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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-167310

JUL 31 1969

Mr. J. E. Fowler, Jr.
Authorized Certifying Officer
Bureau of Mines
Department of the Interior

Dear Mr. Fowler:

Reference is made to your letter of June 18, 1969, with which you forwarded two invoices in favor of the Commonwealth of Pennsylvania, Department of Mines and Mineral Industries in the amounts of $24,894.34 and $18,500, respectively with a request for decision as to whether they may be certified for payment. Also forwarded were copies of the project contracts, the original construction contracts and pertinent correspondence.

The amount of each invoice represents fifty percent of the amount claimed as damages by the Addy Asphalt Company contractor under Public Health and Safety Project No. 1, and the C. & S. Excavating Company, contractor under Public Health and Safety Project No. 2 of the Anthracite Mine Water Control Program. This program was established in accordance with Public Law 162, approved July 15, 1955, 69 Stat. 352, as amended by Public Law 87-818, approved October 15, 1962, 76 Stat. 934 (30 U.S.C. 571-576).

Section 1 of the act approved July 15, 1955, as amended, supra, states that it is recognized that the presence of large volumes of water in anthracite coal formations involves serious wastage of the fuel resources of the Nation, and constitutes a menace to health and safety and national security. It therefore declares it to be the policy of the Congress--

> "* * * to provide for the control and drainage of water in the anthracite coal formations and thereby conserve natural resources, promote national security, prevent injuries and loss of life, and preserve public and private property, and to seal abandoned coal mines and to fill voids in abandoned coal mines, in those instances where such work is in the public health or safety."

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In order to carry out the purposes mentioned in section 1, section 2 of the act authorizes the Secretary of the Interior to make financial contributions to the Commonwealth of Pennsylvania on the basis of projects which he approves--

> "* * * to seal abandoned coal mines and to fill voids in abandoned coal mines, in those instances where such work is in the interest of the public health or safety, and for control and drainage of water which, if not so controlled or drained, will cause the flooding of anthracite coal formations, said contributions to be applied to the cost of drainage works, pumping plants, and related facilities * * *."

Section 2(a) of the act provides that amounts authorized to be contributed by the Secretary of the Interior to the Commonwealth are to be equally matched by the Commonwealth.

Section 2(d) of the act provides that the Commonwealth shall have full responsibility for installing, operating, and maintaining projects constructed pursuant to the act and shall give evidence, satisfactory to the Secretary of the Interior, that it will enforce effective installation, operation and maintenance safeguards. Section 2(f) of the act requires the Secretary of the Interior to determine that projects for the sealing of abandoned coal mines or the filling of voids in coal mines are economically justified.

The authority to contribute toward the sealing of abandoned coal mines and the filling of voids in abandoned coal mines was added to the 1955 act by the 1962 amendment. The purpose is to alleviate the danger of surface subsidence. Also there is a problem of mine fires which in some instances can be prevented from spreading by filling voids. Projects coming under this amendment are designated "Public Health and Safety Projects."

The Secretary of the Interior on December 11, 1962, prescribed "Procedures for Administration of the Anthracite Mine Water Control Act of July 15, 1955. . . As Amended by Act of October 15, 1962." Under those procedures the contributions of the Federal Government to the Commonwealth are made only pursuant to a Contribution Contract between the Federal Government and the Commonwealth as to each individual project. The Contribution Contract is based upon a Project Contract which the Commonwealth may enter into with contractors and suppliers for the

construction, installation, services, or work performed for a project. Payments to the Commonwealth by the Federal Government of its fifty percent contribution are to be made only upon suitable claims and vouchers of the Commonwealth. Amounts claimed under each voucher are to be certified by the Commonwealth as proper charges under the Project Contract, and that they have either been paid or are due and payable. The Commonwealth is to maintain suitable records and accounts of its transactions and payments with the Contractor which the Federal Government may inspect and audit from time to time. Each Project Contract is required to contain a provision stating that the United States of America shall not be considered a party to the Contract or in any manner liable thereunder.

