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DECISION



20522
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-202518

DATE: January 8, 1982

MATTER OF: Reimbursement of State of New York Under Olympic Support Contract

- DIGEST: 1. Contract clause providing for Federal reimbursement of certain disability benefits paid by the State of New York pursuant to its military law is not legally objectionable, since clause clearly stipulates: (1) that such reimbursement will not exceed appropriation available at time disabling event occurred, and (2) that nothing in contract may be considered as implying that United States will appropriate additional funds sufficient to meet deficiencies.
2. Where valid contract clause provides for Federal reimbursement of state disability payments, such periodic payments may be commuted to a lump-sum in accordance with established discount and actuarial tables. Any portion of commuted lump-sum not disbursed must be refunded to Federal Government.

A Finance and Accounting Officer of the Department of the Army has requested an advance decision as to the propriety of payment of a claim for reimbursement arising from a contract between the Department of Defense and the State of New York.

The facts from which this claim arises are as follows. The U.S. Property and Fiscal Officer for New York, acting as agent for the Department of Defense through the Department of the Army, National Guard Bureau, entered into a contract with the State of New York which provided that the State's Division of Military and Naval Affairs would furnish certain support functions to the 1980 XIII Winter Olympic Games at Lake Placid, New York.

The contract contained the following provision at paragraph G-9:

"REIMBURSEMENT FOR CERTAIN BENEFITS:

"(a) Benefits including, but not limited to, disability payments, hospitalization, medical payments, pensions and death benefits, which are paid to military personnel who are members of the Organized Militia of the State of New York (not otherwise covered by insurance purchased hereunder) by the State of New York pursuant to the New York State Military Law and regulations and which arise out of the performance of this contract,

shall be reimbursed by the Federal Government subject to the availability of funds specifically appropriated by Congress for assistance to the 1980 Olympic Winter Games. Any payments hereunder will not entail expenditures which exceed the appropriation for assistance to the 1980 Olympic Winter Games available at the time of the event which gave rise to the claims for such benefits. Nothing in this contract may be considered as implying that the Government of the United States will, at a later date, appropriate funds sufficient to meet deficiencies. Total Government liability for any payment under this contract will not exceed the appropriation for assistance to the 1980 Olympic Winter Games available for expenditure.

"(b) This provision is applicable only if members of the Organized Militia of the State of New York are called to State Active Duty for the support mission of the XIII Winter Olympics."

The contract also provided, at paragraph G-7, that claims for reimbursement under the aforementioned clause, had to be presented in writing to the Contracting Officer on or before March 31, 1981.

On February 3, 1980, Specialist 5 Eric LaJuene was on State active duty providing military support for the Olympics, when he was struck and severely injured by a car. The State of New York's Division of Military and Naval Affairs Pension Examining Board, convened on June 3, 1980, to consider Mr. LaJuene's case, determined that he was at that time 100 percent disabled, that he would remain so until at least May 1, 1981, and that subsequent to May 1, 1981, he should improve and have a permanent disability of approximately 50 percent. Based on these findings, Mr. LaJuene was awarded a disability pension of \$458.78 a month during the period August 25, 1980, through April 30, 1981, and he was awarded \$320.70 per month beginning May 1, 1981. It was projected, using actuarial data, that Mr. LaJuene would be entitled to a total of \$182,442.62 in disability payments over his lifetime. The State of New York filed a claim for reimbursement on July 9, 1980, and submitted a revised claim on August 25, 1980.

On the date on which the contract was approved by the National Guard Bureau, November 28, 1979, the Department of Defense was operating under a continuing resolution, which appropriated in section 101(b):

"Such amounts as may be necessary for continuing projects or activities which were conducted in fiscal year 1979 for which provision was made in the Department of Defense Appropriation Act, 1979, at a rate of operations not in excess of the current rate or the rate provided in the budget estimate, whichever is

lower, and under the more restrictive authority." Pub. L. No. 96-86, October 12, 1979, 93 Stat. 656, 657.

The Department of Defense Appropriation Act, 1979, Pub. L. No. 95-457, October 13, 1978, 92 Stat. 1231, 1237, referred to above, made \$2,000,000 available for logistical support and personnel services to the XIII Olympic Winter Games. The Department of Defense Appropriation Act for 1980, enacted on December 21, 1979, 93 Stat. 1139, 1144, provided \$10,000,000 for the same functions.

