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DECISION

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

FILE: B-198459 **DATE:** August 11, 1981

MATTER OF: Bureau of Land Management: Contracts for Fire Protection

DIGEST:

1. Absent specific statutory authority contracts for fire services are not authorized where a non-Federal governmental entity such as a Rural Fire District is legally obligated under state or local law to provide fire service without compensation. Where no antecedent legal obligation exists, however, contracts may be executed. See statutes and Comptroller General decisions cited.

2. Mutual aid agreements are statutorily authorized in all jurisdictions as are actual cost reimbursements for losses incurred in fire suppression activities on federal lands.

The Director of the Bureau of Land Management (BLM) has asked for our opinion on whether the BLM may legally contract with individual Rural Fire Districts in Oregon and Washington to secure fire protection and firefighting services for federal lands situated within the district's boundaries. The lands in question are extensive tracts of timber, and the Rural Fire Districts affected are legally required to protect these large, sparsely populated areas. BLM strongly urges that the contracts are authorized. The Department of the Interior Regional Solicitor's Office in Portland, Oregon analyzed state laws, court decisions and previous Comptroller General's decisions and concluded that contracts with Rural Fire Departments in those states are improper. We agree with the Regional Solicitor's conclusion.

In a long line of cases, the Comptroller General has held that there is no authority to charge appropriations with the cost of providing fire services where a non-Federal governmental unit is required by state or local law to provide the services without compensation to all property owners within its jurisdiction. 24 Comp. Gen. 599 (1945); B-153911, December 6, 1968. Additionally, we have held that if the governmental unit's provision of fire services is supported in whole or in part by property taxes

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or other levies from which the Federal Government is constitutionally exempt, any additional payment specifically for fire protection amounts to an unconstitutional tax. 49 Comp. Gen. 284 (1969).

Both of these obstacles could be overcome by statute. However, the statute relied upon would have to explicitly authorize contracts with or payments to local governments legally obligated to provide fire protection to property owners without charge. We have held that statutory authority to enter into agreements to pay state agencies for "services" is insufficient to support a contract for legally required fire protection. B-105602, December 17, 1951. This is consistent with the interpretation of "specific statutory authority" applied in appropriations law generally. Compare, for example, 38 Comp. Gen. 33 (1958) (statutory authority to train operating personnel for nuclear ship does not extend to training Maritime Administration personnel) and 41 Comp. Gen. 529 (1962) (authority to engage in printing does not include authority to print business cards, which the Comptroller General has held is personal expense).

BLM argues that it has statutory authority for fire service contracts and cites several statutes as support for that proposition. Particularly mentioned are 43 U.S.C. §§ 1469 and 1738 (1976). Section 1469 provides that:

> "[n]otwithstanding any other provision of law, persons may be employed or otherwise contracted with by the Secretary of the Interior to perform work occasioned by emergencies such as fire, flood, storm, or any other unavoidable cause and may be compensated at regular rates of pay without regard to Sundays, Federal holidays, and the regular workweek."

Section 1738 deals with resource protection operations and it provides in pertinent part as follows:

> "The Secretary is authorized to enter into contracts for the use of aircraft, and for supplies and services, prior to the passage of an appropriation therefor, for airborne cadastral survey and resource protection operations of the Bureau. He may renew such contracts annually, not more than twice, without additional competition. Such contracts shall obligate funds for the fiscal years in which the costs are incurred."

These statutes grant specific authority for BLM to engage in several activities which would otherwise be prohibited by law: employing firefighters without regard to overtime and premium pay requirements; procuring the use of aircraft; making contractual arrangements for supplies and services for the resource protection operations of BLM in advance of appropriations; and renewing contracts without competition. Although these statutes generally are applicable to contracting and other activities in support of fire services, they do not specifically mention entering into contracts with state or local government entities which are required by law to provide fire services without charge, and hence do not provide the needed authority. The kinds of contracts which are authorized by the statute would be for seasonal personnel, procurement of their equipment, chemical fire suppressants, etc., and contracts for complete fire services with providers who are not legally obligated to offer that service without charge.

BLM urges that the legislative history of section 1738 implies a broader authority on the part of the Secretary of the Interior to contract generally for fire services. However, to say that all contracts for fire services are authorized by the legislative history would be to take the crucial words of the Senate Report out of context. The legislative history speaks of "renewable contracts for protection of public lands from fire in advance of appropriations* * *." S. Rept. No. 94-583, 57 (1975) (emphasis added). The fact that the specific exemptions from other restrictions are reiterated in the legislative history supports the foregoing analysis that contracts with governmental units, which must be specifically approved, are not intended to be authorized by the statute. Additionally, the revision of this statute which was accomplished in 1975 did not revise the provision concerning fire services. Rather, it expanded the renewable advance contract authority to other resource protection operations and surveys.

Further support is derived from the fact that the statute and legislative history both address renewing the contracts without competition. Contracts with local governments for fire services would not usually lend themselves to competive procurements. In fact, such contracts would almost always be sole source procurements, because in states where local governments are obligated to provide fire service, there ordinarily are no privately-operated competing fire companies. Thus, the contracting authority is not implicitly extended to contracts with state and local governments which are required to provide such services without charge. In all, we do not think that the legislative history supports the contention that an otherwise prohibited act is authorized.

