MEMORANDUM

TO: Randolph G. Moore  
   Chairperson, Board of Regents

VIA: David Lassner  
    President

VIA: Kalbert K. Young  
    Vice President for Budget and Finance/Chief Financial Officer

VIA: Carrie K.S. Okinaga  
    Vice President for Legal Affairs and University General Counsel

FROM: Vassilis L. Syrmos  
    Vice President for Research and Innovation

SUBJECT: Request for Approval of Indemnification Provision in a Cooperative Agreement with the Department of Defense ("DoD") to Support the Pacific Disaster Center ("PDC")

SPECIFIC ACTION REQUESTED:

It is requested that the Board of Regents approve an indemnification provision in favor of the Federal Government as set forth under a proposed Cooperative Agreement ("Proposed Cooperative Agreement") anticipated to be awarded by the Department of Defense ("DoD") to support the Pacific Disaster Center ("PDC"), which is managed by the University of Hawaii ("University"), and is located on the island of Maui.

RECOMMENDED EFFECTIVE DATE:

The recommended effective date is upon Board of Regents approval.

ADDITIONAL COST:

There are no costs associated with this request.
PURPOSE:

The purpose of this request is to obtain approval of an indemnification provision as set forth in a Proposed Cooperative Agreement anticipated to be awarded by the DoD to the University, prior to December 16, 2015. If awarded the Proposed Cooperative Agreement, the University may receive up to $75 million over the next 5 years to continue to manage and administratively support the PDC. The University/PDC has been providing these services to the Federal Government since December 16, 2006, under an existing Cooperative Agreement ("Existing Cooperative Agreement"), which is set to expire on December 15, 2015.

BACKGROUND:

This request is made pursuant to Hawaii Revised Statutes § 304A-110 (University of Hawaii System, Indemnification). For your convenience, § 304A-110 is reprinted as Attachment 1 to this Memorandum.

The Pacific Disaster Center

The PDC provides applied information research, data analysis, and advanced software tools and applications to support communities of the Asia Pacific regions with respect to improving anticipation and response to natural disasters; more effectively delivering humanitarian assistance and relief in the aftermath of natural disasters; and quickly transitioning to recovery. The PDC works collaboratively with a wide range of clients, including military and civilian response teams, academic research units, tactical operations, foreign governments and nonprofit organizations. PDC builds systems to monitor multi-hazard disasters, provide early warning, and support decisions based on information sharing. PDC uses historical disaster data and several predictive models to visualize the potential impacts of disasters and identify mitigation measures. PDC assists decision makers identify the most vulnerable communities, set realistic risk reduction goals, and effectively deploy resources. A central goal of PDC is to expand the partner network of first responders, data providers, academic communities of interests and international and non-governmental organizations. The overarching goal is to foster disaster-resilience and risk reduction through the use of science, information, and technology.

If awarded the Proposed Cooperative Agreement by the DoD, the University will provide administrative support and management services for PDC until December 2020, with a potential award ceiling of $75 million ($15 million per year).

Indemnification Provisions in favor of the Federal Government

The Department of Defense (referred to as "Government" in the following section) requires the following commitment from the University (referred to as "Recipient") (emphasis regarding indemnification added in bold):

LIABILITY AND INDEMNITY. Each party hereto shall be responsible for its own activities and those of its agents and employees in carrying out its responsibilities under this Cooperative Agreement. The Government will not be responsible for, and the Recipient will assume, all liability to persons which may be attributable or incident to the Recipient's negligence or
breach of this Cooperative Agreement, or by the negligence or breach of the Cooperative Agreement by any of the Recipient's agents and employees. The Recipient further agrees to indemnify, save, hold harmless, and defend the Government, its officers, agents and employees, from and against all suits, claims, demands or actions, liabilities, judgments, prices and attorneys' fees arising out of, or in any manner predicated upon personal injury or death resulting from, related to, caused by or incident to the Recipient's negligence in the carrying out of the terms of this Cooperative Agreement, or breach thereof, or any and all other activities conducted by the Recipient, its agents, employees and contractors incident to this Cooperative Agreement. Any claim against the Government or its employees for damages arising out of negligence, wrongful acts, or wrongful omissions shall be pursued under the Federal Tort Claims Act.

Research Sponsor requires indemnity as a condition of awarding the Cooperative Agreement.

