ARMED SERVICES BOARD OF CONTRACT APPEALS
SKYLINE 6
5109 LEESBURG PIKE
FALLS CHURCH VA 22041-3208
Telephone: (703) 681-8502
13 April 2006

CERTIFIED MAIL
RECEIPT REQUESTED

Thomas P. Humphrey, Esq.
Raymond F. Monroe, Esq.
J. Catherine Kunz, Esq.
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W
Washington, DC 20004-2505

John M. Taffany, Esq.
Tedd J. Shimp, Esq.
MAJ Brian G. Koza, USAF
Sigurd R. Peterson, Jr. Esq.
Air Force Materiel Command Law Office
AFMC LO/JAB, Building 11
2240 B Street, Suite 8
Wright-Patterson AFB, OH 45433-7112

Re: ASBCA No. 54853
Appeal of The Boeing Company
Under Contract Nos. AF33(657)-16584 *et al.*

Dear Counsel:

Enclosed is one authenticated copy of the Board's decision.

Very truly yours,

CATHERINE A. STANTON
Recorder

Enclosure

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
The Boeing Company	)	ASBCA No. 54853
	)	
Under Contract Nos. AF33(657)-16584	)	
F33657-70-C-0876	)	
F33657-71-C-0918	)	
F33657-73-C-0006	)	
F33657-73-C-0734	)	

APPEARANCES FOR THE APPELLANT: Thomas P. Humphrey, Esq.
Raymond F. Monroe, Esq.
J. Catherine Kunz, Esq.
Crowell & Moring LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
John M. Taffany, Esq.
Deputy, Eastern Trial Division
Tedd J. Shimp, Esq.
Senior Trial Attorney
MAJ Brian G. Koza, USAF
Sigurd R. Peterson, Jr., Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE YOUNGER

In this appeal of a sponsored claim, appellant seeks indemnification for the costs of investigation and remediation of groundwater pollution, and for the costs of toxic tort litigation. Appellant received contracts between 1966 and 1973 relating to a missile program and awarded subcontracts to the predecessor of Lockheed Martin Corporation (Lockheed) to develop and produce the missile's propulsion system. The contracts and subcontracts contained indemnification clauses against "unusually hazardous" risks, citing Public Law 85-804, codified in relevant part at 50 U.S.C. § 1431. Appellant seeks recovery under these clauses for the environmental cleanup costs related to Lockheed's production facility for the subcontracts. Respondent moves to dismiss, arguing chiefly that we lack jurisdiction on sovereign immunity grounds. We deny the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

I. *SRAM Contracts and Subcontracts*

A. *Development Prime Contract*

1. Appellant The Boeing Company (Boeing) alleges that, in or about November 1966, the Air Force (also variously referred to herein as the government or respondent) awarded it Contract No. AF33(657)-16584, as the prime contract for development of the Short Range Attack Missile (SRAM), an aircraft-borne nuclear-tipped missile (complaint (compl.), ¶ 22).

2. Boeing alleges, on information and belief, that the contract contained an INDEMNIFICATION CLAUSE UNDER ASPR 10-703 which provided in part:

> (a) Pursuant to the authority of 10 U.S.C. 2354 and Public Law 85-804 . . . and Executive Order 10789 . . . , the Government shall hold harmless and indemnify the Contractor against –
>
> (i) claims. . . by third persons . . . for death, bodily injury . . . , or loss of, damage to, or loss of use of property;
>
> (ii) loss of or damage to property of the Contractor, and loss of use of such property, . . . ;
>
> (iii) loss of, damage to, or loss of use of property of the Government;
>
> to the extent that such a claim, loss or damage (A) arises out of the direct performance of this contract; (B) is not compensated by insurance or otherwise; and (C) results from a risk defined in this contract to be unusually hazardous.
>
> . . . .
>
> (d) With the prior written approval of the Contracting Officer, the Contractor may include in any subcontract under this contract the same provisions as those in this clause, whereby the Contractor shall indemnify the subcontractor

against any risk defined in this contract to be unusually hazardous. . . .

(Compl., ¶¶ 20, 23)

3. Boeing alleges, on information and belief, that the definition of "unusually hazardous risks" applicable to the contract included:

> (a) . . . all risks resulting from or in connection with the explosion and/or detonation or surface impact of a missile, simulated missile or component thereof, utilizing the material delivered or services rendered under this contract are unusually hazardous risks regardless of whether the harm caused by such risk or liability resulting from such risk occurs before or after delivery to the Government of equipment or materials under this contract, or before or after acceptance of contract performance by the Government, or within or outside the United States.
>
> . . . .
>
> (d) For purposes of the clause of this contract entitled "Indemnification Clause Under ASPR 10-703," a claim, loss or damage shall be considered to have arisen out of the direct performance of this contract if the cause of such claim, loss or damage occurred during the period of performance of this contract or as a result of the performance of this contract.

