R. Cambrea
G. C. M

DECISION

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

FILE: B-187402 DATE: FEB 17 1977

MATTER OF: Environmental Protection Agency--Purchase of cooling tower located on private property.

DIGEST:

Proposed purchase by Environmental Protection Agency of a cooling tower, located on property owned by private party, when that structure is an a permanent nature probably not severable from the land and the Government has only a relatively short term agreement with property owner for use of that land, is subject to the same considerations which govern the expenditure of appropriated funds to make permanent improvements to private property. The considerations are generally discussed in 43 Comp. Gen. 469 (1963). Based on our analysis of the facts of this case, we will not object to the subject purchase.

This decision to the Administrator, United States Environmental Protection Agency (EPA), is in response to a request from Alvin L. Alm, Assistant Administrator for Planning and Management, EPA, for our opinion whether, in view of the prohibition on use of appropriated funds for making permanent improvements to private property, EPA can purchase for the purpose of conducting research under the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 et seq. (Supp. V, 1975), a cooling tower owned by Westinghouse Electric Corporation and affixed to land owned by the Duke Power Company when EPA is contemplating abandoning the cooling tower upon completion of its research.

A review of the material submitted by EPA indicates that EPA has entered into an interagency agreement with the Tennessee Valley Authority (TVA), pursuant to authority set forth in various provisions of law including the Federal Water Pollution Control Act, for a coordinated research and development program concerning "Advanced Waste Heat Control." By virtue of this interagency agreement, certain research and development projects (designated "major tasks") are to be initiated pursuant to subagreements developed by EPA and TVA in accordance with the interagency agreement. TVA will perform the research which will be funded by EPA and title to any equipment purchased to carry out any subagreement is to vest in EPA.

Subagreement No. Revision 1, December 14, 1973 (TV-41967A), indicates that one of the "major tasks" to be performed is the "Demonstration of Wet/Dry Cooling Tower Technology and Associated Engineering and Environmental Considerations," which is concerned with the control of thermal discharges. To perform this "major task" TVA and EPA are contemplating the acquisition and operation of a full-scale "Test and Demonstration Cooling Tower Facility" currently owned by Westinghouse Electric Corporation and located at the Cliffside Plant of the Duke Power Company. Westinghouse intends to sell its rights, title, and interest in the cooling tower, computer model programs, and associated data for approximately $500,000, subject to the rights, obligations, and responsibilities of Westinghouse and Duke Power Company as contained in the "Agreement for Demonstration Test Cooling Tower" executed in June 1973 between Westinghouse and Duke Power Company. We have been advised by EPA that Duke Power Company has indicated its willingness to enter into an agreement with the Government for the use of the facility for 3 years under negotiated terms similar to those applicable to Westinghouse when it used the facility.

The 1973 agreement between Westinghouse and Duke Power Company enabling Westinghouse to lease one wet/dry cooling tower cell at Duke Power Company's Cliffside Station "for the purpose of making engineering tests and to demonstrate to electric utility executives the effectiveness of this new tower design." The 1973 agreement also provides, in pertinent part, that:

> "8. The Duke Power Company will supply electric power energy, pneumatic energy, and the necessary real estate as determined both for the tower cell and a supplementary service cubicle at no cost to Westinghouse.
>
> * * * * *
>
> "13. Upon termination of the test period the Duke Power Company will have the option to purchase the demonstration tower at a price to be determined commensurate with the value of the tower; or if a price

> satisfactory to both parties cannot be reached, the tower will remain the property of Westinghouse and it will be removed from the Gilfillan Station on a schedule reasonably determined bearing in mind the needs of both parties."

By virtue of this agreement, Westinghouse leased and operated its testing facilities at the Gilfillan Station. The cooling tower remained the property of Westinghouse to be disposed of as it pleases, so long as it complies with its agreement with Duke. See 36 Am. Jur. 2d, Fixtures, §§ 79, 80. Pursuant to the proposed agreement for "The Purchase of Westinghouse Test and Demonstration Cooling Tower Facility," all of Westinghouse's rights, title and interests in the cooling tower facility would pass to the United States.

