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DECISION

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

[Indemnification for Damages Provisions in Cooperative Agreement Between NOAA and Government of Australia]

FILE: B-198206 DATE: April 4, 1980

MATTER OF: Project Stormfury-~~Australia~~ and Australia-Indemnification for Damages

DIGEST:

1. State Department proposes to agree to indemnify Australia for damages arising from a hurricane seeding cooperative agreement, subject to the appropriation of funds by Congress for that specific purpose. This violates the spirit, if not the letter, of the Anti-deficiency Act. Even though Congress is not legally compelled to make the appropriations, it would be morally committed and has little choice, particularly in view of the effect on foreign relations. This is what we term a "coercive deficiency".

2. The Congress, in the context of a supplemental appropriation bill, may give a Federal agency contract authority to assume liability for damages arising out of an international cooperative agreement. However, procedurally, this could be subject to objection as substantive legislation in an appropriation bill.

3. General statutory authority to carry out international programs does not necessarily carry with it authority to agree to settle foreign claims against the United States.

4. Payment by the United States of a portion of insurance premiums, to protect Australia against financial liability in a joint project, is permissible when it is a condition which Australia exacts in return for its participation. Agreement should provide that the United States assumes no liability beyond the amount of insurance coverage.

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This responds to various questions raised by the Acting Deputy Assistant Secretary for Environment, Health, and Natural Resources, Department of State (State), concerning the propriety of including certain provisions for indemnification for damages in a cooperative agreement to be concluded between the National Oceanic and Atmospheric Administration (NOAA) and the Government of Australia for a weather modification project. State is conducting the contract negotiations on behalf of the United States.

As a continuation of Project Stormfury, a hurricane abatement research program conducted by NOAA since the early 1960s, NOAA intends to undertake a series of hurricane seeding experiments off the coast of Australia in cooperation with its Australian counterpart. State asserts that NOAA's authority to conduct these experiments is 15 U.S.C. § 313 note, 49 U.S.C. § 1463, "and the continued endorsement of Congress, which each year has approved a NOAA budget containing a line item for 'hurricane modification'." Since an agreement needs to be consummated by the end of June 1980 if activities are to commence during the 1980-81 tropical cyclone season, NOAA expects to request a supplemental appropriation for the project in the near future.

Although it appears to be mutually recognized that virtually all storms eligible for seeding would expire far away from land, thus rendering the possibility of accident remote, and that proving a causal relationship between the seeding and subsequent damage would be difficult, Australia apparently views protection from liability for damage as a key issue in the proposed cooperative agreement. The submission states that Australia has proposed that the United States agree to indemnify the Government of Australia for all damages arising from the activities contemplated. However, according to State,

> "We have reason to believe that the Australians are willing to back off from their total indemnification demand and agree to a sharing of the risks, but will insist on firmer obligations on the part of the U.S. Government".

Since neither NOAA nor the Department of Commerce has specific authority to pay claims arising from their activities abroad, State has asked a number of questions about the extent to which the United States may properly agree to indemnification.

As State points out, the Australian proposal that the United States provide complete indemnification for all damages that might result from the project in an indeterminate amount is unacceptable because, aside from the policy reasons, such a commitment would violate the Anti-deficiency

Act, 31 U.S.C. § 665(a). That provision states:

> "No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law."

This office has long held that, absent specific statutory authority, indemnity provisions in agreements which subject the United States to contingent and undetermined liabilities contravene the Anti-deficiency Act, supra. 35 Comp. Gen. 85, 87 (1955); 16 id. 803 (1937); 7 id. 507 (1928).

State asks six specific questions, embodying possible alternatives to a commitment to fully indemnify Australia. Questions 1 and 3 read as follows:

> "1. Could the U.S./NOAA agree to pay a percentage of damages (no limit), subject to the appropriation of funds by the Congress for that specific purpose?
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> * * *
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> "3. Could the U.S./NOAA agree to third party arbitration of disputes, subject to the appropriation of funds by the Congress for the specific purpose of paying expenses associated with and awards arising from the arbitration process?"

These proposals are subject to essentially the same Anti-deficiency Act objection as is the full indemnity proposal. While in the proposals embodied in questions 1 and 3, the liability to pay is still contingent and the amount of the damages is still indefinite, it could be argued that no violation would occur should NOAA agree to either indemnification arrangement because no obligation will arise unless or until the Congress makes an adequate appropriation for its fulfillment. We concede that an agreement which makes it clear that the United States is in no way obligated to make future payments should a contingent event occur unless the Congress chooses to appropriate funds for such payments does not violate the letter of the Anti-deficiency Act. However, we think it violates its spirit.

The Anti-deficiency Act was born as a result of Congressional frustration at the constant parade of deficiency requests for appropriations it was receiving in the 19th century and early 20th century, generated, it believed, by the lack of foresight and careful husbanding of funds by executive branch agencies. (See Annals of Congress 10th Cong., 2d Sess. 1809.) A consistent theme runs through myriad pages of floor debates and reports on supplemental appropriation bills: The Congress was tired of receiving appropriation requests which it could not, in good conscience, refuse because the agency had legally or morally committed the United States to make good on a promise. We term such commitments "coercive deficiencies" because the Congress has little choice but to appropriate the necessary funds.

