

Calendar No. 222109TH CONGRESS
1ST SESSION**S. 1761**

To clarify the liability of government contractors assisting in rescue, recovery, repair, and reconstruction work in the Gulf Coast region of the United States affected by Hurricane Katrina or other major disasters.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 22, 2005

Mr. THUNE (for himself, Mr. VITTER, Mr. LOTT, Ms. MURKOWSKI, and Mr. INHOFE) introduced the following bill; which was read the first time

SEPTEMBER 26, 2005

Read the second time and placed on the calendar

A BILL

To clarify the liability of government contractors assisting in rescue, recovery, repair, and reconstruction work in the Gulf Coast region of the United States affected by Hurricane Katrina or other major disasters.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Gulf Coast Recovery
5 Act”.

1 **SEC. 2. FINDINGS.**

2 Congress finds that—

3 (1) while public officials have the responsibility
4 and expertise to direct and control the Federal,
5 State and local response to any disaster, those offi-
6 cials lack the manpower and equipment necessary to
7 take all of the many steps necessary to implement
8 such a response;

9 (2) in the wake of a disaster, public officials
10 have to depend on private contractors for logistical
11 and other support;

12 (3) historically, private contractors have an-
13 swered the call, providing valuable service to the
14 public in times of disaster;

15 (4) those contractors answered the call on Sep-
16 tember 11, 2001, and in the following weeks and
17 months, working hand-in-hand with Federal, State,
18 and local officials to rescue the survivors of the ter-
19 rorist attacks on that historic date, to recover the
20 bodies of those who died, to remove mountains of de-
21bris, to reconstruct the Pentagon, and ultimately, to
22 restore some sense of normalcy to New York City
23 and Arlington, Virginia;

24 (5) the expertise and equipment that private
25 contractors contributed to the Federal, State, and
26 local response to the terrorist attacks on September

1 11, 2001, greatly enhanced that response, increasing
2 not only the efficiency but also the effectiveness of
3 that response;

4 (6) the support that private contractors provide
5 to Federal, State, and local officials in times of dis-
6 aster—

7 (A) make it safer for police, firefighters,
8 and other rescue workers to search for, rescue,
9 and recover both persons and property dis-
10 located by the disaster; and

11 (B) enable those officials to quickly ad-
12 dress dangerous conditions that threaten life
13 and property, to restore basic public services,
14 and to protect public safety and health;

15 (7) it is in the national interest to have private
16 contractors assist public officials in times of dis-
17 aster;

18 (8) by providing support to the Federal, State
19 or local response to a disaster, private contractors
20 risk future litigation and liability even if those con-
21 tractors are in full compliance with all Federal,
22 State, and local laws (including regulations) that
23 apply to their work;

24 (9) class action lawsuits have been brought
25 against the private contractors that supervised the

1 heroic response to the terrorist attacks on the World
2 Trade Center in New York City on September 11,
3 2001;

4 (10) well-founded fears of future litigation and
5 liability under existing law discourage contractors
6 from assisting in times of disaster;

7 (11) whether private contractors remain willing
8 to offer their expertise and equipment to public offi-
9 cials in times of disaster substantially affects, bur-
10 dens, and deters interstate commerce and travel;

11 (12) clarifying the liability that private contrac-
12 tors must ultimately risk simply to support a Fed-
13 eral, State, or local response to a disaster will help—

14 (A) to ensure that those contractors con-
15 tinue to answer the governmental requests for
16 assistance in times of great need; and

17 (B) to limit the legal expenses that regret-
18 tably but inevitably inflate the cost of the recov-
19 ery from a disaster; and

20 (13) temporarily insulating private contractors
21 from any liability that private parties may seek to
22 impose on the contractors under certain Federal
23 laws would increase the power and authority of the
24 Federal agencies that bear the primary responsibility

1 for the administration of those laws to effectively di-
2 rect and control the response to a disaster.

3 **SEC. 3. DEFINITIONS.**

4 In this Act:

5 (1) **DISASTER ZONE.**—The term “disaster
6 zone” means—

7 (A) the region of the United States in
8 which major disasters relating to Hurricane
9 Katrina were declared by the President on Au-
10 gust 29, 2005, in accordance with section 401
11 of the Robert T. Stafford Disaster Relief and
12 Emergency Assistance Act (42 U.S.C. 5170);
13 and

14 (B) any other region of the United States
15 in which a major disaster is so declared after
16 that date, if the disaster requires the provision
17 of Federal assistance in an amount that exceeds
18 \$15,000,000,000, as determined by the Presi-
19 dent.

