claim on an act of the legislature that explicitly waives sovereign immunity for such claims.[98] Once a party establishes a waiver of sovereign immunity, it must then show that the federal government has a right to enter the contract by establishing that the contractual provision does not violate any statutory restrictions placed on government contracts.[99] Specifically with indemnification contracts, the contractor

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[96] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-RB, pt. C, s. 2 WL 6179172, OBLIGATION/EXPENDITURE IN EXCESS OR ADVANCE OF APPROPRIATIONS (2006).
[97] *See, e.g.*, 59 Comp. Gen. 369 (1980); 35 Comp. Gen. 85 (1955); 16 Comp. Gen. 803 (1937); 7 Comp. Gen. 507 (1928); *Rick's Mushroom Service, Inc.*, 76 Fed. Cl. 250; Union Pac. R.R. Corp. v. U.S., 52 Fed. Cl. 730, 732 (2002).
[98] *See supra* Part II.B.
[99] *See supra* Part II.C.

must establish that the contract does not violate the Anti-Deficiency Act.[100] If the indemnification provision purports to provide unlimited indemnity by the federal government, the contractor has a difficult path and must contradict a long line of case law and Comptroller General opinions holding that such contracts are unenforceable.[101]

A. The Federal Government has Waived its Sovereign Immunity for Claims Arising Out of Contractual Indemnity

In order to establish a claim for contractual indemnity against the federal government, a party must clearly establish a waiver of sovereign immunity associated with the contract.[102] A contractor may show an implied waiver of sovereign immunity through entering a contract or an express waiver of sovereign immunity through pointing to legislation that specifically waives immunity for contract claims. While state law suggests that the federal government waives its sovereign immunity by validly entering contracts, under federal law the most likely source of a waiver is the Tucker Act.[103]

A party seeking to establish a waiver of sovereign immunity may point to the terms of the contractual indemnity provision and argue that, by entering a contract with such a provision, the federal government impliedly consented to suit. This line of reasoning is supported by state law, but lacks similar support in federal jurisdictions.[104] Such a claim fails in federal jurisdictions

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[100] *Id.*

[101] 59 Comp. Gen. 369 (1980); 35 Comp. Gen. 85 (1955); 16 Comp. Gen. 803 (1937); 7 Comp. Gen. 507 (1928).

[102] U.S. v. McLemore, 45 U.S. 286, 288 (1846).

[103] The Tucker Act, 28 U.S.C. § 1491 (2006).

[104] State Bd. of Pub. Affairs v. Principal Funding Corp., 542 P.2d 503,506 (Okla. 1975) (holding that when a party enters a valid contract with the State and a valid appropriation has been made, the State inherently waives its sovereign immunity with regard to the contract obligations); Souza & McCue Constr. Co. v. Super. Ct., 370 P.2d 338, 339 (Cal. 1962) ("[W]hen the state makes a contract with an individual it is liable for a breach of its agreement in like manner as an individual, and the doctrine of governmental immunity does not apply."); George & Lynch, Inc. v. State, 197 A.2d 734, 737 (Del. 1964) (stating that a party that contracts with an agency which is authorized to enter contracts has all the same remedies under the contract that a private citizen would have against another private citizen); Kersten Co. v. Dep't of Social Serv., 207 N.W.2d 117, 120 (Iowa 1973) ("By entering into a contract, [a state] agrees to be answerable for its breach and waives its immunity from suit."); J.A. Sullivan Corp. v. Commonwealth, 494 N.E.2d 374 (Mass. 1986) (stating that a state consents to jurisdiction and thus lawsuit by voluntarily entering a contract).

because, under federal law, any party contracting with the government is deemed to implicitly have knowledge of the government contract limitations regardless of the party's actual knowledge.[105] Accordingly, seeking a waiver of immunity through the express terms of a federal contract is futile.