(Compl., ¶¶ 21, 23)

B. *Development Subcontract*

4. Boeing alleges that it awarded subcontract No. R-712876-9553 as a fixed price incentive purchase order to Lockheed Propulsion Company, a division of the Lockheed Aircraft Corporation, the predecessor of Lockheed, in November 1966 to design, develop, and test the propulsion subsystem for the SRAM (compl., ¶ 24). Boeing alleges that the subcontract contained an indemnity provision whereby Boeing agreed to extend to Lockheed "any extra hazardous risk or indemnity clause that [Boeing] may receive from the Government under Boeing's Prime Contract . . . ." If such a clause was included in the subcontract, it was to be "consistent with terms of the clause contained in the Prime Contract." (Compl., ¶ 25)

5. Boeing alleges that, in April 1967, it sent Lockheed two versions of the indemnification clauses and definitions to be forwarded to the government for approval before incorporation in the Lockheed subcontract (compl., ¶ 26). The clauses stated that Boeing would hold harmless and indemnify Lockheed against:

> (i) claims (including reasonable expenses of litigation or settlement) by third persons (including employees of the Seller) for death, bodily injury (including sickness or disease), or loss of, damage to, or loss of use of property;
>
> (ii) loss of or damage to property of the Seller, and loss of use of such property, but excluding loss of profit; and
>
> (iii) loss of, damage to, or loss of use of property of the Government or the Buyer, or both;
>
> to the extent that such a claim, loss or damage (A) arises out of the direct performance of this order; (B) is not compensated by insurance or otherwise; and (C) results from a risk defined in this order to be unusually hazardous.

(*Id.*) Boeing further alleges that, for purposes of the clauses, "all risks resulting from or in connection with the explosion and/or detonation or impact of a missile, simulated missile or component thereof, utilizing the material delivered or services rendered under this order are unusually hazardous risks regardless of whether the harm caused by such risk or liability resulting from such risk occurs before or after delivery to the Government of equipment or materials under this order, or within or outside the United States" (*id.*). Boeing alleges, on information and belief, that the indemnification clauses and definitions referenced above were subsequently incorporated into the development subcontract (compl., ¶ 28).

C. *First Production Prime Contract*

6. Boeing alleges that the Air Force awarded it the first production prime contract, No. F33657-70-C-0876, in January 1971 (comp., ¶ 34). Boeing alleges that the contract incorporated by reference ASPR 10-702(b)(1), (2) (1968 Sep), INDEMNIFICATION UNDER PUBLIC LAW 85-804, which provided in part:

(a) Pursuant to Public Law 85-804 . . . and Executive Order 10789 . . . , the Government shall hold harmless and indemnify the Contractor against –

(i) claims (including reasonable expenses of litigation or settlement by third persons . . . for death, bodily injury (including sickness or disease), or loss of, damage to, or loss of use of property;

(ii) loss of or damage to property of the Contractor, and loss of use of such property but excluding loss of profit; and

(iii) loss of, damage to, or loss of use of property of the Government;

to the extent that such a claim, loss or damage (A) arises out of the direct performance of this contract, (B) is not compensated by insurance or otherwise, and (C) results from a risk defined in this contract to be unusually hazardous. Any such claim, loss, or damage within deductible amounts of Contractor's insurance shall not be covered under this clause.

. . . .

(d) With the prior written approval of the Contracting Officer, the Contractor may include in any subcontract under this contract, the same provisions as those in this clause, whereby the Contractor shall indemnify the subcontractor against any risk defined in this contract to be unusually hazardous . . . .

(Compl., ¶ 35)

7. Boeing alleges that Special Provision 29 in Section J, DEFINITIONS OF UNUSUALLY HAZARDOUS RISKS, which was incorporated in the contract by Special Provision 30, provided in part:

(a) For the purpose of the clause of this contract entitled "Indemnification Under Public Law 85-804 (1968

> Sept)" it is agreed that all risks resulting from or in connection with
>
> (i) the explosion, detonation, combustion or surface impact of a missile, simulated missile or component thereof utilizing the material delivered or services rendered under this contract;
>
> (ii) The use of materials containing radioactive, toxic, explosive or other hazardous properties of chemicals or energy sources are unusually hazardous risks regardless of whether the harm occurs before or after delivery to the Government of equipment or materials under this contract, or before or after the acceptance of contract performance by the Government, or within or outside the United States.
>
> . . . .
>
> (d) For purposes of the clause of this contract entitled "Indemnification Under Public Law 85-804", a claim, loss or damage shall be considered to have arisen out of the direct performance of this contract if the cause for such claim, loss or damage occurred during the period of performance of this contract, or as a result of the performance of this contract (1968 Sep).