Because the authority to contract with a legally-obligated governmental unit must be specific, and because the requirement is Federal in origin, the Supremacy Clause analysis put forward by BLM is not a consideration in our decision. The other statutory arguments advanced--analogizing the provision of fire services to the statutorily authorized conduct of state and local law enforcement activities on Federal lands, and to the authority to reimburse localities for extraordinary fire-related losses under the Federal Fire Prevention and Control Act, 15 U.S.C. § 2210 (1976)--are similarly unpersuasive.

It is clear from the above discussion that no specific statutory authority exists to enable the BLM to voluntarily contract with governmental units for fire services, but even if states insisted on compensation, there would still remain the question of an unconstitutional tax. Again, the Congress can waive the Federal Government's immunity from state and local taxation, but only by an express, affirmative act. Mayo v. United States, 319 U.S. 441 (1943). BLM conceded in its submission that but for the argued statutory authority to contract, the proposed payments would amount to an impermissible tax. As we have found no authority to contract, that conclusion must also prevent payments to Rural Fire Districts.

Further, local Fire Districts are not lacking for Federal financial participation in their activities. We must assume that some of the districts in question receive payments in lieu of taxes under 31 U.S.C. §§ 1601 et seq. That law provides payments up to $1,000,000 annually based on a formula related to population. These payments are intended to compensate a local government for the loss of revenue occasioned by large tax-exempt Federal land holdings and to underwrite the locally-provided services which the Federal lands receive. B-149803, May 15, 1972.

Additionally the Fire Districts may make claims for any extraordinary losses incurred in fighting a fire on Federal property under the Federal Fire Prevention and Control Act. That Act, codified at 15 U.S.C. §§ 2210 et seq., provides that only expenses "over and above [the District's] normal operating costs * * *" may be reimbursed on a claim. This most recent legislative pronouncement on the financial treatment of fire services for Federal property clearly indicates that Congress did not intend to underwrite the overhead costs of local fire districts. Existing compensation methods alone are applicable to general operating expenses. These methods would include payments in lieu of taxes, tax exemptions affirmatively waived by Congress, payments under permissible contracts for fire protection, e.g., contracts with private fire companies and with governmental units not required by law to provide fire services, and other payments specifically authorized by law.

Finally, there is the suggestion that our traditional test in fire service cases of antecedent legal obligation on the part of a governmental unit is inappropriate, and that instead, the test should be whether the investment is for the primary benefit of the Government. This theory rests on the assumption that the contract proceeds are used to improve equipment and services of local Fire Districts across the board and the Government, as a large landowner in the district, would be the principal beneficiary of those improvements if a fire should occur.

This primary benefit analysis was first employed in 55 Comp. Gen. 1437 (1976). That case allowed the purchase and installation of a traffic light on Government property. The signal regulated traffic on a state highway, allowing improved access to a Government installation. We found that regulation of traffic is universally a function of local governments. However, the local government was unwilling to put a traffic light at the intersection of the state highway and the Federal property's access road, presumably because it would not benefit from the light. The light was installed by the Government on its own property, and, although it made the whole intersection safer for both Government and private travelers, it had the primary effect of allowing faster and safer ingress and egress at the Government installation.

The "primary benefit" analysis may be appropriate for a capital item like a traffic light, but it is less applicable to the purchase of a municipal service because it is impossible to determine how much, if any, of the upgraded services provided to the general public by the Federal contract payments would ever inure to the Government's benefit. We note in this regard that, under optimum circumstances in the present case, no fires would occur, and the Government would receive no tangible benefit for its investment. Further, we question whether the affected Rural Fire Districts would ever be able to fully assume responsibility for extinguishing major forest fires without additional Federal assistance. The Department of the Interior would still need to maintain its tanker aircraft and heavy equipment, to employ smoke jumpers and the like for deployment to major fires. Therefore, the benefit to the Government could never result in savings of all fire-related expenditures.

We do not question that BLM has authority under 43 U.S.C. § 1738 to contract for some kinds of fire services. It is authorized to contract for services in jurisdictions where no governmental unit is obligated to provide free fire protection. In neighboring Idaho, for example, where fire protection of timber and range lands was the obligation of individual property owners, we found

contractual arrangements to be entirely proper. See, B-163089, October 19, 1970, and B-163089, February 8, 1968; and compare 34 Comp. Gen. 195 (1954). It is also free to contract for fire protection with entities not otherwise legally obligated to provide such service if such entities exist. Also, a different result would probably obtain in the case of a Federal enclave under the rationale expressed in 45 Comp. Gen. 1 (1965) which permitted a contract with a local Fire District for protection of a tract of Federal land which was part proprietary and part dedicated to the sole use of the Government--a federal enclave. The theory was that the fire district was not legally required to provide fire protection services for the Federal enclave and it would not be possible to segregate costs for services provided as between the proprietary and sole use Federal land.

Finally, although we hold that contracts with Rural Fire Districts are improper in the states of Washington and Oregon, we agree with the Regional Solicitor that mutual aid agreements, pursuant to 42 U.S.C. § 1856 (1976) could be executed at those installations having a federally-maintained firefighting capability.

Shelton J. Dorsey

Acting Comptroller General
of the United States