Similarly, if a contractor enters an otherwise valid contract with the federal government, for which there is no waiver of sovereign immunity, the injured contractor may claim that the federal government is equitably estopped from denying the validity of its contract.[106] In order to establish equitable estoppel a party must show four elements: "(1) [the defendant] asserted a position by conduct or words; (2) [the injured party] acted in reasonable reliance on the [defendant's] assertion; (3) [the injured party] suffered resulting [in] prejudice; and (4) estopping the [defendant] from acting against [the injured party's interests] serves the interest of justice so as to limit public injury."[107] If the party is deemed as having notice of the government's contract limitations, it can never reasonably rely on a position asserted by the federal government that ignores such limitations. Thus, equitable estoppel cannot defeat sovereign immunity because an element of the equitable estoppels claim will always be missing in such federal claims. While this result may be contrary to the expectations of a party entering an indemnification contract, the indemnity term, on its own, cannot establish the necessary waiver of sovereign immunity or a claim for equitable estoppel.

Nevertheless, although a party may not be able to establish a waiver of sovereign immunity based merely on the terms of the contract itself, it will likely be able to show that the Tucker Act waives sovereign immunity for claims based on contractual indemnification disputes.

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[105] Lopez v. Johns Manville, 649 F. Supp. 149, 157–58 (1986).

[106] *See* Hidden Heights Assisted Living, Inc. v. State, Dept. of Health & Soc. Serv., Div. of Health Care Services, 222 P.3d 258, 268 (Alaska 2009).

[107] Hidden Heights Assisted Living, Inc. v. State, Dep't of Health & Soc. Serv., Div. of Health Care Services, 222 P.3d 258, 268 (Alaska 2009).

As stated previously, the Tucker Act provides the United States Court of Federal Claims with jurisdiction to adjudicate cases resulting from contract disputes with the federal government.[108]

In order to establish that such a waiver of sovereign immunity covers a claim to enforce an indemnification provision, the party asserting the claim must show that contract law establishes the right to enforce an indemnity contract.[109] The Tucker Act does not authorize lawsuits sounding in contract, but based on other rights, and these actions are not authorized simply by framing an action in contract terms.[110] Similarly, a claim for indemnification may be framed in tort terms by stating that the underlying cause of action necessitating indemnification is tort-based; however such an argument does not recognize the very nature of a claim to enforce indemnification. Unlike claims, such as tortious interference, which pertain to contracts but are based in tort law, a claim for contractual indemnity is based on a contractual right and only secondarily concerned with the underlying tort action for which indemnification is being sought.[111] Framing the claim as a tort action cannot change the fact that the claim for indemnification is, at its core, a contract claim with antecedents of a tort action.[112] Because it is relatively easy to establish that claims to enforce contractual indemnity are contract-based, the government's ability to establish immunity from the underlying tort is irrelevant.[113] As claims based on contractual indemnity are clearly contract-based, the Tucker Act waives sovereign immunity from such claims so long as the contract was entered validly.[114] If an agency of the United States, acting with authority to do so, enters into an agreement and binds the United

[108] The Tucker Act, 28 U.S.C. § 1491 (2006).
[109] *See id.*
[110] Ribas y Hijo v. U.S., 195 U.S. 315 (1904); New Orleans-Belize Royal Mail and Cert. Am. S.S. Co. v. U.S., 239 U.S. 202 (1915).
[111] *See* Kenney Orthopedic, LLC v. U.S., 83 Fed. Cl. 35 (Fed. Cl. 2008) (stating that the Court of Federal Claims lacks jurisdiction over a government contractor's claims of tortious interference which is only associated with the contract because the contracting agency's alleged actions did not breach any duty established by the contract).
[112] Angel v. Seattle-First Nat'l Bank, 653 F.2d 1293 (9th Cir. 1981).
[113] *Id.*
[114] 28 U.S.C. § 1491 (2006).