(Compl., ¶ 38; *see also*, compl., ¶ 39)

D. *First Production Subcontract*

8. Boeing alleges that it awarded Lockheed the first production subcontract, fixed price incentive fee purchase order no. R-785050-9556, in 1971 (compl., ¶ 40). On information and belief, Boeing further alleges that: a clause "identical or substantially similar in all material respects" to ASPR 10-702(b)(1) and (2), INDEMNIFICATION UNDER PUBLIC LAW 85-804 (1968 Sep) (*see* finding 6), was incorporated into the first production subcontract; and, the first subcontract contained a provision "identical or substantially similar in all material respects" to Special Provision 29, DEFINITIONS OF UNUSUALLY HAZARDOUS RISKS (*see* finding 7), of the first production prime contract. (Compl., ¶¶ 41, 43)

E. *Second Production Prime Contract*

9. Boeing alleges that the Air Force awarded it the second prime production contract, No. F33657-71-C-0918, in October 1971 (compl., ¶ 48). Boeing further alleges that, like the first production prime contract, the second production prime contract incorporated ASPR 10-702(b)(1), (2) (1968 Sep), INDEMNIFICATION UNDER PUBLIC LAW 85-804 (compl., ¶ 49), the same clause incorporated in the first production prime contract (*see* finding 6).

10. Boeing alleges that the second production prime contract included Special Provision 33 of Section J, DEFINITIONS OF UNUSUALLY HAZARDOUS RISKS (compl., ¶ 52). We find that, as alleged, this clause was identical to the comparable clause in the first production prime contract (*see* finding 7).

F. *Second Production Subcontract*

11. Boeing alleges that it awarded Lockheed the second production subcontract, fixed price incentive fee purchase order number R-798900-9556, in 1971 (compl., ¶¶ 54).

12. Boeing alleges that the second production subcontract contained section 5.4, EXTRA HAZARDOUS RISK CLAUSE which, at subsection 5.4.2, contained an INDEMNIFICATION CLAUSE (compl., ¶ 56). We find that, as alleged, this indemnification clause was substantially identical to the comparable clause in the development subcontract (*see* finding 5).

13. Boeing alleges that subsection 5.4.1 of the EXTRA HAZARDOUS RISK CLAUSE contained subsection 5.4.1, DEFINITIONS FOR INDEMNIFICATION (compl., ¶ 58). We find that, as alleged, this clause was substantially identical to the comparable clause in Special Provision 29 of the first production prime contract (*see* finding 7).

G. *Third Production Prime Contract*

14. Boeing alleges, on information and belief, that the Air Force awarded it the third production prime contract, No. F33657-73-C-0006, "sometime in 1972" (compl., ¶ 63). Boeing alleges that the third production prime contract incorporated ASPR 10-702(b)(1), (2) (Sep 1968), INDEMNIFICATION UNDER PUBLIC LAW 85-804 (compl., ¶ 64), the same clause incorporated in the first and second production prime contracts (*see* findings 6, 9).

15. Boeing alleges, on information and belief, that the third prime production contract contained a DEFINITIONS OF UNUSUALLY HAZARDOUS RISKS clause (compl.,

¶ 67). We find that this clause, as alleged, was identical to the comparable clause in the first and second production prime contracts (*see* findings 7, 10)

H. *Third Production Subcontract*

16. Boeing alleges that it awarded Lockheed the third production subcontract, fixed price incentive fee purchase order R-816730-9556, in 1972 (compl., ¶ 68).

17. Boeing alleges that the third production subcontract contained section 5.4, EXTRA HAZARDOUS RISK CLAUSE, which in turn included subsection 5.4.1, DEFINITIONS FOR INDEMNIFICATION, and subsection 5.4.2, INDEMNIFICATION CLAUSE. We find that, as alleged, these clauses were identical to comparable clauses in the second production subcontract (compl., ¶¶ 70, 72; *see also* findings 12, 13).

