U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

Cindy Locklear
Director of Contracts and Governance
Graham Corporation/Barber Nichols
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October 2, 2024

Re: Applicability of 14 C.F.R. Part 440 Reciprocal Waivers to Custom Component Manufacturers

Dear Ms. Locklear,

This letter is in response to your email request for a legal interpretation dated July 1, 2024, regarding whether a supplier/manufacturer of mission-critical equipment that is incorporated into a launch vehicle must sign the reciprocal waiver of claims required by 14 C.F.R. part 440.

This letter provides specific guidance applying the facts you provided in your July 1, 2024 email. Barber Nichols, LLC (hereby "BN") manufactures, sells, and supplies custom components to a launch service provider for mission-critical systems on its reusable launch vehicle. BN believes that in the event the licensed service provider is granted an FAA launch license or permit regarding the launch of the launch vehicle, which includes BN mission-critical components, BN should execute a reciprocal waiver of claims in accordance with 14 C.F.R. part 440. The licensed service provider has rejected this position stating that BN is not involved in "launch services" and so the reciprocal waiver of claims requirements in part 440 are not applicable to BN.

Title 51 U.S.C. § 50914(b) and 14 C.F.R. § 440.17 require a licensee or permittee to make a reciprocal waiver of claims with applicable parties involved in launch services or reentry services. Under 14 C.F.R. § 440.17, a licensee assumes financial responsibility for property damage it sustains and for bodily injury or property damage sustained by its own employees resulting from licensed activities, regardless of fault. Further, § 440.17(b) specifically states:

> The licensee or permittee and each of its contractors and subcontractors, each customer, and each customer's contractors and subcontractors, must enter into a reciprocal waiver of claims agreement under which each party waives and releases claims against all the other parties to the waiver and against any other customer, and agrees to assume financial

> responsibility for property damage it sustains and for bodily injury or property damage sustained by its own employees, and to hold harmless and indemnify each other from bodily injury or property damage sustained by its employees, resulting from a licensed or permitted activity, regardless of fault.

Furthermore, 14 C.F.R. § 440(b)(1) requires a licensee or permittee to extend or flow down[1] the reciprocal waiver of claims requirements to each of the licensee's contractors and subcontractors involved in launch or reentry services, and each of its first-tier customers.

Title 14 C.F.R. § 440.3 defines contractors and subcontractors as "those entities that are involved at any level, directly or indirectly, in licensed or permitted activities, and includes suppliers of property and services, and the component manufacturers of a launch vehicle, reentry vehicle, or payload." The FAA notes in the Financial Responsibility Requirements for Licensed Launch Activities Notice of Proposed Rulemaking (1996 NPRM) that the term "contractors and subcontractors" is typically followed by the phrase, "involved in launch services." The term "launch services" is defined in 51 U.S.C. § 50902(6)(A) to include "activities involved in the preparation of a launch vehicle and payload for launch."[2] When "involved in launch services" is coupled with "contractors and subcontractors" a literal reading might narrowly limit the group of covered contractors and subcontractors to service providers involved strictly in on-site launch preparatory and support activities.[3] The FAA believes this literal interpretation is not consistent with Congressional intent to ensure financial protection and an equitable sharing of risks among the parties exposed to potentially catastrophic losses from a launch accident.[4] Thus,

> [t]he group of covered parties should not be limited only to the most obvious and visible launch participants that are engaged in preparing the launch vehicle and payload for launch and conducting the launch at the launch range. This group should also encompass, for example, the manufacturer that produces a component part for installation in the launch vehicle or payload, or the supplier that delivers a piece of equipment or other physical object used to prepare for or conduct a launch, as well as the contractor that constructs or refurbishes a launch pad specifically for licensed launch activities.[5]

The 1996 NPRM further indicates that "to the extent a third-party loss is attributable to the direct or [in]direct involvement of contractors or subcontractors who have provided goods or services in connection with licensed launch activities, the required insurance should cover their resulting liability."[6] The final rule maintained the same position as the 1996 NPRM.[7]

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[1] This extension is frequently referred to as a "flow-down" of the reciprocal waiver of claims requirements to contractors and subcontractors.

[2] *Financial Responsibility Requirements for Licensed Launch Activities*, NPRM, 61 FR 38992, 39012 (July 25, 1996).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id*.

[7] *Financial Responsibility Requirements for Licensed Launch Activities*, Final Rule, 63 FR 45592 (August 26, 1998) ("Consistent with the CSLA scheme, the definition would include any contractor or subcontractor that has potential liability exposure to third parties as a result of licensed launch activities. However, in the section-by-section discussion of proposed § 440.17—Reciprocal Waiver of Claims Requirements, the NPRM explains that not all of those entities are expected or required to participate in the reciprocal waiver of claims scheme in order to carry out its purpose. Only

The goal of the reciprocal waiver of claims is to ensure the involved parties absorb certain losses they may sustain as a result of licensed activities.[8] Furthermore, the reciprocal waiver of claims requirements were included in the regulation as an effort to entice commercial space operators in the United States and to allow for innovation to occur without concerns of liability for operators and innovators working toward the same goal.[9]