States to that agreement, the sovereign immunity of the United States will be deemed waived for the terms of that contract.[115] If, however, an agent does not have authority to enter such a contract, the federal government cannot be made liable for such a contract regardless of the expectations of the parties.[116]

B. The Anti-Deficiency Act Bars Enforcement of Contract Claims for Unlimited Indemnity.

Once a party establishes jurisdiction for a contract claim based on a waiver of sovereign immunity, it must next establish that the government agency had legislative authority to enter the contract that the contractor is attempting to enforce.[117] The major bar to enforcement of a contract for indemnification in which the federal government is the indemnitor, is the Anti-Deficiency Act. As stated earlier, the express language of the Anti-Deficiency Act restricts a government actor from

> (A) mak[ing] or authorize[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or (B) involv[ing] [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.[118]

Accordingly, "the Supreme Court of the United States and other federal courts have . . . held that all contracts for future payments of money, in advance of or in excess of existing appropriations, are void ab initio."[119]

Applying this principle to contractual indemnification, the Office of Legal Counsel in the U.S. Department of Justice, stated that "[i]n order to comply with the Anti-Deficiency Act, . . . indemnification agreements with government contractors . . . must include a limitation on the

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115 Porter v. U.S., 496 F.2d 583, (Ct. Cl. 1974).
116 Pulaski Cab Co. v. U.S., 157 F. Supp. 955 (Ct. Cl. 1958).
117 Barron v. McKinnon, 196 F. 933, 938 (1st Cir. 1912) ("We understand that the doctrine of ultra vires rests upon the principle that on grounds of public policy the courts will not enforce an illegal or an ultra vires contract . . . .").
118 Union Pac. R.R. Corp. v. U.S., 52 Fed. Cl. 730, 732 (2002).
119 Williams v. D.C., 902 A.2d 91, 94 (D.C. 2006) (citing *Hercules, Inc.* 516 U.S. at 427).

amount of liability . . ." that the federal government assumes.[120] This limitation can come in the form of a cap on the maximum amount indemnified, or through a general statement that the indemnification clause cannot provide a contractor with indemnification beyond the amount of money that Congress has appropriated for such a contract.[121]

The requirement that the contract place a cap on liability stems from the Comptroller General's interpretation that no officer of the federal government has the right to make any contract on behalf of the federal government that involves payment of an indefinite or uncertain sum and thus may exceed the appropriation set aside for the contract.[122] The Comptroller argued that, if it allows contractual indemnification without the requisite cap on liability, the federal government could enter contracts subject to unlimited liability and thus possibly insufficient appropriations.[123] The Comptroller General further contends that it is impossible to appropriate enough money to cover a contract that creates the possibility of unlimited liability, and thus any such contract violates the Anti-Deficiency Act.[124] This position is supported by Comptroller General opinions dating back to 1928,[125] by the Department of Justice,[126] and by the United States Court of Federal Claims in *Rick's Mushroom Service, Inc. v. United States*[127] and *Union Pacific Rail Road Corporporation v. United States*,[128] and has been used to invalidate

[120] 8 U.S. Op. Off. Legal Counsel 94, *Indemnification Agreements and the Anti-Deficiency Act* (1984).
[121] *Id.*
[122] 15 Comp. Dec., 405, 407 (1909).
[123] 62 Comp. Gen. 366–67 (1983). The interpretation does not contemplate the argument that the Anti-Deficiency Act does not apply to contingent liabilities. *See infra* Part IV.
[124] 62 Comp. Gen. 366–67 (1983). The interpretation does not contemplate the argument that the Anti-Deficiency Act does not apply to contingent liabilities. *See* Part IV.
[125] 59 Comp. Gen. 369 (1980); 35 Comp. Gen. 85 (1955); 16 Comp. Gen. 803 (1937); 7 Comp. Gen. 507 (1928).
[126] 8 U.S. Op. Off. Legal Counsel 94, *Indemnification Agreements and the Anti-Deficiency Act* (1984).
[127] 76 Fed. Cl. 250 (2007), *aff'd*, 521 F.3d 1338 (Fed. Cir. 2008).
[128] *Union Pac. R.R. Corp.*, 52 Fed. Cl. at 732.

government contracts and contracts implied-in-law that purported to indemnify government contractors from unlimited liability.[129]

In an early opinion interpreting the Anti-Deficiency Act, the Comptroller General stated that any lease agreement which obligates the federal government to indemnify a lessor is, "in the absence of express statutory authority, contrary to" the Anti-Deficiency Act.[130] The Comptroller General did not further explain this determination, but concluded that unlimited indemnification provisions cannot impose a legal obligation upon the federal government because they violate the Anti-Deficiency Act.[131]

