

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

B-89664

The Chairman

Atomic Energy Commission

My dear Mr. Chairman:

Consideration has been given to a letter of October 3, 1949, from the Acting Chairman of your Commission relative to the propriety of the inclusion in contract No. AT-(29-1)-789, proposed to be entered into by your Commission with the Western Electric Company for the operation of the Sandia project, of a provision indemnifying the contractor and its affiliates from loss or damages arising from the contract operations. Said provision is as follows:

"The parties recognize the work under this contract involves unusual, unpredictable and abnormal risks. In view of these circumstances and the no-profit feature of the contract, neither Western, Sandia Corporation, Bell Laboratories, nor any company of the Bell System, shall be liable for, and the Government shall indemnify and hold them harmless against, any delay, failure, loss, expense (including expense of litigation), or damage (including personal injuries and deaths of persons and damage to property) of any kind and for any cause whatsoever, arising out of or connected with the work, and whether or not any employee or employees of any such company is or are responsible therefor. The Government shall either assume, or authorize Sandia Corporation in its behalf to carry on, the defense of all claims or legal proceedings which may be asserted or instituted against any such company on account of acts or omissions in the performance of the work; except that if the Government elects to assume such defense, Sandia Corporation at its option may participate therein without affecting its rights under this article. The Government shall pay directly and discharge completely all final judgments including assessed costs, entered against any such company and all claims which may be settled by agreement approved by the Commission, except that, in the case of workmen's compensation awards, Sandia Corporation shall, and in any other case may with the approval of the Commission, make

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payment. The Government's obligations under this Article shall not be subject to the limit specified in Article V, as amended from time to time, and it is recognized that additional appropriations may be required to discharge obligations under this Article."

It is set forth in the letter of October 3 that the Sandia project occupies a central role in the research and development work, as well as the production activities which relate directly to atomic weapons, and that, until now, the operation of such project has been carried on pursuant to the University of California's operating contract for the Los Alamos Scientific Laboratory. However, due to the desire of the University to withdraw from further responsibility for such work, it became necessary for the Commission to obtain a new operating contractor and that, after careful consideration, negotiations were undertaken to secure the services of the Western Electric Company. It is stated that the work to be performed under the proposed contract is of very high importance to the atomic weapons program and, hence, to the common defense and security of the country, and that, as disclosed from the proposed contract, the Western Electric Company will undertake the work on a cost reimbursement basis without fee or profit, subject, of course, to the contract containing the indemnity provision quoted, supra. It is the stated position of the Western Electric Company that, in view of the special nature of the work to be performed under the contract and the fact that the contract will be performed for no fee or profit, the indemnification provision is required to afford its stockholders protection and the assurance that the risks of the operation are to be assumed by the Government.

To the extent that an indemnity provision as is contained in the form of contract here proposed provides for relief of a contractor from liability for its own negligence, or from loss or damage of any kind, and for any cause whatsoever arising out of, or connected with, the work, and whether or not any employee or employees of the contractor is or are responsible therefor, such a provision might, by its very nature, be said to invite carelessness, inefficiency, waste, and even fraud on the Government and, therefore, as a general rule, be viewed as contrary to the best interests of the Government and not consonant with public policy. However, it is recognized that instances arise where, by the very nature of the work or services required by the Government and/or the broad and general statutory authority granted by the Congress for the performance of such work, such a contractual provision may be required to induce a contractor to perform the required work or fully to carry out the mandate of the statute. And, as is stated in your letter, this office has recognized the necessity in such instances of the inclusion in contracts of provisions of this nature. Thus, in a decision of this Office to the Secretary of War, dated April 19, 1943, B-33801, involving a secret contract entered into in furtherance of the war effort, the inclusion in the contract of an indemnity provision substantially similar to that here concerned was held not objectionable.

In the present case, it has been administratively determined to be necessary to provide for the assumption of such liability on the part of the Government under the instant contract. Therefore, and having

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regard for the nature of the work to be performed thereunder and the broad authority vested in your Commission under section 3(a) of the Atomic Energy Act of 1946, 60 Stat. 758, to negotiate contracts in the interest of the common defense and security, this Office will not be required to object to the inclusion in the proposed contract of the indemnity provision in question as contained in Article VI of the contract.

Sincerely yours,

[Signature]
 Comptroller General
 of the United States