Further, this office's 2017 *Letter of Interpretation to Roy Goldberg* (the *Goldberg Interpretation*) provides two main points of clarification relevant to the issue at hand.[10] First, it clarifies that the FAA generally defers to licensees or their contractors and subcontractors to determine what parties should be included in the reciprocal waiver of claims. The FAA stated it was unlikely that sellers of commercial off-the-shelf electronics products would be required to sign a reciprocal waiver of claims because the reciprocal waiver of claims was intended to cover parties that could bring a claim against other participants in the licensed activity in the event of injury, damage, or loss; and sellers of commercial off-the-shelf electronics would likely not be able to bring such a claim. [11] Moreover, as the *Goldberg Interpretation* indicates, licensees or their contractors and subcontractors are in the best position to determine whether a party would ultimately be able to bring a claim against other participants if an incident occurred from the licensed activity. Second, the *Goldberg Interpretation* clarifies that the indemnification provisions in the reciprocal waiver of claims require a party to indemnify another party to the agreement from claims by the indemnifying party's contractors, subcontractors, and, in the case of customers, customer, arising out of the indemnifying party's failure to properly implement the waiver requirement.[12] As a result of this requirement, the indemnifying party should be cautious in considering whether an entity may or may not be able to bring a claim because if a party is able to bring a claim and there has not been a reciprocal waiver of claims executed, the indemnifying party would be responsible for indemnifying that claim.[13]

Based on the facts provided, BN is a component manufacturer of the launch vehicle and therefore meets the definition of a contractor or subcontractor under the regulations. Section 440.3 defines a contractor and subcontractor as entities that are involved at any level directly or indirectly in licensed or permitted activities, to include component manufacturers of a launch vehicle. Further, the 1996 NPRM provides that the term "contractors and subcontractors" found in § 440.17(b) should not be narrowly construed when modified by the phrase "involved in launch services"; instead, the term encompasses any party that could bring a claim against other participants in the licensed activity. The 1996 NPRM explains that "a manufacturer that produces

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those participants, including contractors and subcontractors, whose personnel or property are at risk in the conduct of licensed launch activities and who therefore could pursue claims against other participants in the event of injury, damage or loss need enter into the reciprocal waiver of claims agreement. (61 FR at 39012, July 25, 1996).").

[8] *Id.*

[9] *Id*.

[10] Letter of Interpretation to Roy Goldberg from Lorelei Peter, Assistant Chief Counsel, Regulations Division (Dec. 21, 2017).

[11] *Id.*; *Financial Responsibility Requirements for Licensed Launch Activities*, Final Rule, 63 FR 45592 (Aug. 26, 1998).

[12] 14 C.F.R. § 440.l 7(b) and (c)(l)(ii).

[13] Letter of Interpretation to Roy Goldberg from Lorelei Peter, Assistant Chief Counsel, Regulations Division (Dec. 21, 2017); *see also* 63 FR 45592.

a component part for installation in the launch vehicle" should be included in the covered parties of a reciprocal waiver of claims. Thus, a manufacturer making custom parts for a launch vehicle may be a party to the reciprocal waiver of claims as outlined in § 440.17(b). However, as provided by the *Goldberg Interpretation*, one of the determining factors of the parties obligated to be a party to the reciprocal waiver of claims hinges upon the ability of the participant to assert a claim against a fellow participant involved in the licensed launch activity.

In accordance with § 440.15(c)(iv), a licensee must submit to the FAA for signature the waiver of claims and assumption of responsibility agreement required by § 440.17(c), which is to be executed by the licensee and each first-tier customer of the licensee. Although only the licensee and each first-tier customer sign the reciprocal waiver of claims agreement that is submitted to the FAA for signature, the licensee still has the responsibility to extend or flow down the reciprocal waiver of claims requirements to each of its contractors and subcontractors involved in launch or reentry services. The *Goldberg Interpretation* clarifies that the FAA ultimately defers to the licensee or its contractors and subcontractors to make the determination to include parties such as BN in the reciprocal waiver of claims, understanding that a failure to correctly flow down the reciprocal waiver of claims could result in the licensee bearing the burden of indemnification.

Based on the facts provided, BN meets the definition of contractors and subcontractors in § 440.3. Additionally, BN is likely involved in launch services per § 440.17(b)(1). However, it is unclear if BN would be in a position to assert a claim against other participants in the licensed activity. The FAA maintains that the licensee and BN are ultimately in the best position to determine whether BN should waive claims under part 440 with the understanding that a licensee's failure to appropriately flow down the reciprocal waiver of claims may lead to the licensee bearing the burden of indemnification.

We appreciate your patience and trust that the above addresses your concerns. If you need further assistance, please contact my staff at (202) 805-6916. This response was prepared by Leana Brown, Attorney in the Regulations Division of the Office of the Chief Counsel.

Sincerely,

LAURA JANE MEGAN-POSCH

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Date: 2024.10.03 07:15:26 -04'00'

Laura J. Megan-Posch
Assistant Chief Counsel for Regulations