The Contribution Contract between the Federal Government and the Commonwealth of Pennsylvania for Public Health and Safety Project No. 1, G.A.R. High School, Wilkes-Barre, Pennsylvania, was entered into on October 29, 1963, at an estimated cost of $675,000, for flushing the project area. After advertising for bids, the Commonwealth of Pennsylvania, Department of Mines and Mineral Industries, accepted the bid of the Addy Asphalt Company of Wilkes-Barre, Pennsylvania, which was the low bidder in the lump sum of $639,452.50. The Project Contract for filling underground voids, G.A.R. High School, City of Wilkes-Barre, Luzerne County, Pennsylvania, State-Federal Mine Drainage Project, Public Health and Safety Project No. 1 was dated January 7, 1964.

On September 1, 1965, the Addy Asphalt Company filed a petition with the Board of Arbitration of Claims, Department of Auditor General under the provisions "of the Act of 1929, April 9, P.L. 343, (72 P.S. 1003), as amended, and Act of 1937, May 20, P.L. 728 (72 P.S. § 4651), as amended," against the Commonwealth of Pennsylvania. A complaint, similar to the petition, stated to have been "brought under the provisions of the Act of 1811, as amended," before Board of Claims, Commonwealth of Pennsylvania, was notarized on September 18, 1965, by James A. Adonzio, President of Addy Asphalt Company.

Both the petition and the complaint claim compensation in the amount of $110,099.01. The possibility of settling for a lesser amount has been the subject of negotiation. It is understood from a letter dated April 25, 1968, from H. B. Charnbury, Pennsylvania Secretary of Mines and Mineral Industries to Mr. Joseph H. Corgan, Chief, Division of Anthracite, U.S. Bureau of Mines, Department of the Interior, that any settlement would be rendered as a judgment of the Board of Claims.

In referring to the basis for the claim as set out in the petition and in the complaint, a proposed settlement of the Commonwealth under consideration at that time, a Bureau of Mines memorandum dated September 18, 1968, to J. A. Corgan, Chief, Division of Environmental Activities comments as follows:

"1. The contractor's claim (Paragraphs 12 and 16(1) of the Petition) that the crushing plant operated at an efficiency rate of only 67.07 percent and cost him many hours of unproductive personnel and equipment may be difficult to disprove unless the Commonwealth can produce contrary results from periodic tests which they are not likely to have obtained. The 150 tons per hour capacity of the crusher, while not mentioned in the project documents, is indicated in the crusher specifications and literature supplied by Aggregate Equipment Inc. The method used by the contractor to compute the cost of the loss in efficiency of the crusher as described in his letter to L. Ehrlich, Deputy Attorney General Pennsylvania, is based on his designation of $ .445 per cubic yard as being the portion of the flushing charge ($1.55 per cubic yard) allocated to the crusher and his assumption of machine inefficiency of 32.93 percent, both of which appear defensible ($ .445 X .3293 X 246,478 = $36,232.27).

"Bureau and Commonwealth personnel are aware that breakdowns occurred to the crusher, that extra shifts were worked to build a stock pile, and that trucks waited at times to be loaded directly by the conveyor when material was not available in the stock pile. Because of their recommended settlement of $35,000 for this item, the Commonwealth apparently agrees with the contractor's claim of machine inefficiency and is not prepared to assign the poor performance of the machine to inadequate maintenance.

"It should be noted also that delivery of the crushing plant as outlined in the specifications was to be within 30 days after receipt of order. The invoice submitted by Aggregate Equipment Incorporated gives the order date as 2/28/64, and the shipping date 4/10/64. The contractor indicates in item 10 of the Petition that the Commonwealth did not furnish the crusher and screening plant until

May 1964. This is about three months after 2/3/64, the date on which the contractor began work, which may have occasioned him considerable delay in producing an adequate stock pile, and may be construed as a breach of contract. There appears to be support in the above analysis for the contractor's claims that inefficiency of the crusher and its late delivery added at least $35,000 to the contractor's cost of fulfilling the contract.

