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

DECISION

FILE: 8-188513

DATE: APR 10 1978

**MATTER OF: Legal sufficiency of contract for
transportation of petroleum products
by pipeline**

DIGEST:

1. Contracts for pipeline transportation services may be procured by negotiation under ASPR.
2. Bilateral contract for pipeline transportation services should have been negotiated under and contain appropriate provisions from ASPR where bill of lading is not the basic procurement document but is used to accomplish the transportation services covered by the bilateral contract.

The Directorate of Supply Operations, Defense Fuel Supply Center, Defense Logistics Agency, Department of Defense, has requested our evaluation of a contract for pipeline transportation services for its legal sufficiency and overall efficiency as a rate agreement entered into under the provisions of Section 22 of the Interstate Commerce Act, as amended, 49 U.S.C. 22 (1970). We also have been asked to comment on whether pipeline transportation services may be procured by negotiation under the provisions of the Armed Services Procurement Regulations (ASPR).

The contract is between Southern Pacific Pipe Lines, Inc. (Southern Pacific), and the United States Government and covers the transportation of petroleum products by Southern Pacific's pipeline from Norwalk, California, to Norton Air Force Base, California. Under the terms of the contract, Southern Pacific is to fulfill all of the Government's actual pipeline transportation service requirements for an indefinite period at specified rates or at rates to be determined by subsequent negotiations. While the Government does not guarantee any particular volume of traffic, the contract obligates it to procure all of Norton Air Force Base's requirements for pipeline transportation services from Southern Pacific.

Procurement officials of the United States have greater latitude than do private parties in arranging with interested carriers for reduced rates or for services not offered to the general public because of specific provisions in the Interstate Commerce Act authorizing service to the Government free or at

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reduced rates, 49 U.S.C. 22, 317(b), 906(c) (Supp. V, 1975). The same situation prevails as to the Government's intrastate traffic. See United States v. Georgia Public Service Commission, 371 U.S. 285 (1963); Public Utilities Commission of California v. United States, 355 U.S. 534 (1958).

The usual practice, then, is that the carrier or carriers willing to provide the special service or the reduced rate sought by the United States make a continuing offer of such service and rate. This continuing offer is accepted and ripens into a contract, as to a particular shipment, when the offerer elects to and does utilize the service described in the offer and settles the charges in accordance with its terms. 45 Comp. Gen. 118, 121 (1965). And the Government bill of lading issued to cover the individual shipment represents the contract made by the parties.

The Southern Pacific contract does not involve a normal tender of freight offered in response to Southern Pacific's continuing offer to transport petroleum products at a given rate. Item 15 of the Southern Pacific contract provides in part:

"In consideration of the Carrier's agreement to provide the transportation services herein described at the rates established by Item 2, the United States hereby . . . agrees to purchase all required pipeline transportation service from said Carrier. . . ."

It is an elementary principle of contract law that where parties to an agreement exchange mutual promises, a bilateral contract arises. Simpson On Contracts, sec. 6 (2d ed. 1965). And it is clear that the above terms contemplate the formation of a bilateral contract. If Southern Pacific failed to provide the prescribed transportation services or if the Government failed to utilize Southern Pacific's pipeline for all of its required pipeline transportation services, either party would be liable to respond in damages for breach of the contract.

Generally, the Government's transportation needs are not procured from common carriers through formal contracting procedures. Section 321 of the Transportation Act of 1940, 49 U.S.C. 65 (Supp. V, 1975), authorizes the procurement of transportation services from any common carrier lawfully

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operating in the territory where such services are to be performed and expressly excludes the procurement of transportation services from the formal advertising requirements of 41 U.S.C. 5 (Supp. V, 1975). The rationale underlying this exclusion is that common carriers hold themselves out to perform the services for which they are certificated, at published rates, for all who apply, including the United States. This exemption has been construed to authorize procurement of transportation services by negotiation. H.R. Rep. No. 109, 80th Cong., 1st Sess. 16 (1947). The authority to negotiate contracts for transportation services is preserved by Section 2(c) (17) of the Armed Services Procurement Act of 1947, as amended, 10 U.S.C. 2304(a)(17) (Supp. V, 1975), and by Section III of ASPR.

Admittedly, ASPR does not apply to transportation services procured by bills of lading or other similar forms. ASPR 1-102 (1976 ed.). However, these transportation services were not procured by bills of lading. See the reciprocal procurement obligations created by item 15 of the contract. And item 18, titled "SHIPMENT DOCUMENTS," of the Southern Pacific contract provides:

"Shipper route orders and Government Bills of Lading issued to accomplish movements under the terms hereof shall cite this contract as the authority therefor."

The use of shipper route orders and Government bills of lading under this contract seem incidental to the procurement of the pipeline services covered by item 15 of the contract (indeed, their use seems similar to the use of purchase orders under a supply contract). Since the bill of lading is not the basic procurement document, the contract should have been negotiated under and contained appropriate provisions from the Armed Services Procurement Regulations.

We are not stating that all bilateral contracts for transportation services need contain appropriate ASPP provisions. However, they should unless the basic procurement document for the transportation services is the bill of lading or other similar document described in ASPR 1-102 (1976 ed.), i.e., those

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used in connection with the usual continuing offers received from carriers for both interstate and intrastate transportation services.

R.F.D. 111

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