EPA has advised us that technical representatives of EPA, Westinghouse, and Duke Power Company view the facility as being "unremovable," i.e., property which cannot be removed after erection or installation without substantial loss of value or damage thereto or to the premises where installed. EPA's Assistant Administrator states that "it will probably prove to be more economical to abandon the property in place at the end of the research and demonstration project rather than to remove it and restore the premises to the condition they were in prior to the erection of the facility. It appears, although it is not explicitly stated, that EPA feels the tower will satisfy the requirements of section 202(h) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 483(h) and implementing regulations for abandonment.

In view of the foregoing, EPA does not seek to divorce the decision to buy the cooling tower from a probable future decision to abandon that same property by arguing different legal considerations would be involved in each decision. Instead, it is apparently EPA's view that the question involved is whether it might buy the cooling tower knowing that it anticipates the abandonment thereof.

EPA feels that taking title to this unremovable property situated on non-Government land in these circumstances is analogous to expending appropriated funds to make permanent improvements to non-Government owned realty. As EPA recognizes, it is a well-established rule that appropriated funds ordinarily may not be used for improvements to private property unless specifically authorized by law. This rule is based

upon the fact that no Government official in the absence of specific legislation is authorized to give away Government property. 38 Comp. Gen. 143, 145 (1958) and decisions cited therein. However, EPA argues that the present situation falls within the exception to the general rule set forth in 42 Comp. Gen. 480 (1963), which indicates that permanent improvements to private property may be paid from appropriations not expressly available therefor when:

> (1) the improvements are determined to be incident to and essential for the effective accomplishment of the authorized purposes of the appropriations;
>
> (2) the expenditures for such purposes are in reasonable amounts. (This has also been stated to mean that the cost of the improvement must be in reasonable proportion to the overall cost of the lease or contract price 53 Comp. Gen. 351, 352 (1973); or not extravagant or disproportionate to the needs to which the facilities are intended to be put by the Government 35 Comp. Gen. 715, 716 (1956); or nominal, 46 Comp. Gen. 25 (1966));
>
> (3) the improvement is used for the principal benefit of the Government. (See 46 Comp. Gen. 25, 28 (1966)); and
>
> (4) the interests of the Government are fully protected with respect to the appropriated funds expended on the improvements.

It is EPA's position that the facts of this particular case satisfy the enumerated conditions and warrant the conclusion that their proposed action qualifies as an exception to the general rule.

The proposed Government purchase of an existing cooling tower from Westinghouse which is located on land owned by Duke pursuant to a short term agreement in which Duke agrees to permit its land to be used for such purposes is not, strictly speaking, the making of permanent improvements to private property. However, we would agree with EPA that the considerations are similar in determining whether appropriated funds may be used to effectuate such a purchase.

Section 104(g) of the National Water Pollution Control Act, as amended (33 U.S.C. § 1254(g) (Supp. V, 1975)), requires the EPA Administrator "* * * in cooperation with States and Federal agencies and public and private organizations, conduct continuing comprehensive studies of the effects and methods of control of thermal discharges. * * *" Pursuant to this provision the EPA has undertaken, through the subagreement with TVA, to "Demonstrate Wet/Dry Cooling Tower Technology and Environmental Considerations." Funds for such activity are available to EPA by appropriations for research and development activities for fiscal year 1977, Pub. L. No. 94-378, August 9, 1976, 90 Stat. 1099.

EPA's Assistant Administrator states that in view of the foregoing legislative mandate, the subject expenditure may be approved since it is incident to and essential for the effective accomplishment of the purposes of the statute. However, as we pointed out in 42 Comp. Gen. 430 at 434, supra., the fact that an expenditure that permanently improves private property is incidental and necessary to the accomplishment of the services required by the Government is not sufficient per se to authorize the payment. Rather, we noted that the facts and circumstances of each particular case must be for consideration in determining the propriety of such expenditures. See also 46 Comp. Gen. 25 (1966).