The University contacted DoD to request modifications to the indemnification language under this Proposed Cooperative Agreement. After unsuccessful attempts to obtain relief via email discussions, a phone conference involving attorneys from the University and DoD was scheduled. DoD counsel advised the University that DoD now interprets the relevant governing federal laws as requiring an indemnification unless the contracting unit obtains a waiver from the Secretary of Defense. For this Proposed Cooperative Agreement, because the DoD anticipates that the University/PDC will be given relatively wide discretion in fulfilling its duties and expectations, and will often conduct activities in foreign jurisdictions, the DoD contracting unit declined to seek a waiver of the indemnity requirement. DoD informed the University that the indemnification provision is therefore required as a condition of the Proposed Cooperative Agreement and is non-negotiable.

Risks Analysis

We believe that the inclusion of an indemnification provision in the Proposed Cooperative Agreement is reasonable and appropriate for the following reasons:

1) Risks are relatively low. For the past 9 years, since December 2006, the University/PDC has been successfully providing management support through a similar Existing Cooperative Agreement with the DoD. During that period, the University was never called upon to indemnify the DoD. The University/PDC clearly has the capacity, know-how, and experience to fulfill its responsibilities under the Proposed Cooperative Agreement. In addition, while the University services envisioned by the DoD relate to gauging the impact of natural disasters, responding during the event, and providing community assistance and humanitarian relief in the aftermath, the University/PDC itself is not tasked with direct delivery of any of these services. With funds provided by DoD, the University manages the administrative support of the PDC, and assists the PDC with developing and deploying data analytic "tools" and applications to better equip incident command groups that are established during natural disasters. The incident command groups coordinate the delivery of services to the affected communities by first responders, such as emergency medical, civil defense, and disaster relief agencies. Based on our past experience supporting the PDC, we believe that it is highly unlikely that any claim would be asserted against the research sponsor DoD, as a result of our
performance of the Cooperative Agreement during the next 5 years, which would trigger the "defend and hold harmless" obligations undertaken by the University. Finally, the PDC holds an outstanding record for its decision-support analytical products and system availability over the last 15 years of operation, but it is under no direct or indirect contractual obligation to guarantee the quality of such products or that of system up-time. The liability risks regarding PDC product content or delivery mechanisms are thus mitigated.

2) Benefits are Significant. With University administrative support and management, PDC has provided innovative, global multi-hazard disaster monitoring, early warning, and decision support systems, as well as risk and vulnerability assessment, modeling and visualization, and capacity enhancement services, to the DoD. Furthermore, the PDC Cooperative Agreement is one of the University's largest extramural contracts; and the PDC is one of the major science and technology cornerstones, as well as a substantial contributor, to the economy and technical community on Maui.

3) University is well-positioned to perform successfully for the upcoming period. The University/PDC's strong performance during the past 9 years, and its existing capabilities, place the University/PDC in a favorable position to receive the Proposed Cooperative Agreement for the upcoming 5 years, as indicated by the stated intent of the DoD to utilize a sole source process for the award. In addition, the DoD Announcement of the federal funding opportunity contemplates an increase in the Proposed Cooperative Agreement award from the current $8 million per year, to as much as $15 million per year.

**ACTION RECOMMENDED:**

It is recommended that the Board of Regents approve the indemnification provision in favor of the Federal Government as set forth in the Proposed Cooperative Agreement anticipated to be awarded by the DoD to the University to manage and administratively support the PDC.

Attachment

c: Cynthia Quinn, Executive Administrator and Secretary to the Board of Regents
Attachment 1. Indemnification of Research Sponsor

[$\S$304A-110] Indemnification.

(a) Notwithstanding any other law to the contrary, the board of regents may agree in writing to an indemnity provision by which the university agrees to indemnify, defend, and hold harmless any person, corporation, or entity that sponsors research at the university when all of the following conditions are satisfied:

(1) The person, corporation, or entity requires an indemnity in writing as a condition for providing a grant, benefit, service, or interest in or right to use property;

(2) The president, or the president's designee, following a favorable review by the university general counsel or the counsel's designee, approves the proposed indemnification; and

(3) The chief financial officer, pursuant to section 304A-108, has obtained an insurance policy or policies in an amount sufficient to cover the liability of the university that may be reasonably anticipated to arise under the indemnity provision or has determined that it is not in the best interest of the university to obtain insurance.

(b) Nothing in this section shall be construed to expand the scope of liability of the university beyond that set forth in chapters 661 and 662.

(c) Nothing in this section shall be construed to waive the immunity of the university from suit in federal courts guaranteed by the Eleventh Amendment to the United States Constitution. An indemnity provision not in strict compliance with this section shall not give rise to a claim against the university under this chapter or chapter 661 or otherwise waive the university's sovereign immunity.