I. *Fourth Production Prime Contract*

18. Boeing alleges that the government awarded it the fourth production prime contract, No. F33657-73-C-0734, "in 1973" (compl., ¶ 78). Boeing alleges, on information and belief, that the fourth production prime contract incorporated ASPR 10-702(b)(1), (2) (1972 Aug), INDEMNIFICATION UNDER PUBLIC LAW 85-804, as well as a DEFINITIONS OF UNUSUALLY HAZARDOUS RISKS clause (compl., ¶¶ 79, 82). We find that, as alleged, the INDEMNIFICATION clause was substantially similar to the September 1968 version of the comparable clause in the first, second and third production prime contracts, including the undertaking to "hold harmless and indemnify" Boeing (*see* findings 6, 9, 14), and that, as alleged, the DEFINITIONS clause was substantially identical to the comparable clauses in the first, second and third production prime contracts (*see* findings 7, 10, 15).

J. *Fourth Production Subcontract*

19. Boeing alleges that it awarded Lockheed the fourth production subcontract, fixed price incentive fee purchase order No. R-829591-6556, on 6 July 1973 (compl., ¶ 83).

20. Boeing alleges that the fourth production subcontract contained section 3.1. EXTRA HAZARDOUS RISK CLAUSE, which in turn included subsection 3.1.1, DEFINITIONS FOR INDEMNIFICATION, and subsection 3.1.2, INDEMNIFICATION CLAUSE (compl., ¶¶ 83, 85, 87). We find that, as alleged, subsections 3.1.1 and 3.1.2 were substantially identical to comparable clauses in the second and third production subcontracts (*see* findings 12, 13, 17).

II. *Redlands Contamination and Aftermath*

21. Boeing alleges that Lockheed performed the subcontracts at its Redlands, California, facility between 1966 and 1975. When the SRAM program concluded, Lockheed closed the Redlands facility, which it subsequently sold. (Compl., ¶¶ 14, 98)

22. Boeing alleges that, in performing the subcontracts, Lockheed was required to use trichloroethylene (TCE) and ammonium perchlorate (perchlorate) at the Redlands facility (compl., ¶ 88).

23. Boeing alleges that, in or about 1980, TCE was discovered in the groundwater in the Redlands area (compl., ¶ 99). In a series of orders in subsequent years, the Santa Ana Regional Water Quality Control Board (Water Board) ultimately required Lockheed to take remedial actions regarding TCE (compl., ¶¶ 100-01, 104).

24. Boeing alleges that, in 1997, the Water Board reported small concentrations of perchlorate in Redlands drinking and agricultural wells and requested Lockheed to conduct studies and develop a remedial action plan (compl., ¶108).

25. Boeing alleges that, between December 1996 and February 1999, Lockheed was named as a defendant in multiple class action suits relating to the presence of both TCE and perchlorate in the Redlands groundwater (compl., ¶¶ 102-03, 109-10, 112-13).

26. Boeing alleges that Lockheed sought, with limited success, to recover both its response and remediation costs, and its costs for defending the suits, from its insurance carriers, and has been only partially indemnified by the government (compl., ¶¶ 115-17, 119-20).

27. Boeing alleges that it and Lockheed have complied with all conditions precedent to establish entitlement to indemnification (compl., ¶ 118).

III. *Claim and Appeal*

28. Boeing alleges that, on 6 February 2004, it submitted a certified claim to the contracting officer on behalf of Lockheed. Boeing sought recovery for Lockheed, pursuant to the indemnification clauses of the prime contracts, for the costs Lockheed has and will incur for environmental response and remediation activities, and for the defense costs Lockheed has incurred, and will incur, regarding third party tort claims (compl., ¶ 136). The contracting officer thereafter denied the claim (compl., ¶ 137) and Boeing then brought this appeal. Boeing has since confirmed that it has elected to pursue the

appeal under the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* (Letter from Thomas P. Humphrey to Recorder dated 13 February 2006)

29. In its five-count complaint, Boeing alleges that the government breached each of the contracts. Thus, Boeing alleges in count I that its "claims, losses and damages result from an unusually hazardous risk" and that respondent is "contractually liable to Boeing and/or [Lockheed] for the incurred and future costs for environmental response and remediation" (compl., ¶¶ 145-46). Boeing further alleges that respondent's "refusal to honor its indemnification obligations to Boeing and/or [Lockheed] constitutes a breach of the [development] prime contract" (compl., ¶ 147). The allegations regarding the other prime contracts and subcontracts are virtually identical to those regarding the development prime contract and subcontract. Thus, in counts II, III, IV and V, Boeing alleges that it has and will be damaged as a result of "an unusually hazardous risk," that respondent is "contractually liable" for those damages, and that respondent's "refusal to honor its indemnification obligations to Boeing and/or [Lockheed] constitutes a breach" of the first, second, third and fourth production prime contracts, respectively (compl., ¶¶ 156-58, 167-69, 178-80, 189-91). In its prayer for relief, Boeing seeks two categories of damages for the alleged breaches: (a) actual and estimated response and remediation costs; and (b) incurred and future toxic tort litigation costs uncompensated by insurance (compl. at 72).