20 (2) **GOVERNMENT CONTRACT.**—The term “gov-
21 ernment contract” means—

22 (A) a contract between—

23 (i) a person, proprietorship, partner-
24 ship, limited liability company, or corpora-
25 tion in the regular business of providing

1 materials, labor, equipment, or services for
2 construction-related activities (including
3 construction, demolition, repair, clean-up,
4 alteration, remediation, and related engi-
5 neering); and

6 (ii) any agency or instrumentality of
7 the Federal Government or any State or
8 local government; and

9 (B) a subcontract at any tier of a contract
10 described in subparagraph (A).

11 **SEC. 4. LIMITATION ON LIABILITY OF FEDERAL CONTRAC-**
12 **TORS UNDER CERTAIN FEDERAL LAWS.**

13 (a) IN GENERAL.—Notwithstanding any other provi-
14 sion of law, a person or entity awarded a government con-
15 tract to perform rescue, recovery, repair, or reconstruction
16 work in any portion of a disaster zone shall not, as a result
17 of the performance of that work, be subject to liability that
18 any private party may seek to impose under any provision
19 of Federal law (including any regulation) that—

20 (1) is administered by the Secretary of the
21 Army, the Administrator of the Environmental Pro-
22 tection Agency, or the Secretary of Transportation;
23 and

24 (2) otherwise permits the filing of a lawsuit by
25 a private individual.

1 (b) EFFECT ON LITIGATION MANAGEMENT.—Noth-
2 ing in this section limits or otherwise affects the applica-
3 tion of section 5 of this Act.

4 (c) EFFECT ON EXISTING LAW.—Nothing in this Act
5 limits or otherwise affects the application, to a person or
6 entity described in subsection (a), of—

7 (1) title VII of the Civil Rights Act of 1964 (42
8 U.S.C. 2000e et seq.);

9 (2) the Fair Labor Standards Act of 1938 (29
10 U.S.C. 201 et seq.); or

11 (3) a comparable State fair employment prac-
12 tice law.

13 **SEC. 5. LITIGATION MANAGEMENT.**

14 (a) FEDERAL CAUSE OF ACTION.—

15 (1) IN GENERAL.—There shall exist a Federal
16 cause of action for claims arising out of, relating to,
17 or resulting from the performance of a government
18 contract, whether oral or written, in a disaster zone
19 for—

20 (A) the search, rescue, or recovery of indi-
21 viduals or property dislocated by the disaster;

22 (B) the demolition, removal, repair, or re-
23 construction of structures or utilities damaged
24 by the disaster;

1 (C) the clean-up or remediation of property
2 polluted by the disaster;

3 (D) the removal of debris deposited by the
4 disaster (including dredging); or

5 (E) the dewatering of property flooded by
6 the disaster.

7 (2) SUBSTANTIVE LAW.—The substantive law
8 for decision in any action described in paragraph (1)
9 shall be derived from the law, including choice of law
10 principles, of the State in which the government con-
11 tract was performed.

12 (3) CLAIMS.—A Federal cause of action shall
13 be brought under this subsection only for claims for
14 injuries or damages proximately caused by a person
15 or entity awarded a government contract.

16 (4) JURISDICTION.—The appropriate United
17 States district court shall have original and exclusive
18 jurisdiction over all actions for any claim for loss of
19 property, personal injury, or death arising out of, re-
20 lating to, or resulting from the performance of a
21 government contract, whether oral or written, for an
22 activity described in any of subparagraphs (A)
23 through (E) of paragraph (1).

24 (b) SPECIAL RULES.—

1 (1) IN GENERAL.—The requirements described
2 in paragraphs (2) through (4) shall apply to an ac-
3 tion brought under this section.

4 (2) PUNITIVE DAMAGES.—No punitive damages
5 intended to punish or deter, exemplary damages, or
6 other damages not intended to compensate a plain-
7 tiff for actual losses may be awarded in such an ac-
8 tion.

9 (3) INTEREST PRIOR TO JUDGMENT.—No party
10 to such an action shall be held liable for interest
11 prior to judgment.

12 (4) NONECONOMIC DAMAGES.—

13 (A) DEFINITION OF NONECONOMIC DAM-
14 AGES.—In this paragraph, the term “non-
15 economic damages” means damages for losses
16 for physical and emotional pain, suffering, in-
17 convenience, physical impairment, mental an-
18 guish, disfigurement, loss of enjoyment of life,
19 loss of society and companionship, loss of con-
20 sortium, hedonic damages, injury to reputation,
21 and any other nonpecuniary losses.

22 (B) AWARD OF NONECONOMIC DAM-
23 AGES.—

24 (i) IN GENERAL.—Noneconomic dam-
25 ages may be awarded against a defendant

1 only in an amount directly proportional to
2 the percentage of responsibility of the de-
3 fendant for the harm to the plaintiff.