The Department of Justice expanded upon the Comptroller General's opinion in a memorandum opinion advising the Director of the Bureau of Prisons on the legal risks associated with entering indemnification contracts.[132] In that opinion, the Department of Justice explained that, according to a long series of opinions issued by the Comptroller General, indemnification contracts violate the Anti-Deficiency Act when they created indefinite, indeterminable, or potentially unlimited liability for the federal government.[133] The Department of Justice explained that a contract for indemnity without a cap subjects the federal government to unlimited liability for which a proper appropriation can never be made.[134] Accordingly, the Comptroller General has upheld indemnity contracts only where those contracts limit the federal government's liability to an amount set aside in a reserve fund, or where the indemnity contract is limited to the amount set aside in the original appropriation.[135] Following the Comptroller General opinions, the Department of Justice concluded that indemnification contracts do not

[129] 35 Comp. Gen. 85, 87 (1955).
[130] 35 Comp. Gen. 85, 85 (1955).
[131] *Id.* at 85.
[132] 8 U.S. Op. Off. Legal Counsel 94 *Indemnification Agreements and the Anti-Deficiency Act* (1984).
[133] *Id.* at 96.
[134] *Id.*
[135] *Id.*

violated the Anti-Deficiency Act.[143] Mirroring the line of Comptroller General opinions, the Court of Federal Claims held that where an indemnification contract creates open-ended liability, or liability for which it is impossible to ascertain whether existing appropriations would cover resultant litigation, it violates the Anti-Deficiency Act.[144]

The Comptroller General, Department of Justice, and the court in *Union Pacific Rail Road* make clear that the federal government cannot contractually indemnify for an unlimited and unascertainable amount of liability.[145] Any contract in which the federal government purports to indemnify for an unlimited amount will be deemed void, as violating the Anti-Deficiency Act.[146] As such, parties contracting with the federal government should be well aware of these limitations and contract accordingly. If a contractor finds itself in the situation where it has entered a contract for unlimited indemnification from the federal government, its only option is to argue that the Anti-Deficiency Act has been incorrectly interpreted. This argument is difficult, as the authority over the past sixty years suggests, but it is not impossible.

IV. A CONTRADICTORY INTERPRETATION OF THE ANTI-DEFICIENCY ACT AND CONTINGENT LIABILITY

While virtually all authority holds that the Anti-Deficiency Act makes unlimited indemnification contracts by the federal government ultra vires, a review of the underlying language in the Anti-Deficiency Act and the definitions applied to that language by the Comptroller General suggests a possible alternative interpretation. This interpretation suggests that the Anti-Deficiency Act does not foreclose unlimited indemnification contracts because it was never intended to restrict contingent liabilities, but only applies to definite obligations.

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[143] *Id.*
[144] *Id.* at 735.
[145] *See e.g.*, 35 Comp. Gen. 85, 85 (1955); 8 U.S. Op. Off. Legal Counsel 94 *Indemnification Agreements and the Anti-Deficiency Act* (1984); Union Pac. R.R. Corp. 52 Fed. Cl. 730.
[146] 8 U.S. Op. Off. Legal Counsel 94, *Indemnification Agreements and the Anti-Deficiency Act* (1984).

From the outset, it is clear that "no statute expressly prohibits the execution of indemnity agreements on behalf of the United States. Nor does [the Appropriations Clause] . . . [f]oreclose the government from entering into such contracts.[147] As summarized above, however, the United States Court of Federal Claims, the Comptroller General, and the Attorney General have all interpreted section (a)(1) of the Anti-Deficiency Act[148] as doing so.[149]

The express terms of Section (a)(1) of the Anti-Deficiency Act prohibit employees of the United States from authorizing "an *expenditure* or *obligation* exceeding an amount available in an appropriation or fund for the expenditure or obligation."[150] The general function of the provision is to restrict government entities or agents from entering contracts for which sufficient funding does not yet exist or will never exist.[151] Under the Court of Federal Claims' reading of the clear language of the statute, the Anti-Deficiency Act prohibits government entities from agreeing to indemnify because doing so would necessarily subject it to the possibility of unlimited liability.[152] If the language is clear, as the Court of Federal Claims suggests, the inquiry ends there.[153] If, however, a party seeking indemnification can successfully establish that the language of the Anti-Deficiency Act does not unequivocally show the legislature's intent as applied to contractual indemnity, the court will look to other sources to give meaning to the Act.[154]