"2. The claim of the contractor (Paragraph 13 and 16(2) of the Petition) that he used a far greater amount of 6-inch pipe lines (13,109 linear feet in his petition but 15,048 feet of all pipe in his statement to L. Ehrlich) than the 3,000 linear feet indicated in the Commonwealth's specifications is subject to argument. The claimant is obviously including the lengths of pipe replacements required to keep the 3,000 feet of pipeline layout in operation. In our opinion there is little likelihood that the Commonwealth would have attempted to anticipate pipe wear and incorporate such additional amounts of pipe in the specifications, and also that replacement of parts in any of the contractor's equipment would be his own maintenance problem. If, however, he was influenced by the Commonwealth to purchase and experiment with various types of pipe (second paragraph of 13 in the Petition) which he now believes resulted in excessive costs, any redress would necessarily have to come from the Commonwealth alone. The Federal Government should not participate in paying this claim ($24,745.96) because maintenance and experimentation as indicated above are not provided for in the specifications nor the contract.

"3. The contractor's claim (Paragraph 11 and 16(3) of the Petition) for damages resulting from flushing - only 246,478 yards of material and not the 335,000 represented by the Commonwealth in the project documents may be supported by him in three ways: (insufficient time between mailing bid proposals (11-26-63) and opening of bids (12-19-63) to survey the extensive and hazardous abandoned mine voids in the project area, to determine the quantities required, and to evaluate adequately all aspects of the proposed work before submitting his bid; (2) the contractor may argue also

that if the Commonwealth after making a detailed inspection of the workings could determine the number and locations of bulkheads, props, and cross timbers to be erected and the number and locations of caves to be cleared, he would be justified in relying upon the Commonwealth's estimate of quantities; (3) it is recognized that his unit costs in the early stages of the project work would be higher than unit costs that could be realized from the total estimated volume.

"The actual quantity of material flushed being only 64 percent of the estimated amount furnished in the contract is probably a sufficient basis for claiming 'break of contract due to an engineering mistake which necessitated a change in specifications may be administratively determined to be an item of actual cost for payment under the contract.' (See second paragraph on page 4 of the memorandum to the Director from the Assistant Solicitor, Mines and Coal Research dated April 12, 1967.) It would seem to be advisable, therefore, to accept the Commonwealth's proposed settlement of this item for $14,788.68, which is one-half of the amount originally claimed.

"4. The claim for loss and increased cost resulting from the shut down of operations due to the lack of water service amounting to $15,505.42 (Paragraph 15 in the Petition) appears to be valid but has been eliminated in the Commonwealth's proposal for settlement.

"It is recommended that the Federal Government participate in paying the Commonwealth's proposed settlement for Item 16(1) crusher deficiency $35,000.00 and for Item 16(3) flushing deficiency $14,788.68, but not participate in paying for Item 16(2), additional pipe. The total Federal cost would not be more than $24,894.34, 50 percent of $49,788.68.

"It is noted in Mr. McPhillamey's memorandum of April 12, 1967, to the Director that the claims have been filed before the Board of Arbitration of Claims of the Commonwealth. Dr. Charnbury's letter of April 26, 1968, states that 'the Procedure would be that the settlement should be rendered as judgment before the Board of Claims' - possibly indicating that the Commonwealth is waiting for our endorsement of their settlement proposal before submitting it to the Board of Claims."

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The Contribution Contract between the Federal Government and the Commonwealth of Pennsylvania for Public Health and Safety Project No. 2, Tripp Slope Mine, Scranton, Pennsylvania, was entered into on April 10, 1964, in an estimated amount of $1,090,000 for flushing the project area. After advertising for bids, the Commonwealth of Pennsylvania, Department of Mines and Minerals accepted the bid of the C. & S. Excavating Company, Dunmore, Pennsylvania, in the lump sum amount of $803,324.75. The contract, dated June 8, 1964, is for filling voids in the Diamond, Top Rock and Bottom Rock Seams, in the abandoned Tripp Slope Mine in a designated area in the City of Scranton, Lackawanna County, Pennsylvania.