The proposed agreement for TVA's purchase of the Westinghouse test and demonstration cooling tower facility provides that Westinghouse will sell TVA the wet/dry cooling tower and the computer software package for a total price of $500,000. (Pursuant to a second proposed agreement Westinghouse will provide cooling tower services at an estimated cost plus fixed-fee expenditure of $411,535.) TVA has indicated that from the $500,000 purchase price:

> "* * * The amount allocated for the purchase of the tower is $100,000 and for the software the amount is $400,000. The original cost to Westinghouse for the tower was $1,200,000 and for the software, $500,000. Our calculations indicate it would cost about $2,000,000 to construct a new tower and $600,000 to develop the software package. The value of the Westinghouse tower at the end of the project is negligible and the verified computer models are valued at approximately $3,500,000."

Furthermore, in the opinion of TVA technical representatives:

> "The tower would be of negligible value [to the Government] at the end of the project because it would no longer be needed for experimental purposes and has no value to Duke Power Company as a reserve cooling system. The software package is of minimal value because it represents the capability of designing cooling towers for power utilities or industries which require heat rejection equipment."

Thus, EPA is apparently of the view that the agreement with Westinghouse, in which Westinghouse assigns its rights, title and interest in the cooling tower and software in return for $300,000 and the assignment of its obligations and responsibilities (including removing the cooling tower if it cannot sell it to Duke) under its contract with Duke, is in the best interests of the Government. It also notes that the purchase cost, which will approximate approximately 25 percent of the funds expended on the research itself, is reasonable and is neither "extravagant or disproportionate to the needs to which the facilities are intended to be put by the Government," 38 Comp. Gen. 715 at 716, supra. Further, in EPA's view, the Government, not Duke, will be the primary beneficiary of this proposal.

A Westinghouse power systems project manager has advised in response to a technical inquiry by EPA that the additional cooling capacity of the single research test cooling tower would not significantly improve the performance of the Duke Power Company's 240 MW Cliffside No. 5 cooling system which already utilizes 18 cooling towers for controlling thermal discharges; as noted above, TVA technical representatives concur in this analysis. The Government, on the other hand, would have the benefit of purchasing the existing cooling tower at a fraction of the cost of constructing a new one.

Further, EPA's Assistant Administrator indicates that any agreement with Duke will protect the Government's interest in the cooling tower by including, among other things, provisions in the agreement:

> "* * * wherein the Government (i) will have the right to abandon in place all nonsevorable Government property, (ii) will not have any obligation to disassemble or remove the

property or to restore or rehabilitate the premises on which the property is located, and (iii) will have an unencumbered right to retain title and to dispose of all facilities it has purchased without regard to the laws of real property in the jurisdiction in which the facility is located; such disposition to be accomplished in accordance with the provisions of 41 CFR § 101-47. As to disposal by sale to parties other than the owner of the land, it would be the responsibility of the Government to restore all improvements and facilities to their entirety and to restore the site to the original condition."

In applying the considerations discussed in 42 Comp. Gen. 460, supra, regarding expenditures of appropriated funds for permanent improvements to private property to the situation presented to us in this case, TVA has determined--and we see no basis on which to disagree--that the expenditures here involved, including the proposed expenditures and the probable abandonment of the cooling tower, are for the primary benefit of the Government, are reasonably incident to and essential to the accomplishment of the authorized purposes of the appropriations, are not of substantial value to both, and (public) expenditures reasonably in line with the actual cost of the project.

Based on the facts and circumstances of this case as presented to us and on the foregoing analysis, we will not object to TVA and TVA implementing the proposal discussed herein.

R.F.KELLER

Acting Comptroller General
of the United States