[147] *Id.* (citing Cincinnati Soap Co. v. U.S., 301 U.S. 308, 321 (1937)).
[148] Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1) (2006).
[149] 59 Comp. Gen. 369 (1980); 35 Comp. Gen. 85 (1955); 16 Comp. Gen. 803 (1937); 7 Comp. Gen. 507 (1928); *Rick's Mushroom Serv., Inc.*, 76 Fed. Cl. 250; *Union Pac. R.R. Corp.*, 52 Fed. Cl. at 732.
[150] 31 U.S.C. § 1341(a)(1).
[151] 59 Comp. Gen. 369, 372, (1980).
[152] 62 Comp. Gen. 366–67 (1983).
[153] U.S. v. Gregg, 226 F.3d 253, 257 (3d Cir. 2000).
[154] *Id.*

One particularly beneficial source to contractors claiming contractual indemnification is the Comptroller General's own definition of terms used in the Anti-Deficiency Act.[155] In an opinion interpreting the Anti-Deficiency Act, and thereby validating an argument that the language in the Anti-Deficiency Act is ambiguous, the Comptroller General defined the meaning of the words "expenditure" and "obligation" in advance of appropriations.[156] In the opinion, the Comptroller General first defined "expenditure" as the liabilities that are currently due or payable by the federal government and those that the federal government has paid in the past.[157] As defined, expenditures include things such as payments made for contracts already completed or payments not yet made but required by a contract already completed. Because expenditures require liability currently due or payable, t a contract for indemnification, which requires no payment at the time of enactment and may never require payment, cannot be deemed an expenditure under the Comptroller General's definition.

Next, and more enlightening to this inquiry, the Comptroller General defined the term "obligation" as a "definite commitment that creates a legal liability of the government for the payment of appropriated funds for goods and services ordered and received . . . ."[158] By the Comptroller General's own admission, an obligation refers only to a "definite commitment" to payment, rather than a contingent liability where there is uncertainty as to the eventual existence of any liability or payment of funds.[159] The phrase "definite commitment" as used in the definition of the term "obligation," includes both matured and un-matured legal liabilities to pay,[160] but does not include liabilities which are contingent on some tolling event.[161] A matured

[155] *See* 31 U.S.C. § 1341(a)(1).
[156] 31 U.S.C. § 1341(a)(1).
[157] *See* Manos, *supra* note 74, at 341 n.18.
[158] *See* Manos, *supra* note 74, at 356 (citing GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS, 1-6, 6-9, (2d ed., Dec. 1992)). (Emphasis added)
[159] *Id.*
[160] *Id.*

legal obligation is a liability which is currently payable and due for the individual who has contracted for that obligation.[162] An example of a matured legal obligation is a bill for services already rendered and requiring immediate payment. As such, a matured legal obligation may overlap in some respects with the Comptroller General's definition of expenditure. An un-matured legal obligation, in contrast, is one "which is not yet payable but for which a *definite liability* to pay nevertheless exists."[163] An example of an un-matured liability would be a guaranteed payment on a loan, which is not yet immediately due.

In contrast to a definite liability encompassed by the terms "expenditure" and "obligation," a contingent liability is a liability that is not "now fixed and absolute, but which will become so in case of the occurrence of some future and uncertain event."[164] "The uncertainty as to whether there will be a legal liability differentiates a contingent [liability] from an actual liability."[165] The contingent liability "only becomes an 'obligation incurred' when the contingency materializes or when 'it is probable that a liability will be incurred and its amount reasonably estimated.'"[166] On the contrary, a definite liability becomes an obligation incurred as soon as the contract is entered.[167]

