

Liability and Insurance Requirements

This Q & A Document is intended for HHS program managers to guide them through the liability and insurance requirements set forth in 15 U.S.C. 3719(i) of the America Competes Act (Pub. L 111-358, Jan. 4, 2011.) The HHS Office of General Counsel has reviewed the Act and believes that the provision places two mandatory requirements on agencies (i.e., liability releases from contest participants and indemnification of the Federal Government against third party claims), and effectively provides the heads of agencies discretion in whether or not to require that participants obtain liability insurance for potential third party claims.

This document provides Q & A's on three topics: 1) liability release from contest participants; 2) liability insurance from contest participants for potential third party claims and 3) indemnification of the Federal government against third party claims. This document was developed in consultation with the Office of General Counsel, HHS.

I. Mandatory Requirement: Liability Release from Contest Participants

Question: What is required of HHS agencies to meet the liability release provisions of the Act?

Answer: 15 U.S.C. 3719(i)(1)(B) ("Liability") provides that "[r]egistered participants shall be required to agree to assume any and all risks and waive claims against the Federal Government and its related entities, except in the case of willful misconduct, for any injury, death, damage, or loss of property, revenue, or profits, whether direct, indirect, or consequential, arising from their participation in a competition, whether the injury, death, damage, or loss arises through negligence or otherwise."

In essence, this provision means that registered prize contest participants shall be required to release the Government from any liability that may arise from participation in a contest. In other words, contest participants should sign a liability release as part of the contest registration process.

Question: Is there model language that HHS agencies could use to meet the liability release provisions of the Act?

Answer: HHS would suggest something along the lines of the following:

"By participating in this competition, I agree to assume any and all risks and waive claims against the Federal Government and its related entities, except in the case of willful misconduct, for any injury, death, damage, or loss of property, revenue, or profits, whether direct, indirect, or consequential, arising from my participation in this prize contest, whether the injury, death, damage, or loss arises through negligence or otherwise."

II. Discretionary Decision: Whether to Obtain Liability Insurance from Contest Participants for Potential Third Party Claims

Question: How should HHS agencies handle the liability insurance provision of the Act?

Answer: 15 U.S.C. § 3719(i)(2)("Insurance"), provides as follows:

(2) Insurance. Participants shall be required to obtain liability insurance or demonstrate financial responsibility, in amounts determined by the head of an agency, for claims by--

(A) a third party for death, bodily injury, or property damage, or loss resulting from an activity carried out in connection with participation in a competition, with the Federal Government named as an additional insured under the registered participant's insurance policy and registered participants agreeing to indemnify the Federal Government against third party claims for damages arising from or related to competition activities; and

(B) the Federal Government for damage or loss to Government property resulting from such an activity.

(3) Exception. The head of an agency may not require a participant to waive claims against the administering entity arising out of the unauthorized use or disclosure by the agency of the intellectual property, trade secrets, or confidential business information of the participant.

This provision gives the head of the Agency or designee authorized by the Attached April 22, 2011, Delegation of Authority of the Competes Act (hereinafter, "designee") the discretion to either require contest participants to obtain liability insurance, or demonstrate that they have adequate financial resources, to address third party claims that may result as a result of the competition. In any event, the provision gives the head of the agency or designee the discretion to determine the amount of any such insurance or required financial responsibility.

Question: What amount of liability insurance should HHS agencies require?

Answer: HHS recommends that the head of the agency or designee make a written determination (even where the determined amount is "\$0" in this regard) based on the subject matter of the contest, the type of work that it will possibly require, as well as an analysis of the likelihood of any claims for "death, bodily injury, or property damage, or loss" potentially resulting from contest participation. Obviously, a contest to develop a vehicle or mode of transportation would pose far greater claims potential than a contest for a proposal, schematic, blue print, or software application. HHS understands that many HHS contests will likely involve development of software technology, and notes that the Agency is precluded from requiring a contest participant from waiving claims against an agency for the unauthorized use or disclosure by the agency of the intellectual property, trade secrets, or confidential business information of the participant. See 15 U.S.C. 3719(i)(3).

III. Mandatory Requirement: Indemnification of the Federal Government Against Third Party Claims

Question: What is required of HHS agencies to meet the indemnification provisions of the Act?

Answer: With respect to indemnification, 15 U.S.C. § 3719(i)(2)(A) requires that registered participants agree "to indemnify the Federal Government against third party claims for damages arising from or related to competition activities."

This provision means that registered prize contest participants shall be required to indemnify or protect the Federal Government against claims by third parties for damages arising from or related to competition activities.

Question: Is there model language that HHS agencies could use to meet the indemnification release provisions of the Act?

Answer: Similar to the approach recommended in Section I above, contest participants should sign an indemnification agreement as part of the contest registration process. HHS would suggest something along the lines of the following:

“By participating in this competition, I agree to indemnify the Federal Government against third party claims for damages arising from or related to competition activities.”

IV. Additional Questions

Question: Whom should HHS program managers contact if they have additional questions about the liability and insurance provisions of the Act?

Answer: HHS program managers should contact their cognizant Division of the HHS Office of the General Counsel if they have any questions about the liability of insurance provisions of the Act.