4 (ii) NO PHYSICAL HARM.—No plaintiff
5 may recover noneconomic damages unless
6 the plaintiff suffered physical harm.

7 (c) COLLATERAL SOURCES.—Any recovery by a
8 plaintiff in an action under this section shall be reduced
9 by the amount of collateral source compensation, if any,
10 that the plaintiff has received or is entitled to receive as
11 a result of the same loss of property, personal injury, or
12 death for which the plaintiff seeks compensation from the
13 defendant.

14 (d) GOVERNMENT CONTRACTOR DEFENSE.—

15 (1) APPLICABILITY.—Should a lawsuit be filed
16 for claims arising out of, relating to, or resulting
17 from the performance of a contract that meets the
18 criteria described in paragraph (2), there shall be a
19 rebuttable presumption that—

20 (A) all elements of the government con-
21 tractor defense are satisfied; and

22 (B) the government contractor defense ap-
23 plies in the lawsuit.

24 (2) CRITERIA.—The criteria referred to in
25 paragraph (1) are that—

1 (A) the contract is a government contract
2 that the Chief of Engineers has certified as
3 being necessary for the recovery of a disaster
4 zone from a disaster, as provided in paragraphs
5 (4) and (5); or

6 (B) the contract—

7 (i) is a subcontract of a contract de-
8 scribed in subparagraph (A); and

9 (ii) is for an amount that was not rea-
10 sonably expected, as of the time at which
11 the subcontract was executed, to exceed
12 \$10,000,000.

13 (3) OVERCOMING OF PRESUMPTION.—The pre-
14 sumption described in paragraph (1) shall be over-
15 come only by evidence showing that a person or enti-
16 ty awarded a government contract acted fraudulently
17 or with willful misconduct in submitting information
18 to the Chief of Engineers in conjunction with the
19 consideration by the Chief of Engineers of the gov-
20 ernment contract.

21 (4) EXCLUSIVE RESPONSIBILITY.—

22 (A) IN GENERAL.—The Chief of Engineers
23 shall be exclusively responsible for the review of
24 any government contract that any person or en-
25 tity, including any governmental entity, claims

1 to be necessary for the recovery of a disaster
2 zone from a disaster for the purpose of estab-
3 lishing a government contractor defense in any
4 lawsuit for claims arising out of, relating to, or
5 resulting from the performance of the govern-
6 ment contract.

7 (B) REVIEW OF SCOPE.—Upon the sub-
8 mission of a request for a certification that a
9 government contract was or will be necessary
10 for the recovery of a disaster zone from a dis-
11 aster, the Chief of Engineers shall, not later
12 than 30 days after the date of receipt of the re-
13 quest, whether made before or after the award
14 of a government contract—

15 (i) review the scope of work that the
16 government contract does or will require;
17 and

18 (ii) determine whether the majority of
19 the work is for 1 or more of the activities
20 described in subparagraphs (A) through
21 (E) of subsection (a)(1).

22 (C) CERTIFICATION.—If the Chief of Engi-
23 neers determines that at least a majority of the
24 work that the government contract does or will
25 require is for 1 or more of those activities, the

1 Chief of Engineers shall promptly certify that
2 the government contract is necessary for the re-
3 covery of the disaster zone from a disaster.

4 (5) ISSUANCE OF CERTIFICATE.—For each gov-
5 ernment contract reviewed and certified by the Chief
6 of Engineers under paragraph (4), the Chief of En-
7 gineers shall promptly issue a certificate of need for
8 recovery of the applicable disaster zone from a dis-
9 aster to the person or entity that submitted the re-
10 quest for the certification.

11 (6) RECORDS.—The Chief of Engineers shall
12 maintain records of certifications made, and certifi-
13 cates issued, under this subsection.

14 (e) EFFECT ON CLAIMS AND LAW.—

15 (1) CLAIMS FOR LOSS; ENFORCEMENT AC-
16 TIONS.—Nothing in this section applies to—

17 (A) any claim for loss under any workers
18 compensation law; or

19 (B) any enforcement action that any gov-
20 ernmental entity may bring against any person
21 or entity allegedly for violating any Federal or
22 State law (including a regulation).

23 (2) GOVERNMENT CONTRACTOR DEFENSE.—
24 Nothing in this section limits or restricts the govern-

1 ment contractor defense as that defense exists at
2 common law.

3 (3) RECKLESSNESS OR WILLFUL MIS-
4 CONDUCT.—Nothing in subsection (b), (c), or (d) af-
5 fects the liability of any person or entity for reck-
6 lessness or willful misconduct.

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