Following this logic, with respect to contractual indemnification, a strong case can be made that the obligation incurred by the indemnitor is a contingent liability and thus not an "obligation" encompassed by the Anti-Deficiency Act. If the Anti-Deficiency Act restricts the federal government only from entering obligations, and by its definition, an obligation includes

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[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] BLACK'S LAW DICTIONARY (9th ed. 2009).
[165] AF Regulation 170-13, Accounting for Commitments, 26 (1982).
[166] *See* Manos, *supra* note 74, at 363 (Spring 1994); 62 Comp. Gen. 143, 146.
[167] *See id.*

only definite commitments that create liability, then contingent liabilities, such as contractual indemnity,[168] are not foreclosed by the Anti-Deficiency Act.

Under this line of reasoning, a contingent liability removes contractual indemnity entirely from the reach of the Anti-Deficiency Act and allows a party to validly enter a contract for unlimited indemnity with the federal government. Simply put, a review of the Comptroller General's definition of the words used in the Anti-Deficiency Act, at least shows the ambiguity of applying the Anti-Deficiency Act to contractual indemnification, if it does not completely dispense the present application of the Anti-Deficiency Act to indemnification. The Anti-Deficiency Act prohibits officers of the United States Government from making any expenditure or obligation in excess or advance of available appropriations,[169] but under this reasoning it may not restrict the federal government's use of contractual indemnification. In other contexts, courts have interpreted the Anti-Deficiency Act so as not to foreclose contractual provisions which expand liability under a contract, and the possibility exists that a similar reading will allow contracting parties to contend that it likewise does not foreclose contractual indemnification.[170] Because the significant weight of authority suggests that the Anti-Deficiency Act bars unlimited contractual indemnity by the federal government, a party attempting such an argument may not find great success. If a contract has already been entered with the federal government for unlimited indemnity, however, an attempt at modifying the current state of the law is warranted, if not necessary.

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[168] Stephen D. Hedlund, Government Contract Contingent Liabilities, The Anti-Deficiency Act, and The Hobgoblin of Little Minds, (September 30, 1984) (unpublished L.L.M. dissertation, George Washington University) (on file with author).

[169] Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1) (2006).

[170] 18 Comp. Gen. 285 (1938). See infra part IV C.

C. Applying the "Reasonably Requisite to the Accomplishment of the Appropriation" Standard to Contractual Indemnity

To attempt a modification of the current policy and standard of disallowing the federal government to contractually indemnify for unlimited liability, a party may have to provide a governing framework to further public policy and limit abuse of contractual indemnity in a way similar to how the Anti-Deficiency Act currently limits abuse. One such standard has been applied by the Comptroller General to contracts that allow for increases in the cost of performing the contract that could arguably violate the Anti-Deficiency Act -- the "Reasonably Requisite to the Accomplishment of the Appropriation" standard.[171] Such a standard could increase the flexibility of allowing indemnity while ensuring proper parenting of federal funds.

The "Reasonably Requisite to the Accomplishment of the Appropriation" standard posits that the federal government may enter contracts with contingent liabilities so long as those provisions are reasonably requisite to the accomplishment of the original Congressional appropriation.[172] Applying this standard, the federal government could enter contracts for unlimited liability only if unlimited indemnification was within the bounds of the original appropriation authorized by Congress and necessary for the completion of the contract.[173] Congress would retain control over the appropriations, but government agents would receive additional latitude to indemnify when reasonably necessary. It would allow the power of the purse to remain with Congress, but provide the government agencies with additional flexibility when necessary.

[171] The Reasonably Requisite to the Accomplishment of the Appropriation standard is currently applied to federal contracts involving contingent liabilities that have the possibility of increasing the cost of any government contract, and could aptly apply to indemnification as well. 18 Comp. Gen. 285 (1938).
[172] 18 Comp. Gen. 285 (1938) (stating that contract provisions which may increase the cost of performance of a contract are only appropriate if they are reasonably necessary to accomplish the purpose of the appropriation authorized by statute).
[173] *Id.*