DECISION

A. *Contentions of the Parties*

The premise underlying the government's motion to dismiss is that we lack jurisdiction over this appeal because the requisite waiver of sovereign immunity is not present. Drawing on this premise, the government urges that, while Boeing presented a claim under the Contract Disputes Act, 41 U.S.C. § 601 *et seq.*, "the relief it seeks is committed to the discretion of the Secretary [of the Air Force] under 50 U.S.C. § 1431 (Public Law 85-804) and 10 U.S.C. § 2354." (Respondent's Motion to Dismiss for Lack of Jurisdiction (gov't mot.) at 4) The government accordingly contends that neither Public Law 85-804 nor 10 U.S.C. § 2354 constitutes a waiver of sovereign immunity. (Gov't mot. at 5-6) In addition, the government insists that the Contract Disputes Act does not confer jurisdiction "to hear appeals under [either] P.L. 85-804 or 10 U.S.C. § 2354." (Gov't mot. at 7) The government argues that Lockheed's exclusive remedy is to seek relief under Public Law 85-804 and 10 U.S.C. § 2354, since the "open-ended indemnification clauses" in the contracts would otherwise violate the Anti-Deficiency Act, 31 U.S.C. § 1341. (Gov't mot. at 10) Moreover, the government tells us that we cannot grant relief because the indemnification clauses in the contracts require seemingly unreviewable authorization by the Secretary or his designee and, depending on the

amount, Congressional consent. (Gov't mot. at 11-14) For its part, appellant largely asserts the negative of these propositions in opposing the motion. (Appellant's Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction (app. opp'n) at 8-34)

After considering the complaint, the motion papers, and the relevant law, we conclude that the motion to dismiss must be denied. We address each of the principal arguments below.

B. *Procedural Standard*

For purposes of the motion, we treat all well-pleaded facts as true. That is, we follow the familiar rule that, "[i]n deciding whether there is subject matter jurisdiction, the allegations stated in the complaint are taken as true and jurisdiction is decided on the face of the pleadings." *Aerolineas Argentinas v. United States,* 77 F.3d 1564, 1572 (Fed. Cir. 1996). In adhering to the rule, we recognize that the parties have thus far been unable to locate complete copies of some of the relevant instruments, and that, where this is the case, the Air Force has stipulated, solely for purposes of the motion, that the contracts contained the clauses alleged. (*See, e.g.*, gov't mot. at 3).

C. *Contract Disputes Act Jurisdiction*

We conclude that the Contract Disputes Act confers jurisdiction to entertain this appeal. While all the contracts predate the 1978 passage of the Act (*see* findings 1, 6, 9, 14, 18), the claim (*see* finding 28) was "initiated thereafter," and Boeing has elected to proceed under the statute (*id.*). *See* Pub. L. No. 95-563, § 16, 92 Stat. 2383, 2391 (1978). By its terms, the Contract Disputes Act applies to "any express . . . contract . . . entered into by an executive agency for – (1) the procurement of property, other than real property in being; [or] (2) the procurement of services." 41 U.S.C. § 602(a). Our jurisdiction encompasses "any appeal from a decision by a contracting officer . . . relative to [such] a contract." 41 U.S.C.A. § 607(d). In *Malone v. United States*, 849 F.2d 1441, 1444 (Fed. Cir. 1988), the court noted that the Act broadened our jurisdiction to include "all disputes relating to a contract, including breach of contract issues;" *accord, Community Consulting International*, ASBCA No. 53489, 02-2 BCA ¶ 31,940 at 157,786 (following *Malone*). The Act constitutes a waiver of sovereign immunity. *E.g., Sigmon Fuel Co. v. Tennessee Valley Authority*, 754 F.2d 162, 165 (6th Cir. 1985). Hence, to the extent that the allegations of the complaint fall within our breach jurisdiction, no further waiver, under either Public Law 85-804 or 10 U.S.C. § 2354, is necessary. *See National Gypsum Co.*, ASBCA Nos. 53259, 53568, 03-1 BCA ¶ 32,054 at 158,454 (holding indemnification claims under World War II contract were "claims of legal right based on

the existing terms of the contract . . . and . . are within our subject matter jurisdiction under the Contract Disputes Act").