Since the contract clause in question explicitly limits the potential scope of federal liability to the amount available in a specific appropriation, and states that nothing in the contract may be considered as implying that the United States will at a later date appropriate funds sufficient to meet deficiencies, we find the clause valid. However, the amount claimed for payments to be made to Mr. LaJvene, \$182,442.62, should be reduced to present value. Any portion of the lump-sum which is not disbursed by the State of New York must be refunded to the Federal Government.

We have in a number of cases disapproved of agreements to indemnify, usually on the bases of 31 U.S.C. §§ 627, 665, and 41 U.S.C. § 11, for the reason that the agreements would subject the United States to a contingent liability in an indeterminate amount which could exceed the relevant appropriation. However, such a difficulty is not posed in the case at hand. In this regard, we have stated that:

"* * *[A]ny contracts providing for assumption of risk by the Government for contractor-owned property must clearly provide that: (1) in the event that the Government has to pay for losses, such payments will not entail expenditures which exceed appropriations available at the time of the losses; and (2) nothing in the contract may be considered as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies. Absent inclusion of provisions along these lines, * * * legislative exemption from the application of the statutory prohibitions against obligations exceeding appropriations [will have to be obtained]." 54 Comp. Gen. 824, 827 (1975). See also B-201394, April 23, 1981.

Since these two conditions are explicitly satisfied in the contract in question, we do not object to the contract clause which provides for Federal reimbursement of State disability benefits.

Under the contract, reimbursement by the Federal Government for benefits awarded to members of the Organized Militia of New York resulting from their activities in support of the Lake Placid Olympic

Games is limited to funds appropriated for the 1980 Olympic Games. More specifically, such payment may not exceed those funds available for this purpose on February 3, 1980, the date on which the accident took place. Since funds for reimbursement were not obligated until well after this date, the Army risked violation of the Antideficiency Act, 31 U.S.C. § 665, during the period between the date on which its liability became fixed (i.e. the date of the accident) and the date on which it obligated funds (i.e. the date of receipt of the State's August 25, 1980 claim for reimbursement) because of the possibility that sufficient funds would not have remained to liquidate the State's claim at that time. An estimated amount for this liability should have been obligated upon receipt by the Army of notification of Mr. LaJuene's injury. No violation actually occurred, however, because sufficient funds remained available for obligation at the time at which the State filed its claim.

The State of New York apparently does not intend to turn over the lump-sum to Mr. LaJuene immediately. Rather, it intends to hold the funds and to pay Mr. LaJuene on a recurring basis.

In 22 Comp. Gen. 910, 914 (1943), we considered payments to be made for compensable injuries incident to training for defense workers conducted by State or other agencies. We held that payments from the appropriate appropriation Act were available for this purpose where the agency, in lieu of obtaining workmen's compensation insurance, acts as a self insurer under the applicable workmen's compensation law. We stated that:

"* * *there would appear to be no objection to the payment of a commuted lump sum decreed or authorized in lieu of periodic payments where it is determined, under the applicable State law, that upon the facts and circumstances appearing in a particular case that form of settlement should be made.* * *"
22 Comp. Gen. 910, 914 (1943).

The decision further stated that the payment of a commuted lump-sum to the State would be appropriate even where payment to an injured employee or his dependents was not authorized under State law, assuming that the lump-sum amount would "be computed in accordance with established discount and actuarial principles and tables."

We believe that the "commuted lump sum" payable in lieu of the periodic payments for compensable injuries should take into account more than the use of actuarial tables for life expectancy. "Commuted value" is defined in Black's Law Dictionary 255 (5th ed. 1979) as: "The present value of a future interest in property used in taxation and in evaluating damages. Present value of future payments when discounted." The claimed amount of \$182,442.62 was arrived at by totaling the number of monthly payments to be made until October 8, 2027, based on a life

expectancy table. However, there is no adjustment or discount for the present value of such payments, the last of which is not required to be made until 46 years from now. Since the State of New York will have the use of the undisbursed funds until they are, in fact, disbursed, the commuted lump-sum should reflect the value of such use.

Accordingly, the amount claimed by the State of New York as reimbursement for payments to Eric LaJuene, \$182,442.62, should be reduced to present value. Prior to payment of the commuted lump-sum to the State of New York, the State should be required to agree in writing to refund any portion of such lump-sum not actually disbursed to Mr. LaJuene. 22 Comp. Gen. 910, supra.

Henry R. Van Cleave

For the Comptroller General
of the United States