The claim of the C. & S. Excavating Company in the amount of $212,392.92, was made to the Pennsylvania Department of Mines and Mineral Industries by letter dated February 10, 1966, from Ralph P. Carey, Attorney-at-law. That claim also has been the subject of negotiation. The claim as made and a proposed settlement of the Commonwealth at that time were also the subject of a Bureau of Mines memorandum of September 19, 1968, to Chief, Division of Environmental Activities as follows:

"The subject claim for damage is itemized and described in a letter to the Commonwealth dated February 19, 1966, from Ralph P. Carey, Attorney-at-law, for the C & S Excavating Company. Although the Commonwealth's proposed settlement refers only to Item III, all items are here analyzed because the claimant has purportedly agreed to accept $37,000.00 as full settlement for all claims.

"1. The contractor's claim (Item I) that the crushing plant operated at an efficiency rate of only 69.2 percent is based on the rated capacity of the machine (250 tph), hours worked (1887), and actual yardage flushed converted to tons (291,076.6 yards = 326,006 tons). The inefficiency of the machine (30.8 percent), multiplied by his own designation of the unit cost of operating the crusher ($0.47 per cubic yard) multiplied by the actual yardage flushed (291,076.6 yards) is the method used by the contractor to compute a loss of $42,118.78. The argument presented for this item appears to have merit unless the Commonwealth can refute the claim of crusher inefficiency.

"Note that this claim involves the cost of crusher operation alone; the claim for excessive cost of crusher maintenance and supporting data on the inefficiency of the crusher are presented in the analysis of Item III-A.

"2. In (Item II) the contractor claims that he used 11,827 feet of pipe rather than the 1,500 feet of pipe lines indicated in the specifications, which cost him an additional $9,289.80 for the extra pipe and an equal amount in labor cost for installation for a total cost of $18,579.60. The claimant is obviously including the lengths of pipe replacement required to keep the 1,500 feet of pipe line layout in operation. In our opinion this interpretation of the specifications is not valid because it is not likely that the total amount of pipe wear could have been anticipated. We would interpret the 1,500 feet of pipe lines to represent the basic pipe line layout; the replacement of worn out parts would be the responsibility of the contractor.

"3. The contractor's claim (Item III) for damages resulting from flushing only 291,076.6 cubic yards of material and not the 660,000 cubic yards given in the specifications is supported by him as follows: The bid was based on a profit of $0.11 per cubic yard of material to be flushed, therefore, the deficiency of 368,924 cubic yards represents a loss to him of $40,581.64. The contractor may argue that if the Commonwealth could determine accurately the number of props to be erected, the amount of gob to be handled, and the amount of fallen rock to be moved, he would be justified in depending upon their estimate of total quantity to be flushed.

"The actual quantity of material flushed being only 44 percent of the estimated amount furnished in the contract is probably a sufficient basis for claiming 'breach of contract due to an engineering mistake which necessitated a change in specifications may be administratively determined to be an item of actual cost for payment under the contract.' (See second paragraph on page 4 of the memorandum to the Director of the Bureau of Mines from the Assistant Solicitor, Mines and Coal Research dated April 12, 1967.)

"This is the item which the Commonwealth has reduced to $37,000.00 and which the contractor purportedly

has agreed to accept in full payment for all of his claims. Whether or not a claim for loss in profit on work not performed can be justified, however, is subject to legal interpretation.

"4. Item III-A involved a claim by the contractor that he was obliged to bear an excessive crusher maintenance cost of $0.47 per cubic yard rather than the $0.27 he had apparently incorporated in his flushing bid of $1.20 per cubic yard and reflected a loss to him of $58,215.20. The contract between C & S Excavating Company and the Commonwealth was entered into on June 8, 1964. After a number of complaints by the contractor that the crusher did not perform at the 250 tons per hour capacity, the Commonwealth arranged for tests to be run on November 10, 1964. The following were present at the test:

"Commonwealth

"Messers. R. Lambert, R. Howell, H. Voight, K. I. Reid, Director of the Bureau of Purchase, H. M. Charleton, Director, Bureau of Standards, and others.