The allegations of the complaint plainly fall within our breach jurisdiction. That is, the complaint alleges that each of the contracts was for the procurement of property or services (findings 1, 6, 9, 14, 18), which brings the contracts within 41 U.S.C. § 602(a). The complaint also alleges compliance with other statutory prerequisites, such as submission of a certified claim and a final decision by the contracting officer (finding 28). Substantively, the complaint alleges the classic breach of contract elements of non-performance of a contractual duty, and resulting damages (finding 29). *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 235(2), 236 (1979). As we have found, for the development contract, as well as for the first through fourth production contracts, Boeing has alleged that the breach lies in respondent's refusal to honor its indemnification obligations, as a result of which Boeing and/or Lockheed has incurred losses (finding 29).

D. *Public Law 85-804 and 10 U.S.C. § 2354*

We conclude that neither Public Law 85-804 nor 10 U.S.C. § 2354 divests us of our Contract Disputes Act jurisdiction over this appeal. The government tells us that "the doctrine of sovereign immunity precludes suits against the Government premised upon either P.L. 85-804 or 10 U.S.C. § 2354" and hence that we lack jurisdiction. (Gov't mot. at 6)

We reject this argument principally because it conflates contract adjustments under Public Law 85-804 and indemnification clauses authorized by the same statute. The Armed Services Procurement Regulation (ASPR) in effect at award of each of the prime contracts (*see* findings 1, 6, 9, 14, 18) drew this distinction, establishing separate regulatory regimens governing requests for contract adjustments, on the one hand, and the use of "residual powers," which afforded the predicate for indemnification clauses, on the other hand. *See, e.g.*, ASPR, Sec. XVII, Part 2 – Requests for Contractual Adjustment (1966 ed. Rev. 20) (1971 ed. Rev. 10) (1973 ed.) (1974 ed.); Sec. XVII, Part 3 – Residual Powers (1966 ed. Rev. 20) (1971 ed. Rev. 10) (1973 ed.) (1974 ed.). *See also Les Etablissements Eiffel-Asie*, ASBCA No. 22596, 80-2 BCA ¶ 14,500 at 71,487, *recon. denied*, 80-2 BCA ¶ 14,779 (recognizing that "coverage of unusually hazardous risks through indemnification clauses grounded on . . . [Public Law 85-804] residual powers" typically extends to the "production of hazardous items").

We emphasize that the relief that Boeing seeks is confined to recovery for breach of contract. Thus, in each of the five counts of the complaint, Boeing alleges, with respect to each of the five prime contracts, that the government's "refusal to honor its

indemnification obligations to Boeing and/or [Lockheed] constitutes a breach" (finding 29). We recognize that "Congress intended to exclude from the operation of the Contract Disputes Act the broadly discretionary settlement authority conferred by laws such as Public Law 85-804 . . . [A] claim solely and directly based upon 85-804 . . . is precluded from consideration under the Contract Disputes Act." *Paragon Energy Corp. v. United States*, 645 F.2d 966, 975 (Ct. Cl. 1981). But a claim for a contract adjustment based "solely and directly" on Public Law 85-804 is not before us, inasmuch as Boeing nowhere prays for an order directing any executive branch official to "enter into contracts or into amendments or modifications of contracts . . . [or] to make advance payments thereon." 50 U.S.C. § 1431.

The distinction between a breach claim under Public Law 85-804 and a contract adjustment under that statute is at the heart of the cases principally relied upon by the government. Thus, *Murdock Machine & Engineering Company of Utah v. United States*, 873 F.2d 1410, 1413 (Fed. Cir. 1989), involved the finality of a contract adjustment board's conversion of a contract from a fixed-price type to a cost reimbursement type. The court held that the adjustment board's decision was final and could neither be repudiated by the contracting officer in his decision nor by the Board on appeal. But the court did not question our jurisdiction over a breach claim with respect to the resulting contract, as modified by the adjustment board. Similarly, *Paragon Energy*, *supra*, 645 F.2d at 974-75, articulates the same distinction, as does *Centurion Electronics Service*, ASBCA No. 51956, 03-1 BCA ¶ 32,097 at 158,660, *aff'd, Drew v. Brownlee*, 95 Fed. Appx. 978 (Fed. Cir. 2004), and other cases cited by the government.