We think the requirement to pay an indefinite sum to Australia if a disaster occurs, albeit not a legal obligation unless or until funds are appropriated, is such a coercive deficiency. The fact that the potential claimant is another sovereign nation and failure to honor the agreement would have international consequences adds further weight to this conclusion.

For this reason, in a number of cases decided in recent years, we have expressed dissatisfaction with agreements which, in effect, oblige Congress to enact deficiency appropriations. For example, in B-163058, March 17, 1975, we found that a Department of Defense practice of authorizing contractors to spend funds in excess of Government contractual liability, with the expectation of reimbursement either from subsequent year appropriations or through claims procedures "obviously has an impact on Congressional prerogatives and we concur with the Assistant Secretary of Defense that it should not be encouraged." See also, B-132900, June 3, 1976. In another instance, we stated that contracts providing for assumption of risk by the Government for contractor-owned property had to provide that nothing in the contract could be considered as implying that Congress, would, at a later date, appropriate funds sufficient to meet deficiencies. 54 Comp. Gen. 824, 827 (1975).

Question 2 reads as follows:

> "Could the U.S./NOAA agree to pay a percentage of damages up to a certain amount, subject to the appropriation of funds by the Congress for that specific purpose?"

Although this proposal, unlike those in questions 1 and 3, avoids the problem raised when the amount of liability is indeterminate by suggesting that a maximum amount of liability be fixed, it is subject to the same objections as proposals 1 and 3 since fulfillment of the commitment will require a future congressional appropriation.

State also refers to an agreement which another United States agency has with its Australian counterpart and suggests that Australia might be equally willing to enter into such an arrangement with NOAA. State describes that agreement as follows:

> "The liability provisions of that agreement provide, inter alia, that the Australian side will purchase insurance in the amount of ten million dollars (Australian) covering liability to third parties. For judgments or settlements exceeding that amount, each Government agrees to pay one-half of the amount. Payment of such sums by either side is made contingent upon the appropriation of funds 'for the specific purpose of such indemnification' by the respective legislative bodies of the two countries. No limit is placed on the amount of these payments."

This is essentially the same arrangement contemplated in question 1 and it raises the same problems addressed in answering that question. That is, there is inherent in this arrangement a coercive deficiency.

State then asks:

> "4. If it is your opinion that the representations referred to in 1, 2, and 3 above could be made only with the endorsement of Congress, what are your views as to how such endorsement could be obtained aside from seeking amendment of NOAA's basic authorizing legislation (a step which is not viewed as practical at this time)? Can this matter be handled as part of the supplemental appropriation process?"

We agree that the arrangements suggested in questions one, two, and three can be made only if authorized by the Congress. If the Congress is willing it could enact language, in the form of contract authority, authorizing NOAA to enter into one or any of the agreements described in questions 1, 2, and 3. Procedurally, however, that kind of action could be subject to a point of order if offered in the context of a supplemental appropriation bill.

Of course, this alternative would also have a direct impact on the budget even though the money might never have to be appropriated. While the possibility of a mishap is remote, the potential damage, if there is one, could be of very great magnitude, so that the amount which would have to be authorized could be prohibitively large, as a practical matter.

State's fifth question is as follows:

> "In your opinion, could the fact that a U.S. agency has a broad statutory mandate to carry out international programs (but lacks specific authority to, say, settle claims) have relevance as regards the type of arrangements that could be made with a foreign government, if such arrangements were deemed necessary in order to carry out those programs?"

As a general proposition, we would agree that an agency's statutory mandate is relevant to the arrangement that could be made with a foreign government. Of some relevance to this general principle is our longstanding rule that an expenditure is covered by an appropriation when it is reasonably necessary or incident to the execution of the program or activity authorized by the appropriation. E.g., 50 Comp. Gen. 534, 536 (1971); 38 Comp. Gen. 782, 785 (1959). As far as this matter is concerned, however, we do not think that NOAA's general statutory mandate to carry out international programs, cited above, provides implied authority to enter into agreements to pay claims for which the United States would not otherwise be liable. However, as discussed below, the authority of the agency may be relevant to a determination of whether it can enter into an agreement to protect a participant with it in an international arrangement against liability.

State asks finally:

> "The possibility of procuring private insurance for this project has been raised, and preliminary indications are that it could be obtained. We request your confirmation that, in your opinion, there would be neither a legal nor policy objection to the purchase of such insurance in this situation. It is envisaged that the premium would be shared by the two sides, and that the cost of same would be included in the appropriation requested by NOAA."

It is true that the United States Government has a longstanding policy that it will insure itself against its own risks. Absent express statutory authority, funds supporting Government activities generally cannot be applied to the purchase of insurance to cover loss of or damage to Government property. 19 Comp. Gen. 798, 800 (1940); 39 id. 145, 147 (1959). Here, however, the insurance is not for the purpose of protecting against a risk to which the United States would be exposed as a result of participating in the project. Rather, it is the price exacted by this Government's partner in an international venture to protect its interests. In this view, the insurance premium, with Australia as a beneficiary, is merely one of the costs of the United States' participation in this project for which any

appropriation NOAA receives for this purpose would be available. It should be explicitly provided that the United States' liability under the agreement is limited to its share of the insurance premiums.

Comptroller General
of the United States