"Contractor

"Mr. Sebastinanelli and workmen

"Aggregate Equipment Incorporated

"Messrs. F. C. McCorkel, President, R. Healey, Vice President, and J. Wynn, salesman

"U. S. Bureau of Mines

"Mr. R. H. Whaite

"Before start of the test, Aggregate Equipment Inc., had rebuilt hammers to proper height with their own specially hardened material after removing about 1½ inches of old solder. The first test was started at 8:30 a.m. and the fourth and last test concluded at 2:45 p.m. producing 315 t.p.h. the first hour and lesser amounts in the succeeding three tests for average of 302 t.p.h. During this time the hammers had been worn down 3/8 of an inch.

Mr. Sebastianelli argued that although the machine produced 302 t.p.h. under special conditions, it would fall below the 250 t.p.h. average in 16 hours, the two shifts each working day he was required to work. Mr. McCorkel said the 250 t.p.h. performance could not be maintained using the 16 hour work - 8 hours welding cycle because of the antiquated hand method of welding the hammers that the contractor was using. He intimated that a cycle of operation involving removal of the entire hammer rotating element and replacing with built-up spare each day would be necessary. This would necessitate setting up an elaborate full time shop operation and semi-automatic welding facilities to maintain the cycle of efficient operation. The contractor could argue that the simple statement on maintenance of the crusher given in the specifications does not cover requirements of this magnitude.

"5. Item IV. This statement is interpreted to mean that the contractor purchased $100,090.00 worth of new equipment to handle 660,000 cubic yards as indicated in the project document which would not have been necessary if he had known that he needed to process only 291,076.6 cubic yards, and since the equipment is now worth only 80 percent of its cost he claims a loss of $20,000.00. Duplication of damage is indicated here because it would seem that this claim will have been satisfied if he receives a satisfactory settlement of Item III ($0.11 per cubic yard profit lost because he did not flush 368,924 cubic yards).

"6. Item V. That contractor suffered a loss of other work foregoing a profit of $22,500 which he could have performed if not working on this particular project is a specious argument unless the other work of which he speaks was on a cost plus basis in which case he was ill-advised to enter into a contract where a profit could not be guaranteed.

"7. Item VI. The contractor claims that he sustained a loss per day of $167.30 for 49 idle days between

August 11, 1964, the day on which the underground voids had been prepared for flushing, and October 22, 1964, when the crusher was available to him amounting to a total of $8,197.70. Since the contractor was required to start work on or before July 9, 1964, and since he was able to complete the preparatory work underground by August 11, 1964, he is justified in expecting the crusher to be made available to him long before October 22, 1964.

"8. Item VII. The cost of the bid bond ($4,400.00) is based on his bid of $803,324.76. He claims that if he had known the gross amount to be paid to him would be less than one-half of what he bid, his bid bond cost would have been reduced by $2,200.00.

"It is apparent that the contractor has some real justification for Items I, III-A, VI, and VII, amounting to $110,731.68. However, since the Commonwealth states that the contractor is prepared to settle for $37,000 covering flushing deficiency (Item III), a questionable item involving loss in profit of $40,581.64, and since this proposed settlement would satisfy all his other claims, it would nevertheless seem to be to our advantage to accept the Commonwealth's negotiated settlement proposal. The share of the Federal Government in making settlement, would be $18,500.00."