While the government's argument lumps 10 U.S.C. § 2354 together with Public Law 85-804, the former has a much more modest scope than the latter. By its terms, section 2354 is confined to the inclusion of indemnification clauses in "any contract . . . for research or development, or both." 10 U.S.C. § 2354(a). The statutory authority "does not extend to production contracts." *Les Etablissements*, *supra*, 80-2 BCA at 71,487. Hence, 10 U.S.C. § 2354 would at most apply to the development prime contract (*see* finding 1), not to the four production prime contracts (*see* findings 6, 9, 14, 18). Textually, the statute contains no provision at odds with Contract Disputes Act jurisdiction over Boeing's claim for breach of the indemnification clause in the development prime contract (*see* findings 2, 29).

Nonetheless, the government presses its argument, insisting that we lack jurisdiction over the breach allegations in all the contracts because of the stipulations in Public Law 85-804 that the statutory authority: (1) "shall not be used to obligate" the government for more than $50,000 "without approval by an official at or above the level of an Assistant Secretary or his Deputy, or an assistant head or his deputy, . . . or by a[n agency] Contract Adjustment Board;" and (2) "shall not be used to obligate" more than

$25,000,000 unless designated Congressional committees have been notified in writing and 60 days of continuous session have expired thereafter. 50 U.S.C. § 1431. The government also adverts to the requirement in 10 U.S.C. § 2354(c) conditioning indemnification payments upon certification by the secretary or a designated subordinate that the amount is "just and reasonable."

Treating these secondary arguments in turn, with respect to the secretarial approval requirement, the government tells us that our "assertion . . . of jurisdiction . . . would have peculiar consequences" (gov't mot. at 9). Our decision "would be unenforceable unless approved by an appropriate member of the executive branch" (*id.*). We reject this argument because, textually, the statutory language does not address jurisdiction. *See* 50 U.S.C. § 1431. Unenforceability, the asserted "peculiar consequence[]" of the statutory requirement, is typically an affirmative defense, not a jurisdictional bar. *See e.g., K & R Engineering Co., Inc. v. United States*, 616 F.2d 469, 470 (Ct. Cl. 1980) (granting summary judgment on "affirmative defense that an unlawful arrangement . . . rendered the contract unenforceable"); *see also Do-Well Machine Shop, Inc. v. United States,* 870 F.2d 637, 639 (Fed. Cir. 1989) ("a valid affirmative defense . . . does not oust a tribunal of jurisdiction unless . . . the defense is jurisdictional").

In any event, two other considerations point to rejection of the secretarial approval argument. The first is that, like Congressional notification, the secretarial approval requirement is keyed to the use of the statutory authority "to obligate" amounts above the specified thresholds. *See* 50 U.S.C. § 1431. We read this statutory language to mean obligating the government in the first instance by including an indemnification clause in a contract. That action is different from the issue presented by this appeal, *viz.*, whether appellant is entitled to recovery for the alleged breaches of the indemnification clauses that have already been included in the contracts.

The other consideration regarding secretarial approval is that acceptance of respondent's position would render the indemnification clauses illusory. That is, while it promised in each prime contract to "hold harmless and indemnify" Boeing (findings 2, 6, 9, 14, 18), the government's assertions that any decision that we render must be "approved by an appropriate member of the executive branch" and "the agency controls the grant of relief under these clauses" (gov't mot. at 9, 10), would eviscerate the indemnification clauses if accepted. Under the government's reading of the clauses, there is neither mutuality of obligation nor "sufficient definiteness so as to provide a basis for determining the existence of a breach and for giving an appropriate remedy." *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058, 1061 (Fed. Cir. 2002) (internal citations omitted). Acceptance of the government's position would also transgress the familiar canon disfavoring contract interpretations rendering part of a contract "useless, inexplicable, inoperative [or] void." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274

(Fed. Cir. 1991) (internal quotation marks omitted); *ECI Construction, Inc.*, ASBCA No. 54344, 05-1 BCA ¶ 32,857 at 162,807 (same).