The standard is an iteration of the necessary expense rule which is applied to government contracts in order to determine whether an expense entered into by a government agent is appropriately associated with the original appropriation.[174] Where Congress makes an appropriation for a particular project, that appropriation gives the authority to incur "expenses which are necessary or proper or incident to the proper execution" of that project.[175] A similar application to contractual indemnification provisions would allow the federal government an ability to enter indemnification contracts, so long as indemnification was reasonably necessary to accomplish the purpose of the appropriation. Though at first glance it seems that such a standard would give the government agent undue leeway to enter any indemnification contract, such a standard would allow significant oversight by the legislature. Rather than creating situations where government agents enter contractual indemnity provisions and the contracting party is left without recourse, this standard would allow the legislature to reprimand the agency, while still allowing the contractor to receive the benefit of its bargain in the contract.

The end result of applying such a standard would be to increase the flexibility of contractual indemnity by allowing the federal government to enter contracts for indemnification so long as (1) the contract contains a cap on the governments liability, (2) the contractual indemnification is statutorily authorized, or (3) the contractual indemnity is reasonably required to accomplish the purpose of the appropriation.[176] While such a standard would obviously encounter opposition, a review of its application pertaining to other government contracts demonstrates its possible success.

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[174] Hedlund, *supra* note 143, at 39.
[175] 6 Comp. Gen. 285, 295 (1938).
[176] 18 Comp. Gen. 285 (1938).

V. CONCLUSION

Over the past sixty years the Comptroller General, the Department of Justice, and the United States Court of Federal Claims have interpreted the Anti-Deficiency Act as foreclosing indemnification contracts entered by the federal government that purport to create unlimited liability for the federal government.[177] Any party entering such a contract with the federal government runs the risk of not obtaining the benefit of its bargain unless it can prove that the indemnification provision does not violate the Anti-Deficiency Act. To satisfy the Anti-Deficiency Act, the indemnification provision for unlimited liability must either be legislatively authorized or contain a cap on the amount of liability that the federal government assumes.[178]

The Anti-Deficiency Act establishes Congress's power of the purse, but may unduly restrict a government agent's ability to contract. Indemnification contracts benefit all parties by allowing the allocation of risk in exchange for compensation; however the Anti-Deficiency Act restricts the federal government from receiving such benefit. The standard set forth by the Anti-Deficiency Act in foreclosing the federal government's ability to indemnify for unlimited amounts stifles the federal government's ability to contract without sufficient justification. Private entities are able to contract for unlimited indemnification; however, the legislature doesn't trust its government agents to have a similar power.

The Anti-Deficiency Act was born out of a time when the executive branch consistently made obligations that weren't sufficiently supported by appropriations.[179] It was a response to a proven distrust, and Congress should now reconsider the rule as the federal government has more fully established appropriate accounting principles and general oversight procedures. Although

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[177] *See, e.g.*, 59 Comp. Gen. 369 (1980); 35 Comp. Gen. 85 (1955); 16 Comp. Gen. 803 (1937); 7 Comp. Gen. 507 (1928); *Rick's Mushroom Service, Inc.*, 76 Fed. Cl. 250; Union Pac. R.R. Corp. v. U.S., 52 Fed. Cl. 730, 732 (2002).

[178] *See supra* Part III.B.

[179] *See supra* Part II.B.

the weight of authority suggests otherwise, alternative standards may allow the federal government more flexibility in contracting while ultimately leaving the power of the purse with the legislature. As the federal government increases the contracts it must necessarily enter with private entities, the need for an ability to indemnify increases. A lack of proper husbanding of the federal government's funds causes significant problems, however, an inability to properly contract may similar cause substantial problems. While it is important to provide the federal government with the appropriate freedom to enter contracts, the duration that the current rule has remained unchanged necessitates allowing the status quo ante to remain.

If the Anti-Deficiency Act were a new law going into effect today, the plain language of the Act would require courts to interpret the law in a way that walks the fine line between proper husbanding of the federal government's ability to spend while allowing sufficient freedom to enter mutually beneficial contracts. As it is, however, more harm would likely be done by adjusting the standard that contractors rely on than would be done by allowing the current interpretation to stand. For the time the federal government must seek express legislative authority whenever it requires the use of indemnification provisions and hope that the legislature is amenable.