The parenthetical reference to the "second paragraph on page 4 of the memorandum to the Director of the Bureau of Mines from the Assistant Solicitor, Mines and Coal Research dated April 12, 1967" contained in both of the memoranda of September 18, 1968, quoted above, is a reference to a paragraph which cites a decision of this Office, B-136025, dated June 23, 1958, 37 Comp. Gen. 840. That decision held, as stated in the paragraph, that under a construction contract between the Federal Government and a State which obligates the Government to reimburse the State for actual costs, an arbitration award representing damages for breach of contract due to an engineering mistake which necessitated a change in specifications may be administratively determined to be an item of actual cost for payment under the contract. Based upon that decision the Assistant Solicitor of the Department of the Interior in his memorandum of April 12, 1967, as to the cases here under consideration, was of the opinion

"that upon a proper determination on the merits of the amount due to the contractor, that the Bureau may consider a claim from the Commonwealth and determine whether the claimed amount is an item of 'actual cost' of which the Government will contribute one-half under the terms of the respective Contribution Contracts with the Commonwealth."

On November 8, 1968, the Chief, Division of Environmental Activities, Bureau of Mines, United States Department of the Interior wrote a letter to the Secretary of Mines and Mineral Industries, Commonwealth of Pennsylvania, informing him that the information regarding the claims had been thoroughly reviewed by that office. It also informed him as to the recommendations as to the items the Federal Government should participate in paying and what the Federal Government should not participate in paying.

As to the claim of the Addy Asphalt Company the letter stated that it had been recommended that the Federal Government should not participate in paying for item 16(2), amounting to $24,745.96, in the Commonwealth's prepared settlement because maintenance of pipe lines and experimentation with different kinds of pipe are not provided in the specifications or in the contract. It had been recommended that the Federal Government participate in paying the proposed settlement for item 16(1) in the amount of $35,000 (loss and increased cost from the failure of the crushing plant to meet its rated minimum capacity of 150 tons per hour and from its innumerable breakdowns), and item 16(3) in the amount of $14,788.68 (the loss and increased cost resulting from flushing only 246,478.2 cubic yards of material and not 385,000 as represented by the Department of Mines and relied upon by the contractor). The amount payable by the Federal Government would be fifty percent of the total $49,788.68, or, $24,894.34.

The letter stated that as to the Commonwealth's proposed settlement of the C. & S. Excavating Company's claim amounting to $37,000, the total cost to the Federal Government would not be more than $18,500. This amount was based upon the contractor's claim covering the flushing deficiency but also would satisfy his other claims.

The letter concluded with the statement that disposition of these matters would be expedited if the Commonwealth submitted separate invoices to the Bureau of Mines for payment in the amounts indicated for each claim. Accordingly, the Commonwealth submitted the separate invoices which were forwarded here on June 18, 1969, with your request for decision.

The amount bid in each case was considerably less than the amount estimated in the Contribution Contracts. Also, although the amounts paid

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under the contracts do not appear in the correspondence submitted, it is understood that those amounts were far less than the total lump sum amounts stated in the bids. This was largely because the estimated amounts of material to be used in the flushing operation as stated in the bids was much greater than the amounts actually required to be used. Bids were submitted and payment was made on a cubic yard basis. It is also understood that there is some question as to whether sufficient time or provision was made in each case for the bidder to make independent surveys to confirm the amount of material that would be required to be flushed into the mines. The United States Government specifically was not a party to the contract between the Commonwealth and the contractor.

The claim arising out of the contract between the Commonwealth and the Addy Asphalt Company has been reduced by negotiation from $110.099.01, to $49,788.68. The claim arising out of the contract between the Commonwealth and the C. & S. Construction Company has been reduced by negotiation from $212,392.92, to $37,000.

Under all the circumstances we think that there is a substantial basis for concluding that the Federal Government may properly pay fifty percent of the reduced amounts. In addition to 37 Comp. Gen. 840, supra, see decision of June 20, 1968, B-164243, 47 Comp. Gen. 756, a copy of which was included with the material forwarded with the invoices on June 18, 1969.

The invoices, which may be certified for payment, together with the material forwarded with your letter are returned herewith.

Sincerely yours,

For the

R. F. Keller

Comptroller General
of the United States

Enclosures