With respect to Congressional notification, the government overstates the reach of the provision in Public Law 85-804 in any event. The notice provision was added to Public Law 85-804 in November 1973 by the Department of Defense Appropriation Authorization Act of 1974. Act of Nov. 16, 1973, Pub. L. No. 93-155, 1973 U.S.C.C.A.N. (87 Stat. 605) 672. The amending statute provided that the change "shall not affect the carrying out of any contract, . . . or other obligation entered into prior to the date of enactment of this section." *Id.* at 682. Treating the allegations of the complaint as true for purposes of the motion, *Aerolineas Argentinas*, *supra*, 77 F.3d at 1572, the development prime contract, as well as the first through third production prime contracts, were all awarded before enactment of the amendment (findings 1, 6, 9, 14). Moreover, while the fourth production prime contract was awarded "in 1973" (finding 18), it is likely that it, too, preceded the amendment, given the 6 July 1973 award date for the fourth production subcontract (*see* finding 19).

With respect to the government's secretarial certification argument, we have already concluded that 10 U.S.C. § 2354 is not an impediment to our Contract Disputes Act jurisdiction over this appeal. That conclusion plainly applies to the "just and reasonable" certification requirement in 10 U.S.C. § 2354(c).

E. *Anti-Deficiency Act*

We conclude that the Anti-Deficiency Act does not defeat our Contract Disputes Act jurisdiction over this appeal. Although the Air Force presents its Anti-Deficiency Act argument as a jurisdictional impediment, we do not understand it as such. As we understand it, the Air Force argues that the Anti-Deficiency Act prohibits "[o]pen-ended indemnification clauses," which are "illegal and unenforceable if not authorized by statute," and hence we cannot exercise jurisdiction over this appeal solely as a Contract Disputes Act claim for breach of those clauses. (Gov't mot. at 10) We reject this argument because, again, "a valid affirmative defense . . . does not oust a tribunal of jurisdiction unless . . . the defense is jurisdictional." *Do-Well Machine Shop, supra,* 870 F.2d at 639. The claimed bar of the Anti-Deficiency Act constitutes an affirmative defense but not a jurisdictional impediment. *National Gypsum, supra,* 03-1 BCA at 158,454-55. The same is true of unenforceability, *K & R Engineering, supra,* 616 F.2d at 470, and illegality, *Danac, Inc.*, ASBCA Nos. 30227, 33394, 88-3 BCA ¶ 20,993 (denying motion to dismiss affirmative defense of illegality).

In any event, the government ignores the interplay between the Anti-Deficiency Act and the judgment fund. We addressed the issue in *South Carolina Public Service Authority*, ASBCA No. 53701, 04-2 BCA ¶ 32,651 at 161,605, holding that the Anti-Deficiency Act "does not impinge on . . . contingent liabilities under the contract any more than the [Act] would preclude consideration, for example, of [Contract Disputes Act] claims for constructive changes under the standard Changes provision. To the extent that the government is liable for [Contract Disputes Act] claims, the judgment fund is generally available. 31 U.S.C. § 1304, 41 U.S.C. § 612." *See also, Ford Motor Co. v. United States*, 378 F.3d 1314, 1320 (Fed. Cir. 2004) (holding that Anti Deficiency Act does not bar recovery under World War II indemnification clause authorized by Contract Settlement Act); *accord, E.I. DuPont de Nemours and Co., Inc. v. United States*, 365 F.3d 1367, 1374-1379 (Fed. Cir. 2004) (same).

Moreover, we cannot harmonize the government's argument with its own regulations for contracts awarded after July 1971. Before that time, the Executive Order implementing Public Law 85-804 limited the authorization given to the Department of Defense under the Act to "amounts appropriated." Exec. Order No. 10789, ¶ 1, 23 Fed. Reg. 8897 (Nov. 14, 1958), *as amended by* Exec. Order 11051, 27 Fed. Reg. 9683 (Sept. 27, 1962). On 22 July 1971, the Executive Order was amended to remove that limitation with respect to indemnification provisions. Exec. Order No. 10789, ¶ 1(a), 23 Fed. Reg. 8897, as amended by Exec. Order 11051, 27 Fed. Reg. 9683; Exec. Order 11382, 32 Fed. Reg. 16247; Exec. Order 11610 (22 July 1971), *reprinted at*, ASPR 17-502 (16 April 1973) ("The limitation in paragraph 1 to amounts appropriated and the contract authorization provided therefor shall not apply to contractual provisions which provide that the United States will hold harmless and indemnify the contractor . . . .") This amendment affects the second, third, and fourth production contracts and subcontracts, all of which appear to have been awarded after July 1971 (*see* findings 9, 11, 14, 16, 18, 19).

CONCLUSION

Respondent's motion to dismiss is denied.

Dated: 12 April 2006

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signature continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54853, Appeal of The Boeing Company, rendered in conformance with the Board's Charter.

Dated: APR 13 2006

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals